CHAGOS

Where International Law Stops

Master thesis

Master Programme in Public International Law

Utrecht University

Mihai Martoiu Ticu

12 August 2012

Supervisor: Dr. Alex Oude Elferink

TABLE OF CONTENTS

INTRODUCTION

Who should decide the future of the Chagos Archipelago?

On 20 December 2010, Mauritius started proceedings against the United Kingdom at the International Tribunal for the Law of the Sea (ITLOS). But before the Court can answer two of the questions set before it, it has to decide who has the better claim to the Chagos Archipelagos. It is generally assumed that this question has only two possible answers: the UK or Mauritius. I assert that there is a third possible claimant: the Chagossians. In this thesis, I will look at the question from the point of view of all three parties.

Imagine that you are a judge and these three parties are going to tell you their story. In Chapters 1 and 2, you will hear a tale favorable to Mauritius. In Chapter 3, the UK defends herself. In Chapter 4, the Chagossians claim that it is they who should decide the future of the archipelago. In the end, I hope that you will come down in favor of the same winner as I.

CHAPTER 1: THE LAW OF DECOLONIZATION

In this chapter, I will present a historical view of the Law of Decolonization. The United Kingdom (UK) will play a central role, demonstrating how she influenced and reacted to the law every step of the way, and how her view evolved in time. The legality of the excision of the Chagos revolves around two concepts: *self-determination* and *territorial integrity*. The chapter revolves around those two concepts.

1.1. BEFORE THE UN CHARTER

Self-determination can be traced to the French and American revolutions. The British colonists in North America were the first group to assert the right to self-determination, understood as self-government. In the *Declaration of Independence*, they claimed that governments derive their powers from the consent of the governed. It was an individual, *natural right*, inspired by the Lockean version of a *social contract.* In this argument, the people are *primary;* they first form as a group and then they form the government. The authority remains vested in the people and they reserve the right to challenge and transform failing state institutions.[1]

The French revolutionaries envisaged *accountable* rulers, resulting in internal and external self-determination. The external proscribed rulers from annexing territories and peoples without their consent.[2]

The Russian concept of self-determination had *three components.*[3] First, ethnic/national groups should decide their destiny freely. Second, following a war, the people should decide which state they want to live in. Third, it meant decolonization.[4]

Allied propaganda during World War I promised self-determination, but the UK used this purely as weapon of war.[5] The US president, Woodrow Wilson was serious about it and his first draft of the Covenant of the League of Nations contained the magic word 'self-determination'.[6] However, after the war, economic needs, historical claims, and military and strategic arguments prevailed.[7]

During World War II, in August 1941, Churchill and Roosevelt stated their war aims in the Atlantic Charter, pledging that the US and the UK will "respect the right of all peoples to choose the form of government under which they will live; and [stating that] they wish[ed] to see sovereign rights and self-government restored to those who have been forcibly deprived of them."[8] But Churchill denied that this meant self-determination for the colonies,[9] leaving no

[1] Keitner 2007, p. 38.
[2] Cassese 2008, p. 75; Sureda 1973, p. 17.
[3] Cassese 1998, p. 16.
[4] Ibid.
[5] Calder 2008, p. 1.
[6] Lansing 2003.
[7] Sureda 1973, p. 21.
[8] Roosevelt 1946, p. 285.

doubt about his ideas on the matter: "I have not become the King's First Minister in order to preside over the liquidation of the British Empire."[10]

1.2. The UN Charter

Before the UN Charter, self-determination was only a *political principle*.[11] Articles 1(2) and 55 of the Charter were an 'important turning-point' in the transformation of self-determination into a *legal standard*.[12] Article 1(2) provides that one of the *purposes* of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

The Charter was mainly drafted in two sessions, at the Dumbarton Oaks Conference in 1944 and the San Francisco Conference in 1945. Self-determination was introduced at San Francisco by the Soviet Union.[13] During the negotiations it meant two things: "respect for the wishes of the people concerned in determining territorial changes; and the right of peoples to choose the form of government under which they are to live."[14] A vital aspect of the principle of self-determination "is a free and genuine expression of the will of the people".[15] It was stressed that self-determination did not mean a right to secession.[16] At San Francisco, though, self-determination did not mean independence for colonial people.[17]

At the same time, the Charter neither defined the meaning of self-determination nor listed either rights or obligations.[18] This ambiguity prevented its acceptance as vested principle.[19] Even so, it still was a 'turning point' in the career of self-determination as law.[20]

Chapters XI and XII

Chapter XI of the Charter deals with territories "whose peoples have not yet attained a full measure of self-government", covering colonies, protectorates, mandate territories, and any other territory subjected to another State, without equal rights, or without its consent.[21] Chapters XII and XIII only covers trusteeship territories.

While Chapter XI is binding,[22] its wording is vague. The central undertaking occurs in Article 73(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,

---

[9] HC Deb 09 September 1941, vol. 374, cc68-69.
[10] Speech At The Mansion House, London, 10 Nov. 1942, *New York Times*, 11 Nov. 1942.
[11] Cassese 1998, p. 33; Crawford 2007, p. 112.
[12] Cassese 1998, p. 43.
[13] 6 UNCIO 647; Goodrich and Hambro 1946, p. 61; Spijkers 2011, p. 356; Russell 1958, p. 810; The Soviet Union had already talked about self-determination at the Inter Allied Conference in London in 1942. Starushenko 1961, p. 143.
[14] Goodrich and Hambro 1946, p. 61.
[15] 6 UNCIO 455.
[16] 6 UNCIO 296.
[17] Goodrich and Hambro 1946, p. 61.
[18] Cassese 1998, pp. 42-3; Spijkers 2011, p. 357.
[19] Shaw 1986, p. 61.
[20] Cassese 1998, p. 43.
[21] Fastenrath 2002, p. 1089.
[22] Ibid., p. 1091; Kelsen 1950, p. 553.

according to the particular circumstances of each territory and its peoples and their varying stages of advancement;"

We will see that a large part of the discussions around the excision of the Chagos revolves around the obligation, set out Article 73(e), to transmit information about conditions in the Territories to the Secretary-General regularly.

The US wanted to establish equal rules for colonies and trusteeships,[23] but the vehement British opposition led to major differences between Chapter XI and XII:

- "No reference to Art. 1 of the UN Charter, with the principle of self-determination of peoples and respect for human rights";
- "Art. 73(b) only speaks of the development of self-government, whereas Art. 76(b) additionally mentions independence as an objective of trust administration";
- "[O]nly 'due account' must be taken of the political aspirations of the population in colonies, whereas in trust territories, their 'freely expressed wishes' must be respected";
- "[T]he colonial population is only assured 'just treatment, and ... protection against abuses' in Art. 73(a), whereas the trusteeship system pursues the aim of encouraging 'respect for human rights and for fundamental freedoms' without any discrimination";
- "[T]he administering authority is subject to considerably stricter supervision in the trusteeship system (TC: Chapter XIII, the inhabitants' right of petition)".[24]

President Roosevelt wanted to place every colony under a regime of international trusteeship to prepare them for independence.[25] The Philippines, while still a colony, declared that: (l) the principle of trusteeship should be applicable to all dependent territories; (2) self-government should be the objective of the trusteeship system; and (3) an entity independent of the administering government should judge the degree of advancement of dependent people.[26] The Soviet Union argued that "the self-determination of peoples" was among the aims of the United Nations and this could hardly be omitted from the trusteeship chapter.[27] China and Soviet Union wanted 'independence' for the colonies.[28]

Yet Chapter XI is almost entirely a copy of the British proposal,[29] and she "wrote into the Charter the theory of colonialism developed by the British Colonial Office."[30] The UK claimed that "compulsory application of the trusteeship system to existing colonies…would amount to interference with the internal affairs of member states."[31] And "warned the

[23] Fastenrath 2002, p. 1090.
[24] Ibid., p. 1089.
[25] Sherwood 1948, p. 573; Louis 1978, pp. 4-5; US DELEGATION 1945, p. 128; Russell 1958, pp. 173-74; Rothermund 2006, p. 51.
[26] 10 UNCIO 429.
[27] 10 UNCIO 441; The Soviet Union proposed the addition of "…self-determination with active participation of peoples of these territories having the aim to expedite the achievement by them of the full national independence", 3 UNCIO 618.
[28] China proposed adding "...independence or self-government as may be appropriate to the particular circumstances of each territory and its people", 3 UNCIO 615; For the Soviet proposal, see 3 UNCIO 618.
[29] Spijkers 2011, p. 359.
[30] Simpson 2001, p. 303; Gilchrist 1945, p. 988.
[31] 10 UNCIO 440.

Committee against confusing independence with liberty. What the dependent peoples wanted was an increasing measure of self-government; independence would come, if at all, by natural development."[32] Giving independence to *all* colonies would be dangerous for world peace and security.[33] For France, trusteeship was "not the only way of promoting the development of dependent peoples" and demanded respect for the principle of "non-intervention in the domestic affairs of member states".[34] The Dutch representative claimed that imposing trusteeship "would be a backward step from the point of view of the more advanced colonial territories. His government could not agree to its universal application."[35]

In short, the Soviet Union and China wanted independence for colonies as well, but this was opposed by the UK and France.[36] The US was caught between her anti-colonialist stance and the principle of non-intervention.[37] Moreover, she craved the retainment of the conquered islands in the Pacific.[38] The compromise gave the Administering Powers a free hand.[39]

1.3. Resolution 1514(XV) - The Declaration on the Granting of Independence to Colonial Countries and Peoples.

Resolution 1514 declares colonialism to be an obstacle to peace, contrary to the Charter and a denial of fundamental human rights. It provides that "[a]ll 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." There are no pretexts for delaying independence. Armed and repressive measures against the liberation movements "shall cease".

Paragraph 5

Paragraph 5 provides that power should be transferred to the colonial peoples "without any conditions or reservations". During the debates, the states interpreted those words as preventing the type of agreements that Mauritius signed. Iran said that:

> "The Administering Powers should refrain from attaching to independence any conditions or reservations which would restrict the exercise of the people's sovereignty. Unequal and restrictive treaties on economic, political financial or military matters, signed prior to independence and limiting in any way the exercise of national sovereignty, constitute a source of future misunderstandings and friction incompatible with the preservation of an atmosphere of mutual confidence and the maintenance of peaceful and friendly relations."[40]

[32] 10 UNCIO 440. "British subjects, including the prime minister of New Zealand, insisted that dominion status in the British Commonwealth was far finer than independence.", Gilchrist 1945, p. 989.
[33] 8 UNCIO 146.
[34] 10 UNCIO 433.
[35] 10 UNCIO 433.
[36] Musgrave 1997, p. 66; Fastenrath 2002, p. 1091.
[37] Musgrave 1997, p. 66; 10 UNCIO 434.
[38] Russell 1958, p. 77; US DELEGATION 1945, p. 126; Sherwood 1948, p. 716.
[39] Kelsen 1950, p. 557ff.
[40] A/PV.926, p. 995, para. 66.

Ghana was "opposed to colonial Powers who cajole nationalist leaders to sign military treaties permitting the establishment of military bases..."[41] By "no reservations", India meant "no giving with one hand and taking away with the other" and was "strongly against any imperialist power making agreements before independence in regard to either political, territorial or other rights. That is to say, if these areas which are in tutelage before they become free agree, as the price of freedom, to the establishment of bases or to enter into trade agreements or military agreements, they have not gained real freedom."[42]

If this is the spirit of Resolution 1514, then the Lancaster House Agreement between the UK and Mauritius would violate it.[43]

In an internal document, the British Foreign Secretary, Sir Alec Douglas-Home, wrote that the UK had abstained from resolution 1514 because of Paragraphs 3 and 5.[44]

Paragraph 6

In Chapter 2, we will see that most of the debates within UN relating to Chagos revolved around paragraph 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."

This paragraph raises some issues of interpretation. *Blay* notices that 'country' can mean any geographical territorial unit:

- an existing sovereign state;
- a territory of a state parted by occupation, for instance by a Colonial Power;[45]
- a Non-Self-Governing Territory (NSGT) before being split by the Colonial Power.

In the Friendly Relations Declaration,[46] both terms are used in the same sentence: "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other *State or country.*"[47] This means that 'country' refers to something other than 'State'.[48]

Now, let us examine the debates that occurred before Resolution 1514 was adopted.

Retrocession

Some States claimed that paragraph 6 meant that, in cases where a Colonial Power colonized a part of the territory of a State, the historic title of the original State trumped the right to self-determination declared in Paragraph 2.[49] Guatemala, for instance, claimed Belize and tried to

[41] A/PV.927, p. 1012, para. 68.
[42] A/PV.944, p. 1244, para. 129.
[43] See Chapter 2.
[44] PRO CAB 129/107/53.
[45] Blay 1985, p. 443; Musgrave 1997, p. 183.
[46] A/RES/2625(XXV).
[47] My emphasis.
[48] Blay 1985, p. 443; For an excellent discussion, see Musgrave 1997, p. 182.
[49] "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."

add an amendment to Resolution 1514 to the effect that "[t]he principle of the self-determination of peoples may in no case impair the right of territorial integrity of any State or its right to the recovery of territory."[50] Indonesia convinced Guatemala to retract her amendment, asserting that paragraph 6 already meant retrocession.[51] Indonesia had a similar interpretation, claiming a historic title to West Irian.[52] Other states, such as Iran,[53] Morocco[54] and Ireland[55], agreed that paragraph 6 already meant retrocession.

Declarations unclear in meaning

Cambodia, as one of the forty-three sponsoring states, explained:

> "70. It is of course understood that any act of aggression against an independent State constitutes a crime against humanity. This crime takes on an even graver complexion when it is directed against a country which has just attained its independence and is traversing the difficult initial stages of development.
>
> 71. Member States, and especially the former Administering Powers, must, moreover, refrain from any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country. Thus, it would be desirable if, in the declaration on the termination of colonialism, all Member States would solemnly reaffirm the undertaking they assumed under the United Nations Charter never in any way whatever to violate the national sovereignty and territorial integrity of another State."[56]

In her first paragraph, Cambodia seems to interpret paragraph 6 in the spirit of the principle of *uti possidetis*. In the second paragraph, she appears to express the prohibition of disruption of the colonial territory by the Colonial Power *before* or *during* the independence process. This reading is justified by the using of the term 'country' instead of 'state'. However, she uses the term "*former* Administering Powers", meaning that the new state *already* exists; thus the Colonial Power must respect territorial integrity *after* independence. This reading is supported by the last sentence, where the Charter principle of territorial integrity of states is reaffirmed.

Pakistan gave the impression of wanting to avoid disruption of the territory *after* independence.[57] Nepal's words suggest that the Colonial Power should not dismember the NSGT *before* independence.[58] Ecuador linked paragraph 6 to *uti possidetis*.[59]

---

[50] A/L.325, quoted in Clark 1980B, p. 28.
[51] A/PV.947, p. 1271, para. 8.
[52] Ibid., para. 9; A/PV.936, p. 1153, para. 55.
[53] A/PV.946, p. 1269, para. 68.
[54] A/PV.947, p. 1284, para. 160.
[55] A/PV.935, p. 1139, paras. 112-13.
[56] A/PV.926, p. 995, paras. 70-71.
[57] "This paragraph embodies an important safeguard against any attempt to disrupt the national unity and territorial integrity of a country. In introducing this significant point of balance into the scheme of the whole draft resolution, we have, I believe, made it clear that we do not countenance, and do not intend to countenance, a misuse and perversion of the terms of our draft resolution for any ulterior ends of enlarging the territory of one country at the expense of another.", A/PV.930, p. 1059, paras. 73-4.

One aid to reading paragraph 6 would be the statements made by other states about territorial integrity. Iran spoke of States *and* Administering Powers, which must "refrain from any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country."[60] Tunisia stated that "the Colonial Powers must … strictly respect the independence, sovereignty and territorial integrity of the new States."[61] The UAR stressed the preservation of the unity and territorial integrity of the 'colonial countries' and exemplified this with Palestine, the Congo, and the looming division of Algeria by France.[62] Jordan[63] and Lebanon[64] also saw Palestine as a case of the violation of territorial integrity. Portugal and Spain saw their territorial integrity as being violated by their colonies' becoming independent. Cuba saw the Guantánamo Naval Base as a colonialist violation of her territorial integrity.[65]

Non-dismemberment of a colony before and during independence

Iraq said that partitioning should not be the price for independence.[66]

Franck and *Clark* believe that, during the vote for Resolution 1514, paragraph 6 meant two things to the majority: first, the principle of *uti possidetis*, precluding smaller units from being split off during decolonization and, second, that self-determination did not imply a right to secession from existing states.[67] Thus, these debates suggest a reading of paragraph 6 as preventing a Colonial Power from excising parts of the colony *before* independence.

Further perceptions

Of the nine abstaining states those giving an explanation were against the wording of the resolution, not against decolonization.

---

[58] "The sixth principle cautions, in the light of the living experience of the colonial territories, against any attempt on the part of the colonial Powers at the partial or total disruption of the national unity and the territorial integrity of the colonial country by stating that such attempts would be incompatible with the Charter of the United Nations.", A/PV.935, p. 1136, para. 74.

[59] "My delegation also condemns any attempt to disrupt the national unity or territorial integrity of a country as being contrary to the principles of the Charter and to the foundations of law and peaceful co-existence. Wars of conquest, the imposition of treaties that mutilate the territorial heritage of a State, and military occupation as a means of settling international disputes are all unfortunately the survivals of a retarded colonialist mentality.
[…] The international doctrine of *uti possideti juris* came into being at the same time as we attained our independence, since Simón Bolivar, our liberator, took it as the basis for the existence of States. On the basis of this principle, nationalities became territorial entities, and respect for this principle has been maintained throughout the course of our American juridical development. Thus, American international law condemns the dismemberment of States by armed intervention and conquest. We cannot allow the civilized world to resound to the tragic *Vae victis* of the ancient barbarians.", A/PV.933, p. 1102, paras. 171-2.

[60] "Member States, and especially the former Administering Powers, must, moreover, refrain from any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country.", A/PV.926, p. 995, para. 71; A/PV.926, p. 993, para. 52; A/PV.926, p. 994, para. 62.

[61] A/PV.929, p. 1044, para. 126.

[62] A/PV.929, p. 1049, paras. 178-80.

[63] A/PV.930, p. 1057, para. 47.

[64] A/PV.937, p. 1162, para. 49.

[65] A/PV.937, p. 1170, para. 111.

[66] "[I]t is essential that nations should not be compelled to pay the heavy price of partitioning their own homeland in order to achieve independence. We have already seen many examples of this and it is a danger which the United Nations must always guard against. It is therefore imperative that the declaration should contain a paragraph condemning the partial or total disruption of the national unity and territorial integrity of countries.", A/PV.937, p. 1173, para. 134.

[67] "On the other hand, most states voting for Resolution 1514's paragraph 6 probably did so in the belief that they were creating a sort of 'grandfather clause': setting out the right of self-determination for all colonies but not extending it to parts of decolonized states and seeking to ensure that the act of self-determination occur within the established boundaries of colonies, rather than within sub-regions.", Franck and Hoffman 1975, p. 370; see also Clark 1980A, p. 30.

The UK stated that paragraph 1, referring to a "system of alien domination which is contrary to the United Nations Charter", did not apply because Chapter XI allowed colonialism.[68] She disagreed with the statement in the preamble that the "existence of colonialism prevents the development of international economic co-operation, [and] impedes the social, cultural and economic development of dependent peoples", since she respected all her obligations under Article 73 in respect of the development of the territories.[69] She found the implied criticism in paragraph 3, to the effect that the Colonial Powers used "fabricated grounds of unpreparedness" to delay independence regrettable.[70] Finally, she deemed paragraph 2 to be "out of place"; the UK "wholeheartedly" endorsed "the principle of self-determination", but no universally acceptable definition had yet been styled for the "right to self-determination".[71]

A piquant detail is that, during this debate, the UK already had Chagos in mind, stating that "it would surely be a betrayal of the whole spirit of Chapter XI of the Charter for us to say that the people of, for example, the Seychelles Islands, or the Gilbert Islands, should decide immediately what form they wish their ultimate independence to take..."[72] She dismembered Mauritius in defiance of her words in this debate: "It is of fundamental importance to the future peace and prosperity of Africa that the countries of that continent should retain their integrity…"[73]

In the ulterior debates about Gibraltar within the Fourth Committee the UK interpreted paragraph 6 as follows:

> "It is obvious to my delegation that that refers to attempts in the future and that it cannot be twisted to give spurious backing to attempts by countries to acquire sovereignty over fresh areas of territory under centuries-old disputes. The paragraph is clearly aimed at protecting colonial territories or countries which have recently become independent against attempts to divide them or to encroach on their territorial integrity, at a time when they are least able to defend themselves, with all the stresses and strains of approaching or newly achieved independence. One has only to recall the question of the secession of Katanga from the Congo, which was the major, if not the most important, issue before the General Assembly in 1960 when Resolution 1514(XV) was prepared, discussed and adopted, to recognize that that was in fact the intention behind the paragraph."[74]

During a debate about the Falklands, the UK stated:

> "If words mean what they say, this paragraph is an injunction addressed to all countries to take no action in the future. I stress 'in the future' because the word used in the resolution

[68] A/PV.947, p. 1275, para. 49.
[69] Ibid., para. 50.
[70] Ibid., para. 52.
[71] Ibid., para. 53.
[72] A/PV.925, p. 985, para. 45.
[73] Ibid., para. 47.
[74] A/AC.109/PV.284, p. 22.

is 'attempt' whose consequence would be to split existing territories or States, or which would infringe their sovereignty in a manner inconsistent with the United Nations Charter, and in particular with Article 2 of the Charter."[75]

1.4. Resolution 1541(XV)

Resolution 1541, established the principles determining the obligation to transmit information under article 73(e) of the Charter.[76]

Principle I confirms the obligation to transmit information under Article 73.

Principle II establishes that this obligation continues until the NSGT attains a "full measure of self-government".

Principle III defines the obligation to transmit information as an "international obligation".

Principle IV affirms that, when the territory is *prima facie* geographical and ethnically or culturally distinct from the metropolitan state, it is a colony. This is the 'Salt Water Test', an important element of the Law of Decolonization. The test makes Chagos a colony, but not the republics of the Soviet empire.

Principle V adds that if a territory is arbitrarily placed in a position of subordination, it is a colony.

Principle VI enumerates the modes for a full measure of self-government:

- Emergence as a sovereign independent State;
- Free association with an independent State;
- Integration with an independent State.

Principle VII provides that free association should be achieved by free and voluntary choice, expressed through informed and democratic processes. Free association is not final; the people of the NSGT have the freedom to change its status at a later date. They should have the right to an internal constitution, without outside interference.

Principle VIII provides that integration should be based on complete equality, equal status and equal fundamental rights and freedoms.

Principle IX limits the integration. The NSGT must be in an advanced stage of self-government, enabling the people to make responsible choices. Integration can only happen through their wishes, freely expressed, with a full knowledge of the change in their status and voiced through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations may supervise these processes.

[75] Quoted by Venezuela in Ibid., pp. 3-5.
[76] A/RES/1541(XV).

Principle X, XI and XII allow for security and constitutional limitations to the transmission of information.

1.5. The Human Rights Covenants

Prior to the Covenants, self-determination had been crystallizing as a *legal principle*. From the fifties onward, it had also begun to crystallize as a *right*. In 1953, Resolution 637(VII) already spoke of a *right* of self-determination of people in NSGTs.[77]

The Covenants are the first treaties granting the right to self-determination.[78]

In the heated debate on introducing self-determination into the Covenants, the UK argued that self-determination was a political principle, not a legal one:

> "HMG have on many occasions made it clear that this article is unacceptable to them and has, in their view, no place in a covenant which is concerned with individual human rights. Self-determination is a political principle of very great importance, whose application in practice involves political issues and may have to be subordinated to equally important principles such as the maintenance of peace. Its assertion as an unqualified right of 'all peoples' and 'all nations' not only would do nothing to assist in the solution of these political problems but would have the most far reaching political consequences for many States and not merely for those administering Non-Self-Governing Territories."[79]

Both Human Rights Covenants entered into force in the sixties with a common Article 1:

> "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

The Covenants denied the possibility of reservations to Article 1, but the UK found a way round that. She signed and ratified the Covenants with the following declaration:

> "First, the Government of the United Kingdom declare their understanding that, by virtue of Article 103 of the Charter of the United Nations, in the event of any conflict between

[77] A/RES/637(VII)A-C.
[78] A/PV.935, p. 1136, para. 74.
[79] A/2910/Add.1. Annex I.

their obligations under Article 1 of the Covenant and their obligations under the Charter (in particular, under Articles 1, 2 and 73 thereof) their obligations under the Charter shall prevail."[80]

This declaration is interesting for the following reasons: in its formulation of article 1(2), the Charter guarantees fewer rights than Article 1 in the Covenants, because it is a vague, general formulation of a *principle*. And Article 73 of the UN Charter does not guarantee the NSGTs overmuch, excluding independence and self-determination on purpose. It thus seems that, with the aforesaid declaration, the UK tried to dilute her obligations to respect the self-determination of the colonies.[81]

Even during the negotiations, the UK strove to keep the colonies beyond the reach of the Covenants by proposing colonial clauses, though this was defeated by a hostile UN consensus.[82] She also declared that she would not extend the Covenants to the BIOT (Chagos). However, this would not relieve UK from her obligation; the Human Rights Committee observed in General Comment 12 that "[t]he obligations exist irrespective of whether a people entitled to self-determination depends on a State party to the Covenant or not."[83] Thus the UK would be obliged to respect the right to self-determination provided in Article 1, even if she would not be party to the Covenants. The Committee has rejected the UK's claims that it had no obligation to report on the BIOT.[84] In the *Wall* advisory opinion, the ICJ claimed that Israel has an obligation to respect the Palestinian right to self-determination, despite the fact that Israel never extended the application of the Covenants to the occupied territories.[85]

Cassese claims that, since the Article 1(3) "is to be read in conjunction with Chapters 11 and 12 of the UN Charter, it actually writes the principle of self-determination into the chapters governing dependent territories (although, of course, technically speaking it cannot amend those Chapters but only supplement them for those Member States of the UN which have ratified the Covenants). In this way, the Covenants give teeth to the Charter's general principle of self-determination…"[86]

1.6. Resolution 2625(XXV)

Resolution 2625 reaffirmed the right to self-determination as the right of peoples to determine freely their political status, and pursue their social, cultural and economic development. Like the Human Rights Covenants, this extends the group encompassed by self-determination from

[80] See the UNTS, Internet Database.
[81] "The aim of the declarations was to make clear, in view of the vagueness of the Article, that it was not to be interpreted as imposing on a colonial power greater obligations in respect of its dependent territories than the UN Charter itself.", Harris and Joseph 1995, p. 78.
[82] Ibid., p. 74; See generally the UK's practice on colonial clauses: Normand and Zaidi 2008, p. 230ff. and Simpson 2001.
[83] HRI/GEN/1/Rev.1, para. 6.
[84] "The Committee regrets that, despite its previous recommendation, the State party has not included the British Indian Ocean Territory in its periodic report because it claims that, owing to an absence of population, the Covenant does not apply to this territory.", CCPR/C/GBR/CO/6, para. 22.
[85] ICJ, *Construction of a Wall*, para. 149.
[86] Cassese 1998, p. 58.

colonial people to everybody. Every state has a duty to promote the realization of the principle of self-determination, specified as bringing a speedy end to colonialism with due regard to the freely expressed will of the people. The subjugation, domination and exploitation of people are contrary to the Charter, a violation of the principle of self-determination and a denial of fundamental human rights. Resolution 1541 gave three modes for the realization of self-determination; integration, association and independence. Resolution 2625 adds a fourth mode, "the emergence into any other political status freely determined by a people". The provision that the NSGT has a status "separate and distinct" from the territory of the State administering it and that this status shall exist until the people have exercised their right of self-determination is very important. The resolution does not authorize the dismembering of the territory of a sovereign State acting in accordance with self-determination and having a truly representative government. This much-debated provision is usually interpreted as guaranteeing the territorial integrity of democratic states *alone*;[87] oppressed peoples might be allowed to secede.

The UK made an interesting proposal.[88] For the first time, she accepted self-determination as a *legal principle*, rather than a political one. A state has an obligation to accord "a right freely to determine their political status" to the people within its jurisdiction.

We can see a new inconsistency here. She proposed three forms for the implementation of self-government: association, integration and independence. These three forms come from

[87] Thornberry 1993, p. 114ff; Rosenstock 1971, p. 732; Kirgis 1994, p. 305.

[88] "1. Every State has the duty to respect the principle of equal rights and self-determination of peoples and to implement it with regard to the peoples within its jurisdiction, inasmuch as the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation. The principle is applicable in the case of a colony or other Non-Self-Governing Territory, a zone of military occupation, or a Trust Territory, or, subject to paragraph 4 below, a territory which is geographically distinct and ethnically or culturally diverse from the remainder of the territory of the State administering it.

2. In accordance with the above principle

(a) Every State shall promote, individually and together with other States, universal respect for an observance of human rights and freedoms.

(b) Every State shall accord to peoples within its jurisdiction, in the spirit of the Universal Declaration of Human Rights, a right freely to determine their political status and to pursue their social, economic and cultural development without discrimination as to race, creed or colour.

(c) Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State.

(d) Every state exercising authority over a colony or other Non-Self-Governing Territory, a zone of military occupation or a Trust Territory shall, in implementation of the principle, maintain a readiness to accord self-government through their free choice, to the peoples concerned, and to make in good faith such efforts as may be required to assist them in the progressive development of institutions of free self-government, according to the particular circumstances of each Territory and its peoples and their varying stages of advancement; and, in the case of Trust Territories, shall conform to the requirements of Chapter XII of the Charter of the United Nations.

3. States exercising authority over colonies or other Non-Self-Governing Territories, zones of military occupation or Trust Territories shall be deemed to have implemented this principle fully with regard to the peoples of those Territories upon the restoration of self-government or, in the case of Territories which have not previously enjoyed self-government, upon its achievement, through the free choice of the peoples concerned. The achievement of self-government may take the form of emergence as a sovereign and independent State; free association with an independent State; or integration with an independent State.

4. States enjoying full sovereignty and independence, and possessed of a representative government, effectively functioning as such to all distinct peoples within their territory, shall be considered to be conducting themselves in conformity with this principle as regards those peoples.", A/7619, p. 51.

resolution 1541, which the UK was still rejecting in 2009.[89] And she rejected resolution 1541 because it contained only those three modes of achieving self-determination and lacked the fourth mode present in resolution 2625, namely, the open-ended "any other political status freely determined".

1.7. The legal status of GA resolutions

Skeptics aver that GA resolutions are not binding.[90] But it is also true that States invoke resolutions in their legal arguments in International Courts without raising any eyebrows. And the judges quote resolutions in their decisions. Therefore, there must be some grain of legal force within them. In 1955, Judge Lauterpacht commented that:

> "A Resolution recommending to an Administering State a specific course of action creates some legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith. If, having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision. These obligations appear intangible and almost nominal when compared with the ultimate discretion of the Administering Authority. They nevertheless constitute an obligation; they have been acknowledged as such by the Administering Authorities."[91]

Resolutions do not *ipso facto* create new rules of customary law.[92] They may prove extant Customary International Law (CIL),[93] help solidify emerging CIL, or add to new CIL.[94] Legally relevant factors include who voted for or against the resolution, the effective power of the voters,[95] the legal language used, the context of its adoption, and so forth.[96]

The *International Law Association* upholds that "[r]esolutions accepted unanimously or almost unanimously, and which evince a clear intention on the part of their supporters to lay down a rule of international law, are capable, very exceptionally, of creating general customary law by

---

[89] In 2009, the UK replied to the Fourth Committee as follows:
"General Assembly resolution 1541 (XV) is not legally binding. Furthermore, the United Kingdom did not vote in favour of the resolution. It believes that the guiding principles for the relationship with the Territory should draw on the Charter of the United Nations. This states, inter alia, that an administering Power shall take due account of the political aspirations of the peoples of its Territories, and 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 United Kingdom places the utmost importance on these fundamental principles, which are at the heart of the constitutional review process.
The United Nations Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (1970), which elaborates the principle of self-determination, also makes clear that there is an option for the peoples of a Territory in addition to those set out in resolution 1541. It says that the establishment of a sovereign and independent State, 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.", A/64/70, p. 5.
[90] Pomerance 1982, pp. 64-65.
[91] ICJ, *South-West Africa-Voting Procedure*, Separate opinion of Judge Lauterpacht, p. 118.
[92] ILA 2000, p. 55.
[93] ICJ, *Legality of the Threat or Use of Nuclear Weapons case*, pp. 226, 254–5; the *Western Sahara case*, pp. 31–3; the *East Timor case*, pp. 90, 102; the *Nicaragua case*, pp. 14, 100-101, 106; and the *Construction of a Wall case*, pp. 136, 171–2.
[94] ILA 2000, p. 55.
[95] McDougal 1979, pp. 328-29.
[96] ILA 2000, p. 60.

the mere fact of their adoption. In the event of a lack of unanimity, (i) a failure to include all representative groups of States will prevent the creation of a general rule of customary international law; and (ii) even if all representative groups are included, individual dissenting States enjoy the benefit of the persistent objector rule."[97] Even resolutions declaring the law only create a rebuttable presumption that the law is indeed as declared.[98] Repetition of the resolutions does not, of itself, add to the legal obligation.[99] Special names such as 'Declaration' may suggest legal intent, "[b]ut there is no magic in the label."[100]

For *Shaw*, repeating resolutions, by calling for self-determination for a NSGT, may affirm *subsequent practice* in terms of the interpretation of the Charter.[101]

Resolutions related to NSGTs are peculiar. The GA has acquired the competence to decide which territory qualifies as NSGT.[102] This means that resolutions establishing whether or not a territory is an NSGT must somehow be legally binding.[103] *Castañeda* and *Shaw* have argued that they are. The UN's organs need to "determine the meaning and scope of" Charter provisions in order to be able to apply them.[104] Therefore this interpretation of a rule is binding.[105] In San Francisco, Committee IV/2 concluded that "[i]n the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular function. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers."[106] If the interpretation is "not generally acceptable" it will not be binding;[107] thus, it is binding if generally acceptable. For *Castañeda*, when a resolution determines *facts or legal situations*, this finding must be binding.[108] If we were to apply this view to Resolution 2066(XX), then we would have some binding elements. The GA regretted that the UK "has not fully implemented Resolution 1514(XV) with regard to [Mauritius]" and

[97] Ibid., p. 61.
[98] Ibid., p. 58.
[99] Judges Klaested and Lauterpacht in *South West Africa opinion*.
[100] ILA 2000, p. 62.
[101] Shaw 1986, p. 74.
"The large number of Assembly resolutions calling for self-determination in specific cases represents international practice regarding the existence and scope of a rule of self-determination in customary law. They also constitute subsequent practice relevant to the interpretation of particular Charter provisions. For example, resolutions proclaiming that an obligation exists under Article 73(e) of the Charter to transmit information in a particular case may be regarded as a binding interpretation of the Charter provision in that specific instance since the competence of the General Assembly to determine such matters has been clearly recognized. The change from Chapter XI to self-determination with die Colonial Declaration as the juridical basis for the process marks the stronger line taken by the Assembly as a whole but the effect remains broadly similar-that is, the determination by the General Assembly of a factual situation within which the declared norm will be deemed to operate. By such methods, of course, the outlines of the norm itself will be elucidated, and to that extent factual determinations by the Assembly will be juridically relevant.", Ibid., p. 84.
[102] Ibid., p. 74-75, 83; "The right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized.", ICJ, *Western Sahara*, para. 71.
[103] The best discussion on the current law can be found in Hillebrink 2007, p. 27ff.
[104] Castañeda 1969, p. 122.
[105] Ibid., p. 123.
[106] 13 UNCIO 687.
[107] 13 UNCIO 688.
[108] "This is the meaning of the General Assembly's determinations of facts or legal situations. They are not binding in themselves or by themselves; they are binding as an element, that is, as the content, of a binding rule of the Charter. Although these determinations are limited to concretizing and applying the rules of the Charter to particular cases, without creating new obligations for the members not implicit in the Charter, they have full legal validity.", Castañeda 1969, p. 134.

noted "with deep concern that any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration, and in particular of paragraph 6 thereof."[109] This would be what *Castañeda* envisioned when positing the binding force of resolutions *establishing* (legal) facts. Therefore the determination in resolution 2066 (XX) to the effect that the UK had violated Resolution 1514 must have some legal conclusiveness.

The UK abstained from voting on resolution 2066. On the one hand, she could be considered a persistent objector to a customary rule that might flow from this resolution. On the other hand, one could argue that the reading of *Castañeda* gives such resolutions a similar status as the status of administrative resolutions. They are binding and decided by majority.

If one considers resolution 1514 an interpretation of the Charter, then resolution 2066 is the State parties' claim that the UK violated the Charter. As far as I know, only a judge can establish the correct interpretation of a treaty when the parties disagree.

The legal status of Resolution 1514(XV)

When adopted, some states considered it a binding interpretation of the Charter,[110] while others believed that it restated the duties imposed by the Charter. For some, it asserted the goals of the Charter and rectified its unfulfilled objectives.[111] Sweden compared Resolution 1514 with the UDHR, but some envoys reject this analogy, affirming that there was more to 1514, namely that, behind the resolution lay a clear *legal intent* to restate or reinterpret the Charter.[112]

In 1967, *Asamoah* wrote it was an authoritative interpretation of the Charter.[113] For *Castañeda*, in 1969, it was at the 'intermediate level'.[114] In 1971, the ICJ recognized Resolution 1514 as an important stage in the development of self-determination[115] and, in *Western Sahara*, called it

[109] A/RES/2066(XX).
[110] Shaw 1986, p. 77; Asamoah 1967, p. 177.
[111] Asamoah 1967, p. 177.
[112] Ibid.
[113] Ibid., p. 179.
[114] Castañeda measures the binding force of GA resolutions on three levels. "This resolution contains disparate elements with regard to its degree of legal validity. Its essential terms –'[The General Assembly] solemnly proclaim[s] the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations'-are not the equivalent of establishing the specific legal obligation to grant political independence, immediately and unconditionally, to all dependent peoples. But the resolution was at the same time much more than the expression of an ideal; it was the modern interpretation of the principle of self-determination, rendered by the most representative organ of the international community, on the basis of political trends and events since the Charter was signed. The Declaration was a programmatic formulation based on new determinations that could no longer validly be impugned. For example, 'lack of preparation in the political, economic, social, or educational fields' will no longer 'serve as a pretext to delay independence.'

The distinction between 'advanced' and 'less advanced' nations has disappeared as the legal criterion and basis for the preservation of colonial status. Independence is postulated as the inevitable goal; its advent has ceased to be something completely indeterminate and has become a short-time imperative. The Charter institutions for the protection of dependent peoples have lost their relatively permanent character. Free determination in the decade of the 60s means much more than it did in 1945. The new manner of conceiving the colonial problem, and even the changes that have taken place in the way the United Nations interprets and applies the Charter's institutions, are above all a consequence of changing reality. But the Declaration not only reflects the change that has been wrought; it also symbolizes and concretizes a new politico-juridical conception: the definite repudiation and end of colonialism.", Castañeda 1969, pp. 114-15.
[115] ICJ, *the Continued Presence of South Africa in Namibia*, para. 52.

"the basis for the process of decolonization."[116] In 1982, *Pomerance* was skeptical of its legal force.[117] For *Sloan*, in 1991, it provided "authentic interpretations of the Charter";[118] it was a ten on a scale of one to ten.[119] For *Cassese*, in 1998, it contributed to the transformation of the 'principle' of self-determination into a *legal right.*[120] In 2007, *Crawford* claimed its "quasi-constitutional status"[121] For Brownlie, in 2008, it was an authoritative interpretation of the Charter.[122]

The legal status of Resolution 1541(XV)

The Colonial Powers treat 1541 as an authoritative document.[123] During the preceding debates, many envoys said that the formulation of the Principles was a legal matter.[124] Only France has not yet explicitly recognized 1541 as a valid interpretation of the Charter.[125] It has been "viewed as an authentic explanation of how to grant independence."[126] In *Western Sahara,* the ICJ described Resolution 1541 as complementing Resolution 1514 and stated that "certain of its provisions give effect to the essential feature of the right of self-determination as established in Resolution 1514(XV)."[127] *Hillebrink* concludes that "Resolution 1541 could therefore be considered as a generally accepted, and therefore legally binding interpretation of the Charter."[128]

The UK told the Fourth Committee in 2009 that Resolution 1541 was not binding, that she did not vote for it and that the relationship with NSGTs should draw on the Charter, meaning that the

> "administering Power shall take due account of the political aspirations of the peoples of its Territories, and 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 United Kingdom places the utmost importance on these fundamental principles…"[129]

However, in the same year, 2009, the UK submitted a Written Statement during the *Kosovo Opinion*, citing both resolutions 1514 and 1541.[130] Therefore, the UK has implicitly admitted that those resolutions have legal significance.

---

[116] ICJ, *Western Sahara*, para. 57.
[117] Pomerance 1982, pp. 11-12.
[118] UDHR, Resolution 1514(XV), Resolution 2625(XXV), Sloan 1991, p. 46.
[119] Ibid., pp. 7-8.
[120] Cassese 1998, p. 70.
[121] Crawford 2007, p. 604.
[122] Brownlie 2008, p. 581.
[123] Hillebrink 2007, p. 20.
[124] Ibid., p. 21.
[125] Ibid., p. 23.
[126] Keitner and Reisman 2003, p. 6.
[127] ICJ, *Western Sahara*, para. 57.
[128] Hillebrink 2007, p. 24.
[129] A/64/70.
[130] ICJ, *Kosovo Opinion*, Written Statement of the United Kingdom of Great Britain and Northern Ireland.

The legal status of Resolution 2625 (XXV)

Resolution 2625 is almost universally accepted as an interpretation of the Charter and declaratory of the principles of IL.[131]

1.8. Erga omnes and jus cogens

In *East Timor*, the ICJ held the right of self-determination has an *erga omnes* character,[132] and repeated this in the *Construction of a Wall* opinion.[133] However, it is not generally accepted that obligations *erga omnes* hold a higher normative value.[134] Many scholars believe that self-determination is a *jus cogens* norm,[135] and some disagree.[136]

1.9. Title to territory

The title to the Chagos is an important factor in deciding which of the three parties should decide the future of the archipelago.

Scholars have a hard time explaining who has the title to the territory of a colony. They have to explain how the colonial peoples have the right to decide the future of the colony while, at the same time, the Colonial Power retains sovereignty and the title to the territory. It is like living in a house and having the right to do whatever you please with it but, on paper, somebody else is the owner and dictates how you should behave. The NSGT has a "status separate and distinct from the territory of the State administering it"[137] but this does not solve the problem.

Cassese writes that:

> "The new law of self-determination has not resulted in the invalidation of these legal bases of title *ipso facto*. However, a legal process, starting with the League of Nations mandate system, followed by the United Nations trusteeship system and compounded by the gradual emergence of legal rules on self-determination, has led to the emergence of a set of legal obligations for those countries still enjoying sovereignty over colonial territories. These obligations make it incumbent on those States to enable the people of colonial territories freely to choose whether to opt for independent statehood, or association or integration with an existing State. Thus, those obligations do not produce the immediate legal effect of rendering the legal title over colonial territories null and void. Rather, besides setting out a series of limitations and qualifications intended greatly to restrict sovereignty, they envisage a temporary legal regime that must of necessity lead to the eventual extinction of legal title. In a way, these obligations act as a sort of time-bomb: the holder of

[131] Rosenstock 1971, p. 714. Schwebel 1994, p. 558; Sloan 1991, p. 85; Shaw 1986, p. 82.
[132] ICJ, *East Timor*, para. 29.
[133] ICJ, *Construction of a Wall*, paras. 155-156.
[134] De Wet 2012, p. 25.
[135] Cassese 1998, p. 133-40; Brownlie 2008, p. 512; Shaw 1986, p. 91; Frowein 1993, pp. 218-19; McCorquodale 1995, p. 326; Orakhelashvili 2009, p. 51; Raič 2002, p. 219; E/CN.4/Sub.2/405/Rev.1, p. 13, paras. 84-85.
[136] Crawford 2007, p. 81; Pomerance 1982, pp. 70-2.
[137] A/RES/2625(XXV).

> the sovereign title has to fulfil them knowing that by this action it will eventually have to relinquish its title."[138]

Shaw says that "while the administering State in such a situation still possesses the title to the territory in question, it is qualified by the right of the people of the territory to call for its transfer in the context of the exercise of self-determination."[139] For *Sureda*, the right to self-determination is a *jus cogens* norm, rendering colonialism illegal and the colonial title to a territory void.[140] *Crawford* disagrees with *Sureda*, but still fails to make us any wiser:

> "The view that sovereignty over a non-self-governing territory remains with the administering State can be accepted only with reservations. That State has accepted far-reaching obligations with respect to such territories, obligations not substantially different from those that were accepted by States administering Trust Territories under Chapter XII. It is true that the Charter contemplates a greater measure of international supervision of Trust Territories, but even with respect to supervision the two regimes tended to be conflated by subsequent Assembly action. Nonetheless, certain distinctions remained, at least in theory: for example, the plea of domestic jurisdiction was in principle irrelevant to Trust Territories, but was capable of applying to Chapter XI territories, however little that plea may have prevailed in practice. Administering States have more freedom with respect to termination of Non-Self-Governing status than with respect to termination of Trusteeship. And the General Assembly has never claimed or exercised a power to revoke or declare forfeited a State's title to administer a Non-Self-Governing territory: the most it has done is to call upon States to terminate such status by granting independence."[141]

Thus, with the exception of *Sureda,* the scholars referred to here believe that the title still remains with the Colonial Power, but limited by the right to self-determination of the colonial peoples. So how can the colonial peoples have a right to decide the future of the territory and yet still not hold the title to their territory?

1.10. Territorial integrity and uti possidetis

The territorial sovereignty principle is crucial in International Law (IL), creating a need for territorial stability.[142] Thus, in IL, the territory of a State is sacrosanct as regards other legal persons, which are mainly states.[143]

Minorities have no right to *external* self-determination and they exercise their right within the boundaries of the State. In very exceptional cases, the minorities acquire a right to secession,

[138] Cassese 1998, p. 186.
[139] Shaw 1986, pp. 171-72.
[140] Sureda 1973, p. 353.
[141] Crawford 2007, p. 613.
[142] Shaw 1996, p. 151.
[143] Article 2(4), UN Charter; ICJ, *Kosovo*, para. 80; A/RES/2625(XXV); ICJ, *Nicaragua, paras.* 191-193.

in cases of grave and massive violations of human rights, when the group is denied a meaningful right to self-determination; however, the jury is still out.[144]

Colonial peoples have the right to external self-determination as a group, within the boundaries of the colony. Minorities within colonies do not have separate rights to self-determination. The NSGT will become independent as one state.

The principle *uti possidetis*, as a part of the principle of territorial stability, regulates the transfer of sovereignty to successor states. It demands that successor states emerge from within the same territory. Within the Law of Decolonization, it demands that a colony becomes independent within the administrative boundaries of the former colony. It only plays a role when the boundary already exists as an international one, and it defers to boundaries already established by treaty.[145] The *uti possidetis* line may be changed by treaty, consent, practice and acquiescence.[146]

1.11. Recapitulation

In this section, I will summarize the information presented thus far.

The law of self-determination revolves around two competing words: self-determination and territorial integrity. Self-determination is a principle and a right. As a general principle, self-determination is the "the need to pay regard to the freely expressed will of peoples".[147] Viewing it as a right, we need to answer three questions: the *who*, the *what* and the *how*.

Who has the right to self-determination?

People. In the Law of Decolonization, the word 'people' means the *whole* group living within a territory, no matter how many nationalities and minorities it may consist of.

In independent states, the entire population within the territory has the right to self-determination, but this means something different from the right to self-determination of the colonial peoples. For people in independent States, self-determination has an external and internal component. Externally, it means the right to be free from outside interference. Internally, it means the right to partake in the decisions of the state.

Only territories that were known 'to be of the colonial type' in 1945 benefit from the Law of Decolonization. The 'Salt Water Test' helps in deciding the status of a territory: a NSGT is distinct geographically, ethnically and culturally and in a position of subordination to the metropolitan State.

People under alien occupation and people living under racist regimes, such as in South Africa, also have the right to self-determination.

---

[144] Supreme Court of Canada in the *Quebec Secession* opinion, Kohen 2006, p. 188; Raič 2002, p. 365; Crawford 2001, p. 57; Hannum 1993, p. 44; Buchanan 2004; Tomuschat 2006, p. 35.
[145] Shaw 1996, p. 151.
[146] Ibid., p. 154.
[147] ICJ, *Western Sahara*, para. 59.

What?
The colonial peoples have the right to determine the future of the territory. They may freely:

- determine their political status;
- dispose of their natural wealth and resources;
- pursue their economic, social and cultural development.

How?
The colonial peoples can realize their right to self-determination in four ways, by:

- independence;
- association with a State;
- integration with a State;
- any other political status freely determined by the people.

The status of an NSGT changes only when it attains a "full measure of self-government". Only independence and integration are definitive, and the right to self-determination, in the meaning of the Law of Decolonization, disappears once one of these statuses is achieved. Association is not definitive; the right to self-determination continues to exist and the people may change their status.

Association and integration must be a free and voluntary choice made by the peoples of the territory and expressed through informed and democratic processes. Integration requires universal adult suffrage. After integration, there is no more subordination and the citizens in the territory and in the metropolitan State have equal rights and freedoms.

Under Article 73(e) of the Charter, the Administering States have an obligation to report to the UN on the economic, social and educational development of a Territory. The General Assembly keeps a list of NSGTs. A territory is non-self-governing until the GA decides otherwise by way of a resolution. The GA can re-list a territory as a NSGT. GA assumed the authority to enlist territories,[148] to decide between claims to self-determination,[149] and whether the territory exercised or should exercise self-determination.[150]

The British stance on self-determination
The UK changed her mind. During both World Wars, she used self-determination as weapon, recanting once the hostilities had ceased. French and British reluctance rendered Chapter XI toothless, with mention of neither independence nor self-determination. The UK abstained from the voting for resolutions 1514 and 1541. In 1961, the government told Parliament that, while voting on resolutions mentioning Resolution 1514, the UK made it clear that she was only voting on the substance of the resolution in question, without recognizing Resolution 1514 itself.[151] The UK opposed Article 1 of the HR Covenants. In the initial stages of the talks

[148] Shaw 1986, pp. 74, 83.
[149] Sureda 1973, p. 49ff.
[150] Ibid., p. 64.
[151] HC Deb 05 July 1961 vol 643 cc1427.

pertaining to Resolution 2625, the UK refuted self-determination;[152] however, following that resolution, she gradually accepted self-determination as both a legal principle and legal right.

Today, she holds a standard view. In a Security Council debate about the Falklands, she said:

> "It is true that we [the UK] took the position in the 1960s that self-determination was a principle and not a right. However, in 1966 the two International Covenants […] were adopted [...]. Not only has my country endorsed the right to self-determination in the sense of the Charter, the Covenants and the Friendly Relations Declaration, but we have gone a great deal further to disprove the allegation that we are the Colonial Power *par excellence*. Since General Assembly Resolution 1514(XV) was adopted at the end of 1960, we have brought to sovereign independence and membership of United Nations no less than 28 States. We are proud of our record, and I think we have every right to be."[153]

Also worth noting is the British letter addressed to the Secretary-General of the UN, where she states that "[t]he United Kingdom is also bound by its obligations under the [ICCPR] to promote the realization of the right of self-determination and to respect that right in conformity with the provisions of the Charter."[154]

[152] Quotes produced by the Argentinean envoy to the Security Council, allegedly expressed by the UK in Mexico during the negotiations for resolution 2625:
"[T]o conclude that there exists a right of self-determination on the basis of Article 1, paragraph 2, of the Charter, or of Article 73, subparagraph b, or Article 76, subparagraph b, is an unjustifiable interpretation of the Charter."
"If the existence of a right to self-determination is upheld, it could be invoked in circumstances in which it might conflict with other concepts contained in the Charter."
"[W]hile the principle of self-determination is a basic principle which carries considerable weight, it cannot be defined with sufficient accuracy in connection with specific circumstances to constitute a right and is not recognized as such either in the Charter of the United Nations or in customary international law.", S/PV.2366.
[153] S/PV.2366, p. 17, paras. 182-83.
[154] Marston 1985, p. 397.

Chapter 2: The Mauritian Position

This chapter favors Mauritius. It describes the history of the conflict, the attitude of the UN and the discussions within the British Government.

2.1. History

In 1793, with twenty-two slaves from Mauritius, most probably of Madagascan and East African origin, Pierre Marie Le Normand created a plantation on Diego Garcia.[155] In the same year, Condorcet presented his draft Constitution, which drew up the French principle of self-determination:

> "[The French Republic] solemnly renounces the annexation of foreign territories, unless the majority of the people of those territories so wishes, and only where these territories would not be joining another nation on the basis of a social pact enshrined in a previous constitution freely proclaimed."[156]

Before Le Normand, the Chagos was uninhabited. The British occupied Seychelles in 1794 and Mauritius in 1810, at the end of the Napoleonic wars. France ceded Mauritius and dependencies to the UK by treaty in 1814.

After the abolition of slavery in 1835, the UK brought in 450,000 indentured Indian laborers to Mauritius in the period from 1836 to 1907.[157] This was to shape the ethnic and political future of Mauritius, with her politics being divided more along ethnic than ideological lines.[158] Today, the population breakdown is 68% Indo-Mauritian, 27% Creole, 3% Sino-Mauritian and 2% Franco-Mauritian.[159] In 1903, the UK separated Seychelles from Mauritius and made it a new colony. By 1962, the US was beginning to show an interest in Diego Garcia as military object.[160]

1964

A Government memo advises Ministers to approve the US/UK recommendations made during previous meetings because "defence arrangements in the Far East were out of proportion to the British stake in investment and trade in the area […]. By persuading the United States to associate themselves more with Britain by using existing strategic facilities or developing new ones in places where there was no anti-colonial bias, or better still no inhabitants, our burden might be reduced."[161] In June, the British Governor of Mauritius consults Sir Seewoosagur Ramgoolam, the Mauritian premier, about a possible excision. Ramgoolam prefers a long-term lease and the right to benefits from any minerals found.[162] In

[155] Evers and Kooy 2011, p. IX; Vine 2009, p. 21.
[156] Cassese 2008, p. 75.
[157] Simmons 1982, p. 35.
[158] See generally Simmons 1982.
[159] CIA World Factbook.
[160] PRO FCO 32/484, No 1.
[161] Ibid.
[162] Ibid.

October, after attention from the media, the Non-Aligned Conference in Cairo condemns Indian Ocean island bases.[163]

1965

In July, the UK sends her proposals for the detachment of the Chagos Archipelago from Mauritius and three islands from Seychelles to the governments of Mauritius and Seychelles.[164] Seychelles states that she will accept if "generous terms [are] offered". Mauritius is "sympathetically disposed to defence facilities proposals, but object[s] in view of likely public opinion, to detachment and prefer[s] long-term lease of islands. Also asked for safeguards for minerals, oil and fishing rights, meteorological, air and navigational facilities and provision for a defence agreement with U.K. as well as British help in obtaining trade (sugar) and other concessions from U.S."[165]

The Indian Government starts protesting against foreign military bases in the Indian Ocean and objecting to the unilateral detachment of islands before Mauritius and Seychelles have achieved independence.[166]

In the period from 7 to 24 September 1965, the *Mauritius Constitutional Conference* unfolds in Lancaster House in London. The conference is attended by delegates from the major Mauritian political parties[167] and two independent Members of the Legislative Assembly. The aim is "to reach agreement on the ultimate status of Mauritius, the time of accession to it, whether accession should be preceded by consultation with the people and, if so, in what form."[168]

Ramgoolam wants independence and represents the majority of the population, since his Labour Party is favored by the Indian majority. Sir Charles Gaëtan Duval of the Parti Mauricien,[169] the major opposition party, wants some form of integration or close association with the UK:

> "Mauritius was too isolated and internally divided for independence to be a success. There was no nearby federation which his country could join. There was a considerable body of opinion in Mauritius in favour of some form of Association with the United Kingdom and he hoped that such an Association would lead one day to Mauritius forming part of a large political unit rather than remaining in isolation. The form of self-determination which his party proposed was recognised in the United Nations Charter and by all democratic nations. It was important to consult the wishes of the people on the ultimate status of

[163] Ibid.
[164] Ibid.
[165] PRO FCO 32/484/1; PRO CO 1036/1150.
[166] PRO FCO 32/484/1.
[167] Mauritius Labour Party, the Parti Mauricien Social Democrate, the Independent Forward Bloc, the Muslim Committee of Action.
[168] M.C.C.(65), *FUTURE CONSTITUTIONAL DEVELOPMENT OF MAURITIUS,* DESPATCH FROM SECETARY OF STATE TO GOVERNOR COLONIAL OFFICE, LONDON, S.W.1., 8 June 1965.
[169] Parti Mauricien Social Démocrate (PMSD).

Mauritius and […] His party was prepared to accept either Commonwealth or United Nations supervision of a referendum."[170]

We can see from Duval's words that the participants are well informed on the Law of Decolonization and they argue on the basis of Article 73,[171] and the right to self-determination.[172] We have seen that the principle of self-determination is "the need to pay regard to the freely expressed will of peoples".[173] During the Constitutional Conference, elections are spoken of as an alternative to referendum; thus the people would vote indirectly for independence or its alternatives. Duval wants a referendum because, during elections, the people would vote on the basis of ethnic lines and other issues, while a referendum would be about independence and independence alone.[174] *McCorquodale* would agree with Duval for the same reasons, describing elections as "fraught with difficulty" and asserting that referenda were the UN's preferred method.[175]

On 20 September, the conference approaches an end, but the "Mauritians [do] not give way on question of detachment,"[176] and they have "opened their mouths very wide over compensation for the detachment of Diego Garcia."[177] On 22 September, the civil servants of the Colonial Office (CO) coach Wilson for his meeting with Ramgoolam the next day. They brief their Prime Minister about his Mauritian counterpart:

"Getting old. *Realises he must get independence soon or it will be too late for his personal career*. Rather status-conscious. Responds to flattery. […] Neither the American nor the British defence authorities can accept leasehold."[178]

The brief describes the difficulties with the Mauritian delegation:

"When offered lump-sum compensation for detachment of the order of £2m., they brushed it aside as a drop in the ocean of Mauritius requirements, returned to their proposals for trade and immigration concessions from the U.S., and suggested as an alternative that they should receive what the Mauritians calculate is the money value of these concessions, viz. up to £7m. per annum for twenty years and £2m. per annum thereafter. […] There is thus deadlock as to compensation for detachment."[179]

Anthony Greenwood, Secretary of State for the Colonies, chairing the conference, has started to incline toward independence rather than referendum. The CO advises Wilson as to how to handle the interview: "all Departments have accepted the importance of securing consent of

[170] M.C.C.(65)10, p. 2.
[171] M.C.C.(65)9, Memorandum of the PMSD, pp. 3,5.
[172] "The United Nations Charter recognises our right to self-determination and we are confident, Sir, that this right will be readily conceded to us by Great Britain.", M.C.C.(65), Official Opening Speech by Jules Koenig, Parti Mauricien.
[173] ICJ, *Western Sahara, para.* 59.
[174] M.C.C.(65)9 Memorandum of the PMSD, p. 7.
[175] McCorquodale 1995, p. 304.
[176] PRO FCO 32/484/1.
[177] PRO PREM 13/3320.
[178] My emphasis. Ibid.
[179] Ibid.

the Mauritius Government to detachment [of The Chagos]. […] The Prime Minister may therefore wish to make some oblique reference to the fact that H.M.G. have the legal right to detach Chagos by Order in Council, without Mauritius consent, but this would be a grave step."[180]

One J.O. Wright writes a strong steering brief, reading:

> "Prime Minister, Sir Seewoosagar Ramgoolam is coming to see you at 10.00 tomorrow morning. The object is to frighten him with hope: hope that he might get independence. Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago."[181]

A note from Greenwood offers the same advice:

> "I am glad you are seeing Ramgoolam because the Conference is a difficult one and I am anxious that the bases issue should not make it even harder to get a Constitutional settlement than it is already. I hope that we shall be as generous as possible and I am sure that *we should not seem to be trading Independence for detachment of the Islands. That would put us in a bad light at home and abroad and would sour our relations with the new state.* And it would not accord well with the line you and I have taken about the Aden base (which has been well received even in the Committee of 24). Agreement is therefore desirable and agreement would be easier if Ramgoolam could be assured that:
>
> (a) We would retrocede the Islands if the need for them vanished, and
>
> (b) We were prepared to give not merely financial compensation (I would think £5,000,000 would be reasonable but so far the D.O.P. have only approved £3,000,000) but a defence agreement and an undertaking to consult together if a serious internal security situation arose in Mauritius.
>
> The ideal would be for us to be able to announce that the Mauritius Government had agreed that the Islands should be made available to the U.K. government to enable them to fulfil their defence commitments in the area."[182]

The next day, 23 September, Wilson meets Ramgoolam at 10 AM. The minutes show that Wilson follows the advice. He first flatters Ramgoolam about being knighted by the Queen a few months before. Then he repeats that Diego Garcia was not "all that important; and faced with unreasonableness the United States would probably not go on with it".

> "As for Diego Garcia, it was a purely historical accident that it was administered by Mauritius. Its links with Mauritius were very slight. In answer to a question Sir Seewoosagur Ramgoolam affirmed that the inhabitants of Diego Garcia did not send

[180] Ibid.
[181] Ibid.
[182] Ibid.

elected representatives to the Mauritius Parliament. Sir Seewoosagur reaffirmed that he and his colleagues were very ready to play their part.

The Prime Minister went on to say that, in theory, there were a number of possibilities. The Premier and his colleagues could return to Mauritius either with Independence or without it. On the Defence point, Diego Garcia could either be detached by order in Council or with the agreement of the Premier and his colleagues. The best solution of all might be Independence and detachment by agreement, although he could not of course commit the Colonial Secretary at this point. Sir Seewoosagur Ramgoolam said that he was convinced that the question of Diego Garcia was a matter of detail; there was no difficulty in principle."[183]

Thus a referendum was looming; Ramgoolam was old and aware that this might be his last chance to enter the Mauritian history books as the liberator of his people and the first Prime Minister of an independent Mauritius; He could either obtain money and economic favors, or the Chagos could be excised without his consent; And in the Queen's eyes, he would look ungrateful after she had knighted him. These factors might explain why he changed his mind about the lease. As advised, Wilson *frightened* Ramgoolam, but avoided the patina of blackmail.

On the same day, during a discussion about referendum, Anthony Greenwood suspends the proceedings and invites the Mauritian delegates to decide on the Chagos.[184] It is 2:30 PM. From the very beginning, he puts the participants under pressure, telling them that he has to deliver a decision to the government by 4 PM. He says that Diego Garcia is not very important and Mauritius might lose the financial retributions. He explains that he is *caught* between the reluctant Americans and Mauritius, but he is the good guy, he has done his best to secure the maximum benefit for Mauritius. He reminds the Mauritians that the link with the Chagos is "accidental", and that the UK could excise it anyway. Ramgoolam replies that "the Mauritius Government were anxious to help and to play their part in guaranteeing the defence of the free world. He asked whether the Archipelago could not be leased." No! And that is that. Mauritius will return home independent, three million pounds richer, a referendum poorer, and leaving the Chagos behind her in London.

I will refer to this agreement as 'the Lancaster House Agreement' throughout this thesis. Its central provisions establish that:

"i. the Chagos Archipelago should be detached from Mauritius and placed under British sovereignty by Order in Council;

[183] My emphasis. Ibid.
[184] Excision Report, p. 14.

vii. if the need for the facilities in the Chagos Archipelago disappeared, sovereignty would be returned to Mauritius;"[185]

The British and Mauritian governments exchange understandings about this agreement. Mauritius understands that point VII excludes "sale or transfer by H.M.G. to third party or…any payment or financial obligation by Mauritius as condition of return."[186] The Colonial Office replies: "As regards point (vii) the assurance can be given provided it is made clear that a decision about the need to retain the islands must rest entirely with the United Kingdom Government and that it would not (repeat not) be open to the Government of Mauritius to raise the matter, or press for the return of the islands on its own initiative."[187]

On 8 November, the UK forms a new colony, the British Indian Ocean Territory (BIOT). A month later, the GA adopts Resolution 2066(XX), "Noting with deep concern that any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of [Resolution 1514], and in particular of paragraph 6 thereof… Invites the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity;"[188]

1968

Mauritius becomes independent. Between 1968 and 1973 the UK removes the population from the Chagos.[189]

Further relevant facts

Year after year, the African Union adopts a resolution affirming that the Chagos was unlawfully excised and is an integral part of Mauritius, and calling on the UK to enable Mauritius to exercise her sovereignty over the Archipelago.[190] The Group of 77 and China have declared something similar.[191] The Non-Aligned movement makes a like declaration on an annual basis.[192] In 2009, the European Parliament adopted a resolution declaring that it "[r]ecognises the plight of the people of the Chagos Archipelago, who have been forcibly removed from their islands and are currently living in a state of poverty in the islands of

[185] CM (65) 183, COUNCIL OF MINISTERS UK/US Defence Interests in the Indian Ocean MEMORANDUM BY THE CHIEF SECRETARY, 4 Nov. 1965. Reproduced in the Excision Report, p. 59.
[186] PRO FCO 58/354, No 102. TELEGRAM No. 247 FROM MAURITIUS TO THE SECRETARY OF STATE FOR THE COLONIES SENT 5th NOVEMBER 1965.
[187] Ibid., No 102, "*B.I.O.T working papers Paper No. 2: H.M.G.'S Undertakings to the Mauritius Government*", C.O. telegram 313 of 19 Nov. 1965.
[188] A/RES/2066(XX).
[189] For an account, see the cases in the British courts; Evers and Kooy 2011; Sand 2009; Vine 2009.
[190] For instance, in 2010, Assembly/AU/Dec.331(XV).
[191] "Chagos Archipelago, including Diego Garcia, […] was unlawfully excised from the territory of Mauritius in violation of international law and United Nations General Assembly resolution 1514.", TD_468. Ministerial Declaration of the Group of 77 and China on the occasion of UNCTAD XIII. United Nations Conference on Trade and Development. 23 April 2012
[192] For instance, the outcome documents of the Sixteenth Ministerial Conference of the Non-Aligned Movement, held in Bali, from 23 to 27 May 2011: "The Ministers reaffirmed that the Chagos Archipelago, including Diego Garcia, which was unlawfully excised by the former colonial power from the territory of Mauritius in violation of UN Resolutions 1514(XV) of 14 December 1960 and 2066(XX) of 16 December 1965, forms an integral part of the territory of the Republic of Mauritius."

Mauritius and the Seychelles, and considers that the Union should work towards trying to find a solution for the Chagossians to allow them to return to their rightful homeland islands."[193]

The official Mauritian position is that the Chagos "was unlawfully excised", in violation of resolutions 1514(XV), 2066(XX), 2232(XXI) and 2357(XXII). "The Chagos Archipelago had always been under the administrative rule of Mauritius until its unlawful excision by the then Colonial Power. Mauritius has never relinquished its sovereignty over the Chagos Archipelago and has, ever since this unlawful excision, consistently and persistently pressed the United Kingdom Government both in bilateral and multilateral forums for the early and unconditional return of the Chagos Archipelago to Mauritius."[194]

The official British position is that the BIOT has been British since 1814. "However, the British Government has recognized Mauritius as the only State which has a right to assert a claim of sovereignty when the United Kingdom relinquishes its own sovereignty. Successive British Governments have given undertakings to the Government of Mauritius that the Territory will be ceded when it is no longer required for defence purposes, subject to the requirements of international law."[195]

In 2010, the UK created the world's largest Marine Protected Area around the Chagos. A Wikileaks cable from the US embassy in London and dated 2009 reproduced a discussion with Colin Roberts, a senior Foreign and Commonwealth Office (FCO) official. Roberts stated that HMG's intention was that there would be no "Man Fridays" in the BIOT. He "asserted that establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents." The cable commented: "Establishing a marine reserve might, indeed, as the FCO's Roberts stated, be the most effective long-term way to prevent any of the Chagos Islands' former inhabitants or their descendants from resettling in the BIOT."[196]

The cable provided Mauritius with the incentive to start proceedings against the UK at the ITLOS.

2.2. Chagos at the UN

The UN talked about BIOT between 1964 and 1976. When Mauritius became independent in 1968, the UN stopped talking about Chagos, but continued talking about the islands detached from Seychelles until Seychelles received the islands.

Within the UN structure, the General Assembly created the Fourth Committee to deal, *inter alia*, with decolonization. The GA created the Committee of 24 (C-24), to deal exclusively with decolonization and the implementation of resolution 1514. The C-24 created Sub-

[193] European Parliament resolution of 25 March 2009 on the Interim agreement establishing a framework for an Economic Partnership Agreement between Eastern and Southern Africa States on the one part and the European Community and its Member States on the other.
[194] CCPR/CO/73/UK-CCPR/CO/73/UKOT/Add.1, para. 4.
[195] A/56/PV.47, p. 38.
[196] Reference ID: 09LONDON1156, http://wikileaks.org/cable/2009/05/09LONDON1156.html.

Committee I to deal with Mauritius and Seychelles. So, the work would start in Sub-Committee I. Its reports and conclusions would be debated in the C-24, which would then draw conclusions and adopt reports and resolutions. The Fourth Committee would pick up from here and suggest resolutions to the GA. In the end, the GA might adopt a resolution. In the paragraphs below I will reproduce some of those debates, which will help us to establish the legal rules applying to the Chagos.

1964

One year before the creation of the BIOT, the Soviet envoy raised the matter of two articles which had appeared in the *Daily Telegraph* and *The Washington Post*, respectively, and which had discussed the UK's and the US' search for islands in the Indian Ocean for military bases and the selection of Diego Garcia and the Aldabra Islands. The *Post* article claimed that the UK and the US wanted islands because bases in other countries were unsafe owing to political unrest. "It was frankly admitted that the only bases which could be relied upon in the long term were bases which could not become an object of nationalist agitation."[197] The envoy mentioned a petition in which Mr. René, the President of the Seychelles Peoples United Party (SPUP), had opposed the establishment of military bases on islands. The Soviet envoy claimed that military bases blocked the gaining of independence of the colonies, and noted the declaration of the Non-Aligned Countries,[198] which condemned the military bases in NSGTs.[199]

India stressed that resolution 1514 granted an "inalienable right to self-determination and independence" to the people of Mauritius, Seychelles and St. Helena.[200] Poland agreed and, emphasizing the SPUP's opposition to bases on the islands, asserted that bases impeded decolonization. Syria agreed that the islands "were entitled to full independence"[201] and stressed that the Declaration of the Non-Aligned Countries was adopted unanimously, representing one third of the world's population, thus suggesting a relevant *opinio juris*.

The British envoy said that the pace and direction of the constitutional advance in the Territories would be guided by the wishes of the people "as expressed through democratic procedures and through their freely chosen leaders and representatives. It was surely the unanimous feeling of the Special Committee that it was what the people themselves wanted, that must be regarded as the decisive consideration, in accordance with the principle of self-determination and with paragraph 2" of resolution 1514.[202] It is interesting that the British envoy argued on the basis of the principle of self-determination and resolution 1514, because, at that time, the UK was denying both that such principle existed and that resolution 1514 was relevant.

[197] A/5800/Add.6, Chapter III, p. 40.
[198] A/5763, p. 26.
[199] A/5800/Add.6, Chapter III, p. 41.
[200] Ibid.
[201] Ibid., p. 43.
[202] Ibid., p. 44.

The C-24 concluded that, according to the Charter and resolution 1514, the people of the Territories had an inalienable right to self-determination and independence, and recommended that the UK implement the Charter's provisions[203] and that the people should be given the opportunity to exercise their right to self-determination without delay under UN supervision and in complete freedom.[204]

1965

The Mauritius Constitutional Conference in London ended on 24 September and, by 16 November, the Fourth Committee had started criticizing the UK for intending to create a new colony. During the Fourth Committee's debates, Tanzania stated that:

> "Those islands were inhabited by 1,384 persons, and the establishment of the new colony was intended to permit the installation of military and naval bases by the Governments of the United Kingdom and the United States. The joint United Kingdom-United States project was aimed at reversing the course of history. It was contrary not only to resolution 1514(XV), but also to other resolutions adopted by different United Nations organs concerning specific colonial problems and the application of the principle of self-determination, which must be regarded as a general principle of international law. That principle would be meaningless if it could be circumvented and if, by the payment of compensation to the majority of the inhabitants of a colony, a Colonial Power could retain in perpetuity a part of the territory of that colony inhabited by a minority. The right of colonial peoples to self-determination could never be subject to financial dealings, which were particularly reprehensible when their purpose was the establishment of foreign bases in a colonial Territory."[205]

Thus Tanzania described self-determination as a general principle of IL and an inalienable right, and the Lancaster House Agreement between the UK and Mauritius a violation thereof.

Cuba recalled Resolution 1654(XVI) from 1961,[206] noting "that acts aimed at the disruption of national unity and territorial integrity were still being carried out in certain countries in the process of decolonization".[207] The representative stressed that Resolution 1514(XV) required states to respect the integrity of the NSGT's territory. "Her delegation could not accept the argument that payment had been made for the islands concerned; no sovereign State would allow the alienation of any part of its territory."[208]

India said that "[t]he administering Power should bear in mind the important principle set forth in operative paragraph 6 of General Assembly resolution 1514(XV) and not take any steps in regard to the future of Mauritius which would be contrary to that principle…"[209]

---

[203] Ibid., p. 46.
[204] Ibid., p. 47.
[205] A/C.4/SR.1557, p. 229.
[206] A/RES/1654(XVI).
[207] A/C.4/SR.1558, p. 231.
[208] A/C.4/SR.1558.
[209] Ibid.

Yugoslavia claimed that "the United Kingdom was not entitled to part with part of its colonies and should be asked not to proceed with the transaction…"[210]

The UK defended herself as follows:

> "The islands in question were small in area, were widely scattered in the Indian Ocean and had a population of under 1,500 who, apart from a few officials and estate managers, consisted of laborers from Mauritius and Seychelles employed on copra estates, guano extraction and the turtle industry, together with their dependants. The islands had been uninhabited when the United Kingdom Government had first acquired them. They had been attached to the Mauritius and Seychelles Administrations purely as a matter of administrative convenience. After discussions with the Mauritius and Seychelles Governments – including their elected members – and with their agreement, new arrangements for the administration of the islands had been introduced on 8 November. The islands would no longer be administered by those Governments but by a Commissioner. Appropriate compensation would be paid not only to the Governments of Mauritius and Seychelles but also to any commercial or private interests affected. Great care would be taken to look after the welfare of the few local inhabitants, and suitable arrangements for them would be discussed with the Mauritius and Seychelles Governments. There was thus no question of splitting up natural territorial units. All that was involved was an administrative re-adjustment freely worked out with the Governments and elected representatives of the people concerned."[211]

The British arguments are pragmatic, but not legal. The principle of *uti possidetis*, and resolution 1514 demand that a colony becomes independent within the whole territory of the former colony. Resolution 1514 stresses territorial integrity in the last preambular paragraph and in two other operative paragraphs. And paragraph 5 demands that all powers shall be transferred to the colonial people, *without any conditions or reservations*.

The number of inhabitants is also irrelevant; the UK argued this herself in the debates about the Falklands,[212] and about Gibraltar only one year before this debate.[213] The UK had argued that the principle of self-determination applies to the Pitcairn Island – with only 63 inhabitants – and the Administering Power has an obligation to report under Article 73(e).[214]

Even if the inhabitants of Chagos were not a permanent population, this would be irrelevant to the territorial integrity of Mauritius. *Shaw* wrote about the detachment of the Chagos that "the Colonial Power is under a duty by virtue of the principle of self-determination to

---

[210] Ibid.
[211] Ibid.
[212] "The people of the Falkland Islands are small in number—about 1,800—but as I have said on many previous occasions in the Council, this in no way at all detracts from their rights under international law, under the Charter of the United Nations, under Article 73 of that Charter.", S/PV.2366, para. 184.
[213] The UK envoy said: "It has repeatedly been said in this Committee and its organs that the size of a population is irrelevant to the applicability of the Charter and of resolution 1514(XV).", A/AC.109/PV.284, p. 21.
[214] Marston 1983, p. 399.

decolonize the whole unit as administered, and if it fails to do so in fact, then it is to that extent in breach of its obligations."[215]

And even if the islands had been empty in 1810 when the UK occupied them, this is irrelevant, as the UK claimed it to be as regards the Falklands:

> "Of course [the Falkland inhabitants] stemmed from an immigrant community; so did much of the population of North and South America and indeed Europe and Africa. It would surely be fantastic to limit the principle of self-determination to the handful of peoples who could truthfully claim to be the descendants of indigenous inhabitants. There was nothing in the charter or in resolution 1514(XV) to warrant such a major restriction."[216]

Equally irrelevant is whether the UK kept Chagos attached to the Mauritius for administrative convenience, as is the fact that the islands are widely scattered in the Indian Ocean. The principles of *uti possidetis,* of territorial integrity and the decolonization resolutions do not allow such exceptions. *Shaw* wrote that the British argument:

> "misses the point about the evolution of territorial units as colonially determined and the consequent right of the inhabitants of that entity as it has developed over time to concretize its existing political status and proceed to self-determination and independence. To disrupt the territorial integrity of colonial units at the pre-independence stage on the basis of the haphazard nature of their original constitution would be to undermine the viability and meaning of the principles of territorial integrity and self-determination as they have developed."[217]

And

> "the development of the right of self-determination clearly introduced constraints upon the authority and capacity of the Colonial Power. To permit the administering authority to alter the territorial composition of the colonial entity upon independence would be to undermine the concept of self-determination and would allow the colonial power to affect the choice to be made by a process of territorial severance, irrespective of the potential economic consequences of such a policy. […] It could, therefore, be argued that, in the light of the evolution and status of the principle of self-determination by the mid 1960s, the United Kingdom was under an obligation to maintain the existing territorial framework of the colonial unit until independence and that any defence arrangements with regard to Diego Garcia should have been made after Mauritian independence."[218]

Tanzania introduced a draft resolution stating that "paragraph 6 of resolution 1514(XV) contained a clear statement on the territorial integrity of colonial Territories and it must be

[215] Shaw 1986, pp. 141-2.
[216] A/C.4/SR.1558.
[217] Shaw 1986, p. 130.
[218] Ibid., pp. 131-32.

interpreted unequivocally, without legal quibbles."[219] India agreed and mentioned that the Indian premier had issued several strong condemnations of the excision as a violation of resolution 1514.[220] Argentina stressed that the principle of territorial integrity had deep roots in the consciousness of the Latin American countries and was enshrined in paragraph 6 of Resolution 1514.[221] Venezuela added that territorial detachment of this kind was in contravention with "the principles enshrined in the United Nations Charter."[222]

The draft resolution was sponsored by 33 States, approved by 77 votes to none, with 17 abstentions, and adopted as Resolution 2066(XX) by the General Assembly on 16 December 1965, by 89 votes to none with 18 abstentions.

1966

The C-24 considered the question of military bases and the excision. In Sub-Committee I, the Soviet Union noted that the UK was "failing to respect the territorial integrity of the islands and defying the provisions of the resolution calling for the dismantling of military bases."[223] She recommended that the C-24 decide that the rights of the inhabitants to dispose of the natural resources of the islands were assured and that "all land should be restored to the indigenous inhabitants…[and] all agreements imposed on the Territories which limited the sovereignty and fundamental rights of the peoples concerned should be abrogated."[224]

The British envoy responded that the "the first human inhabitants of Mauritius and the Seychelles had come from France and those of St. Helena from the United Kingdom. He wondered whether the indigenous inhabitants to whom the representative of the Soviet Union was referring were the dodos and tortoises the sole occupants of the islands before the Europeans had arrived."[225]

Tunisia noted that the UK had already dismembered Mauritius. Tunisia recommended that the C-24 invite the UK to implement Resolution 1514, to lead the populations of the islands to independence, to abandon the plan to dismember Mauritius and Seychelles and to install military bases there.[226]

Tanzania argued similarly to *Shaw*, as mentioned earlier in this section:

> "the inhabitants of the islands, whatever their origin, were none the less subjected to colonial domination. It was precisely that domination, depriving them as it did of the right to choose their own form of government […]. There had been nothing new in the statement of the United Kingdom representative: he had merely avoided the main issue, the obligation to allow the populations of those Territories to exercise their right of self-

[219] A/C.4/SR.1566, p. 287.
[220] Ibid.
[221] A/C.4/SR.1570, p. 317.
[222] Ibid.
[223] A/AC.109/L.335, p. 4.
[224] Ibid.
[225] Ibid., para. 18.
[226] A/AC.109/L.335, p. 16, para. 43.

determination. There could be no possible doubt on that matter: that obligation was one of those laid upon the administering Power both by resolution 2066 (XX)…"[227]

Tanzania depicts the essence of the Law of Decolonization. This essence is not that the inhabitants of a territory are *indigenous* or that they lived in the territory *before* the Colonial Power came. The Law of Decolonization revolves around the following elements:

- The NSGT is subordinate to the Colonial Power;
- The NSGT is geographically separate and is distinct ethnically and/or culturally from the country administering it;
- The right to self-determination is realized when the people attain a "full measure of self-government", through a "free and voluntary choice".

It seems, therefore, that not *indigenousness* but *freedom* is the essence of decolonization. The people must have the freedom to decide their own fate. Some authors, such as *Spijkers*, seeking an overarching principle for decolonization, believed that the essence of decolonization and of self-determination lies in the termination of oppression.[228] But when a people attains freedom, it still exercises its right to self-determination as a people in an independent state, despite the absence of oppression. Thus, the right to self-determination also exists in the absence of oppression.

Therefore, the matter of whether or not the Chagossians were present before the Europeans came is irrelevant. As long as they are not free, they are still subject to the Law Of Decolonization.

Sub-Committee I concluded that the UK had failed to implement Resolution 1514(XV) and violated the territorial integrity by creating a new territory in direct contravention to resolution 2066(XX).[229] The Sub-Committee recommended that the C-24 states categorically that the agreements between the UK and other Powers affecting the sovereignty and fundamental rights of the Territories should not be recognized as valid.[230]

The C-24 allowed Teekram Sibsurun, of the Mauritius People's Progressive Party, to read a petition protesting against military bases in Mauritius and claiming that the Government of Mauritius had never told the public about the agreement with the UK regarding the base on Diego Garcia.[231]

The British envoy repeated that the islands were not linked geographically, politically or ethnically with Mauritius.[232] Besides, until independence, the UK had the authority to enter into any international agreements related to dependent territories.[233]

[227] A/AC.109/L.335, p. 16, para. 44.
[228] For instance Spijkers 2011, pp. 381, 444.
[229] A/AC.109/L.335, p. 20, para. 54.
[230] Ibid., p. 21, para. 64.
[231] A/6300/Rev.1, p. 683, para. 156.
[232] Ibid., p. 684, para. 168.

The C-24 adopted the Report of Sub-Committee I and endorsed its conclusions and recommendations.[234] The GA adopted a resolution introduced by India and condemning the "disruption of the territorial integrity… and … the creation by the administering Powers of military bases and installations in contravention of the relevant resolutions of the General Assembly".[235]

1967

In the Sub-Committee I discussions, Syria, Tunisia, Tanzania, Yugoslavia and the Soviet Union mentioned the dismemberment of Mauritius and Seychelles in violation of resolution 2066, paragraph 6 of resolution 1514, and the Charter.[236] Yugoslavia claimed that the argument that the Governments of Mauritius and Seychelles had agreed to the transfer of the islands "was without substance because Mauritius and Seychelles were still not independent. The fact that the United Kingdom had been in a hurry to detach the Chagos Archipelago from Mauritius prior to the proclamation of independence spoke for itself."[237] Here, we can see the same argument as in *Shaw* before: that the UK was under obligation to maintain the territorial integrity of the colony until independence.[238]

The UK repeated her arguments from 1965, that the islands were remote from Mauritius and that the Chagos was not "a homogeneous part of either of those Territories in ethnic, geographical, economic or any other terms."[239] This argument is inconsistent with previous British arguments, that the people on Chagos were workers from Mauritius and Seychelles. If they were, then they must have been ethnically homogeneous with the Mauritians or the Seychellois at the very least.

Tanzania observed that the islands "were many thousands of miles from the United Kingdom. That fact showed the extent to which the United Kingdom regarded geographical proximity as a prerequisite for the existence of a nation. At any rate, the islands in question had always been treated as part of Mauritius and Seychelles. If the facts were as the United Kingdom presented them, one could only assume that the United Kingdom had been systematically misleading the United Nations in the information it had been submitting."[240] In fact, what Tanzania was arguing here was that the principle of territorial integrity in the Law of Decolonization applies to the entire territory administered as one colony, no matter how far apart the different sections might be.

The Soviet Union asserted that the British "Secretary of State for the Colonies had stated in 1965 that there were 1400 people living on the islands. The inhabitants certainly did not wish to see their islands handed over to the United Kingdom for use as military bases",[241] and that,

---

[233] Ibid., para. 169.
[234] A/6300/Rev.1, p. 687, para. 204.
[235] A/RES/2232(XXI).
[236] A/AC.109/L.398, para. 15, 19, 47, 52, 60.
[237] Ibid., p. 15, para. 48.
[238] Shaw 1986, pp. 131-32.
[239] A/AC.109/L.398, p. 21, para. 65.
[240] Ibid., p. 23, para. 70.
[241] Ibid., p. 26, para. 81.

under Resolution 1514, "self-determination must not be subject to any conditions, and no form of pressure must be exercised on the people. Once independent, the new nations could enter into whatever arrangements they wished."[242] Tanzania asked why the UK had paid £3 million in compensation to Mauritius if the islands were not a part of it.[243]

Sub-Committee I concluded that the UK had violated the territorial integrity of a NSGT, and GA resolutions 2066(XX) and 2232(XXI).[244]

Back at the C-24, Sibsurun presented a new petition, asking that the UK be called upon to respect the Mauritius' territorial integrity and ensure that they were not used for military bases.[245] The Indian envoy was extremely negative,[246] stating that his Government had been greatly perturbed by the excision of Chagos and that it was a clear violation of resolutions 2066(XX) and 2232(XXI).[247] The C-24 approved the Sub-Committee I report, adopted a resolution deploring the division of the islands and declared that the creation of military installations and any other military activities in the Territories were a violation of General Assembly resolutions and constituted a source of tension.[248]

The GA adopted resolution 2357(XXII),[249] declaring that any attempt aimed at the disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter and of Resolution 1514.

1968

Mauritius became independent. The C-24 urged UK to respect the territorial integrity of Seychelles. This resulted in GA Resolution 2430(XXIII), which repeated the wording of Resolution 2357(XXII).

1969

The debates were repeated and the GA adopted a new resolution containing one paragraph concerning territorial integrity.[250] The US envoy asked whether the sponsors of the resolution intended to establish a connection between military bases and territorial disruption and asked which Charter provisions established such a connection.[251] The envoy from Mali answered that NO Charter provision *authorized* military bases on the territory of an NSGT and that, by signing Article 73 of the Charter, the members undertook to regard the interests of the inhabitants of those Territories as paramount and the States accepted the obligation to promote their well-being as a sacred trust.[252]

---

[242] Ibid., p. 27, para. 82.
[243] Ibid., para. 85.
[244] Ibid., p. 38, para. 126.
[245] A/6700/Add.8, p. 33, para. 124.
[246] Ibid.
[247] Ibid.
[248] Ibid.
[249] A/RES/2357(XXII).
[250] A/RES/2592.
[251] RESEARCH DEPARTMENT 1983, p. 9.
[252] Ibid. p. 10.

1970

The C-24 came to two conclusions: that the UK was continuing to violate the territorial integrity of the Seychelles, and that she refused to comply with resolution 1514 and 2592(XXIV).[253] Recommendations established that the detachment of islands from Seychelles and the setting-up of the BIOT were incompatible with the Charter and resolution 1514, and called on the UK to return the islands immediately.[254] The GA adopted the yearly resolution about territorial integrity.[255]

1971

The story repeated itself in 1971.[256]

1972

The C-24 reiterated its concern regarding the violation of the Seychelles' territorial integrity and the detachment of the islands from Seychelles and Mauritius "without prior consultation with the people of the Territory." It strongly condemned "the eviction of the Seychellois […] as a violation by the administering Power of its obligations to safeguard the rights of the people of the Territory and their well-being", and urgently called on the UK to cease this action immediately.[257]

For the first time, the Committee mentioned the eviction of the Chagossians. The GA adopted its customary resolution.[258]

1973

The C-24's report again mentioned the eviction of the Chagossians and added that they were prohibited from fishing around the Chagos.[259]

1974

Sub-Committee I wrote a report on the military activities in the colonies, which might impede the implementation of resolution 1514.[260] In the section about Seychelles, it mentioned that the Mauritian Government had claimed that the UK had violated the Lancaster House Agreement by granting permission to the United States to expand its facilities on Diego Garcia:

> "In a statement in April, Mr. Rabindra Murburrun, Mauritian High Commissioner to India, said that the United Kingdom Government had given Mauritius a solemn assurance in 1967 that Diego García would only be used as a communications centre and that, unless this promise was adhered to, his Government would take the issue to the International Court of Justice."[261]

[253] A/8023/Rev.1, Vol. III, Add.4 (Part I), Chapter VIII, p. 3.
[254] Ibid., p. 4.
[255] A/RES/2709(XXV).
[256] A/RES/2869(XXVI).
[257] A/8723/Add.4 (Part I), Chapter XI, p. 8.
[258] A/RES/2984(XXVII).
[259] A/9023/Add.4 (Part IV), Annex, Appendix IV (Seychelles).
[260] A/9623/Rev.1, Vol. II, CHAPTER V, Annex, REPORT OF SUB-COMMITTEE I, p. 202.
[261] Ibid., p. 233.

The yearly GA resolution contained the usual paragraph concerning territorial integrity.[262] The GA adopted a resolution for Seychelles and, in the preamble, was mindful of the position of the Government of the Seychelles with regard to the territorial integrity of the Seychelles.[263]

1975

The C-24 adopted a similar resolution, mindful of the position of the Government of the Seychelles about the territorial integrity of the Seychelles.[264] So did the GA.[265]

1976

Seychelles attained independence and received the detached islands back. The UN ceased to mention the Chagos.

Discussion

The C-24 and the General Assembly described the excision as a violation of the Charter, of resolution 1514, especially paragraph 6, and of the territorial integrity of Mauritius and Seychelles. Once Mauritius achieved independence, the UN remained silent on the Mauritian islands, and continued condemning only the detachment of the Seychelles' islands. Without reason. The UK did not annex the islands; they were a new colony, with all the properties needed for the Law of Decolonization.[266]

The UN debates, reports and resolutions might be considered *opinio juris* of the participating States and *subsequent practice* in the interpretation of the Charter. Thus, when the GA adopted Resolution 2066, it had important legal consequences. The paragraphs inviting the UK to carry out certain actions might not be binding, but the paragraphs establishing that detaching islands from Mauritius would violate resolution 1514 could be considered as being so and established legal facts. In Chapter 1, we saw that *Castañeda* argued that resolution provisions establishing facts and legal rules are binding. The UN's organs need to "determine the meaning and scope of" Charter provisions in order to be able to apply them.[267] Therefore this interpretation of rules is binding.[268] In San Francisco, Committee IV/2 concluded that "each organ will interpret such parts of the Charter as are applicable to its particular function. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers."[269]

The same is true for the rest of the yearly recurring GA resolutions containing a paragraph declaring that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the

[262] A/RES/3290(XXIX).
[263] A/RES/3287(XXIX).
[264] A/10023/.Rev.1, Vol. III, CH.XIV, p. 133.
[265] A/RES/3430(XXX).
[266] See Chapter 4.
[267] Castañeda 1969, p. 122.
[268] Ibid., p. 123.
[269] 13 UNCIO 687.

Charter of the United Nations and of General Assembly resolution 1514(XV)". This might be considered as a binding subsequent interpretation of the Charter.[270]

2.3. Dodging the 'real issues' with the Russians on your back

In this section, we will cover that same period, but in the British archives. We will watch the arguments emerging and hope to explain why the UN failed to do its job. Because while the British arguments about territorial integrity were flawed, the UK has still effectively hindered Chagos from entering the UN's list of NSGTs.

1964

In the British courts a document from 1964, warning the British government that the excision of the Chagos could lead to difficulties at UN, arising from paragraph 6 of resolution 1514 and Article 73, was quoted in the first *Bancoult* case.[271]

1965

On 8 November, after the first day of the Fourth Committee's debates, the British UN Mission asked the Foreign Office (FO) to advise. The problem was that saying that there were "virtually no permanent inhabitants" on Chagos "may well lead to charges of failure to carry out our charter obligations to those who are permanent inhabitants; moreover our counter-arguments will have to avoid giving ammunition to Argentina which is sure to perceive analogy with Falkland Islands." The UK had argued that the Falklands were a NSGT and the Falkland islanders had the right to self-determination. Argentina had reacted by asserting that the UK had evicted the entire indigenous population and that only British colonists lived there. The UK had retaliated by reasoning that the fact that the inhabitants were only British colonists, not indigenous, was irrelevant; they were still subject to the Law of Decolonization.[272] It followed that the same argument was valid for the Chagos. Thus the British envoy remarked that it would be inconsistent to argue that the Chagossians were not indigenous in order to convince the UN that the Chagos is not a NSGT. To solve the problem, the envoy stated, the Mission needed to argue that the Chagos had no permanent residents.[273] On 10 November, the Foreign Office (FO) replied:

> "We recognise we are in a difficult position as regards references to people at present on detached islands since we want to avoid territory being classed as non-self governing within terms of Chapter XI and also do not wish to give a full […] argument to Argentine over the Falkland Islands and also to some extent to Spain over Gibraltar.[…]

[270] See Chapter 1 supra, The legal status of GA resolutions.
[271] [2001] QB 1067, [2000] EWHC Admin 413, p. 1080, para. 9.
[272] For instance, in one debate, the British envoy said: "It had been suggested that the population was somehow irrelevant on the grounds that the people were transient, that there were no births or deaths in the islands, that the people had been planted there by the United Kingdom rather than being of indigenous stock and that many of them were employed by the Falkland Islands Company. There should be no misunderstanding about their status. The population numbers slightly over 2,000 of whom 80 per cent had been born in the islands. Many could trace their roots back for more than a century in the islands. Of course they stemmed from an immigrant community; so did much of the population of North and South America and indeed Europe and Africa. It would surely be fantastic to limit the principle of self-determination to the handful of peoples who could truthfully claim to be the descendants of indigenous inhabitants. There was nothing in the charter or in resolution 1514(XV) to warrant such a major restriction.", A/C.4/SR.1558.
[273] PRO FCO 141/1428, No 2, CYPHER TELEGRAM 0485, PROM SECRETARY OF STATE TO GOVERNOR SEYCHELLES, 13 Nov. 65.

we know a few were born on Diego Garcia, and perhaps some other islands, and so were their parents before them. We cannot therefore assert there are no permanent inhabitants, however much this would have been to our advantage."[274]

1966

On 2 February, Mr. Brown of the UK Mission at the UN, agreed with the head of the Mission, Lord Caradon, that there was a possibility that the UK would be faced with "serious trouble" and that everything depending on how the UK "present[ed] the matter". So far, the C-24's "point of attack" had only been the violation of the territorial integrity of Mauritius and the Seychelles; its focus was

> "not yet on the more serious charge of violating Chapter XI of the Charter itself, although this would come and be much more serious if it became apparent that we were doing so. […] [I]t seems to us difficult to avoid the conclusion that the new territory is a non-self-governing territory under Chapter XI of the Charter, particularly since it has and will or may have a more or less settled population, however small. We cannot disclaim Charter obligations to the inhabitants because they are not indigenous, since this would destroy our case on the Falklands and Gibraltar; nor apparently would the facts substantiate a plea that the inhabitants are not permanent - even if (which is not necessarily the case) Chapter XI of the Charter were confined to permanent populations. Therefore we here feel that, however we may present the issue, the United Nations will consider that it does fall under Chapter XI."[275]

1968

By 1968, the UK was denying the Chagossians a return to the Chagos if they left the islands, no matter what their reason for doing so. Going on holiday or going to hospital would strand one in Mauritius. One document discussed the pros and contras of permitting a hundred people to return to Chagos. The pros were that:

- the plantation needed labor;
- 'the Indians' might otherwise suspect that the UK was going to build a military base;
- the Chagossians were "mostly persons born in the Chagos Archipelago, who could claim to be 'belongers' of the Indian Ocean Territory itself";
- it would help to avoid "further friction with the Mauritius Government, who are already urging strongly that we are in any case financially responsible for the resettlement of these people. They are at present unemployed and destitute in Mauritius, where there has been a press campaign deploring H.M.G.'s lack of humanity";
- it would reduce the "danger of drawing international attention to the existence of people with claims to live and work in the" BIOT.

[274] Ibid., No 3, CYPHER TELEGRAM 0487, PROM SECRETARY OF STATE TO GOVERNOR SEYCHELLES, 14 Nov. 1965.
[275] PRO CO 936/947, F.D.W. Brown to C.G. Eastwood, 2 Feb. 1966.

On the other hand, it meant deporting a couple of hundred more people when the construction of the base started. "In brief! the issue is whether our long term aim is to 'sterilise' the Territory by resettling elsewhere the whole of the existing population (and thus avoid our United Nations charter obligations to a 'people')…"[276]

1969

On 28 January, one J. H. Lambert of the FCO wrote that "the problems facing Ministers arise out of our Charter obligations towards 'a people'." He pointed to the UK's three choices, namely, to move the Chagossians to other islands within Chagos; to Mauritius and Seychelles; or "being prepared to ride any storm and coping with it as best we may when it comes."[277] And, in a draft letter, he wrote about the need to reach a conclusion before the "UN get to grips with the question of Charter obligations".[278] On 7 February, Mr. Aust, a legal advisor in the Colonial Office (CO),[279] agreed:

> "The problem we have to face is how to avoid making B.I.O.T. a 'non-self-governing territory' within the meaning of Article 73 of the U.N. Charter. If it is not decided to remove all the present inhabitants to Seychelles and Mauritius, certain legal measures will have to be taken so that we can present a reasonable argument based on the proposition that the inhabitants of B.I.O.T. are merely a floating population."[280]

Mr. Sykes wrote to the American Embassy on 6 February about the alternatives to removing the population so as to avoid the "obligation to the inhabitants" under Article 73.[281] A working paper entitled "Alternative Ways of Removing the Ilois from BIOT", stating that Diego Garcia needed to be "cleared" of its population in 1970 in order to be able to "deny" any Charter obligations, which would be impossible if the Ilois were moved to other islands within the Chagos.[282]

After brainstorming with the Americans on what to tell the C-24, the British mission to the UN concluded that they should say that Chagos has "previously been administered from Mauritius, which was now another member state of the Organisation" and that this would be

---

[276] PRO FCO 58/351, No 17, "*British Indian Ocean Territory*", Mr. Johnston to Sir E. Peck and Mr. Mulley, 31 Oct. 1968.
[277] PRO FCO 58/352, No 56, "*BIOT - SUBMISSION TO MINISTERS*", J. H. Lambert to R.A. Sykes, 28 Jan. 1969.
[278] Strike through in the original, replaced with "before we are faced at the UN" in the final version. Ibid., "*BIOT*", From Mr. Lambert to J.D.B. Shaw.
[279] Mr. Aust is named as Legal Adviser for the CO in the *Chagos Islanders* case [2003] EWHC 2222 (QB), para. 110, but he might have worked for the FCO, according to my personal correspondence with one person who was member of the C-24. According to this source the Commonwealth Office merged with the Foreign Office on 17 Oct. 68, becoming the Foreign & Commonwealth Office.
[280] Emphasis in the original. PRO FCO 58/352, No 61, A.I. Aust to Mr. Jerrom and Mr. Whitnall, 7 Feb. 1969.
[281] "The alternative solution, B, would be to clear the whole population of the Chagos Archipelago and re-locate them in the Seychelles and Mauritius. In U.N. terms, this would be the ideal solution since we could argue that there are no 'inhabitants' anywhere on BIOT: this is of cardinal importance since the only legitimate way in which BIOT could be raised in the Committee of 24 or the Fourth Committee would be in the context of Art.73 of the United Nations Charter and our obligation to the inhabitants. On the other hand, we could have considerable difficulty in persuading the Mauritian Government to take the ex-Mauritian Ilois and we could also be criticised in humanitarian terms for uprooting people from the Chagos and depriving them of a livelihood there.", PRO FCO 58/352, No 60, R.A. Sykes to Mr. J.D. Stoddart, 6 Feb. 1969.
[282] PRO FCO 58/353, No 86, *"Alternative Ways of Removing the Ilois from BIOT*".

outside the C-24's competence.[283] This argument would contradict the previous one from only a few years back, when the UK argued that Chagos was *not* part of Mauritius.

On 12 February 1969, Mr. Shaw, a member of the British UN Mission in New York, disagreed that it was "of cardinal importance" that the Chagossians "be cleared out root and branch" because "B.I.O.T, has never been a major topic in the Committee, mainly because the Committee declines to recognise its separate existence".[284]

London thought that Mr. Shaw was too optimistic. In a letter from 21 February, Mr. Lambert agreed that "there [was] a prospect that the ignorance and confused thinking prevailing in international circles on this island could enable us to dodge the real issues, in the first instance when the Diego Garcia project is announced".[285] Nevertheless:

> "the particular form in which the attack was first mounted - the disruption of the territorial integrity of Mauritius - will no longer be open to our opponents in the U.N. (provided always that Mauritius will not choose to air any subsequent grievance against us about BIOT). But given the lack of any publicly aired Mauritian resentment against the continued detachment of these islands, the tacit agreement of an independent Mauritius to the existence of BIOT should dispose of the argument of a dependency with an administering power is no agreement at all. […]
>
> 6. I do not think we can either in the longer or the shorter term exclude the possibility that this semi-permanent population will find themselves in the international limelight. If interest in them became strong enough, the press for example may well discover that they exist in significant numbers. If attention were drawn to them we should find it difficult to assert that BIOT is not a 'non-self-governing territory' and that we had no obligations in respect of it under Chapter XI of the Charter. In particular we should find it extremely difficult to deny that we had sufficiently honoured or are now honouring our Charter obligation 'to ensure . . . . their political, economic, social and educational advancement'. No proper schools or hospitals exist in these islands and there are no representative political institutions. […]

---

[283] "3. We then turned to the line which our two Missions might jointly take if, in spite of this and other precautionary measures to damp down interest, the Diego Garcia project were to be raised in the Committee of 24, or its Sub-Committee I. It remained our general philosophy to say as little as we need on matters concerning BIOT. Subject to that overriding consideration, we put to them the view that our best line in the first place would be that Diego Garcia had never at any time been part of the Seychelles or any territory currently on the Committee's agenda. This would carry the implication that, even by the Committee's own criteria, the whole question of Diego Garcia was outside its competence, and while we would avoid doing so unless pressed, we could, if necessary, spell out our point by going on to remind the Committee that Diego Garcia had previously been administered from Mauritius, which was now another member state of the Organisation.
4. This argument will face a good many members of the Committee with a dilemma: in order to move onto the position that B.I.O.T. was a separate territory meriting their attention, they would have to drop their established doctrine that we are dismembering the territorial integrity of the Seychelles. They could perhaps argue that the three other islands remain part of the Seychelles, and that we have in addition Chapter XI obligations in respect of the Chagos Archipelago alone, but this would be a complicated and artificial line and we doubt whether they know enough about the situation in the Indian Ocean, or even where the Islands are, to pursue the point to this extent.", PRO FCO 58/352, No 59, J.D.B. Shaw to J.H. Lambert, 5 Feb. 1969.

[284] PRO FCO 58/353, No 61, J.D.B. Shaw to J.H. Lambert, 12 Feb. 1969.

[285] Ibid., J. H. Lambert to J. D. B. Shaw, 21 Feb. 1969.

> It is true that the Mauritius Constitution gives the present Ilois an automatic right to Mauritius citizenship, but equally U.K. legislation accords them citizenship of the U.K. and Colonies. Moreover, the children of those born in the Chagos part of BIOT after Mauritian independence will, unlike their parents, not be dual citizens but only citizens of the U.K. and Colonies."[286]

On one draft of the above letter, Mr. Aust, the CO's legal adviser, suggested the sentence beginning "If attention is shown..." in paragraph 6 be deleted and replaced with: "If the full facts about the Ilois became known it would be extremely difficult for us to continue to assert that BIOT is not a 'non-self-governing territory' and that we have no obligations in respect of it under Chapter XI".[287]

In a draft Minute for the Prime Minister, cleared by all the ministries[288] and legal advisers concerned, the problem was shown as having three components: the UN, the welfare of the Chagossians, and the "financial burden falling on H.M.G.", all of which had to be solved in such a way as to avoid "greater trouble for the future."[289] As a result of the travel restrictions and other difficulties imposed on the Chagossians, the number had fallen to a maximum of eight hundred, of whom four hundred and thirty-four could claim to have roots on Chagos. In addition, three hundred and seventy were already on Mauritius. They could "present a more awkward problem of status than had been foreseen"; one "could not take away from the Ilois their right to citizenship of the U.K. and Colonies by way of connection with Chagos."[290] The problem was presented under the heading "United Nations Considerations" as follows:

> "As an administering power, we accept 'as a sacred trust' under Chapter XI of the U.N. Charter several obligations towards peoples' who 'have not yet attained a full measure of self-government'; in particular 'to ensure ... their political, economic, social and educational advancement' and 'to develop self-government'."[291]

"[I]f the numbers and character of the Ilois became known to Parliament or in the U.N.", then there was a risk of being "forced to acknowledge a Charter responsibility to develop self-government and social services for an irremovable population with all the financial and administrative consequences that that would imply." Besides, the U.S. demanded "total clearance of the Chagos since this avoids possible trouble in the future".[292]

"Clearing" the Chagos presented two other advantages: "H.M.G. will have no open-ended financial liability for the welfare and administration of the inhabitants of the Chagos" and "we

---

[286] Ibid.
[287] PRO FCO 58/353, No 82, A.I. Aust to Mr. Papadopoulous, 21 Feb. 1969.
[288] Ministry of Defence and the Treasury, The Pacific and Indian Ocean Department, United Nations (Political) Department, East African Department, South Asian Department, Oil Department, Financial Policy and Aid Department.
[289] PRO FCO 58/354, No 106, R.A. Sykes, "*DRAFT MINUTE from Foreign and Commonwealth Secretary to Prime Minister copied to Secretary of State for Defence Chancellor of the Exchequer Minister of Power*", 24 Mar. 1969.
[290] "[W]hen Mauritius became independent in 1968 we succeeded in having the Ilois included among those who automatically became Mauritian citizens on independence […] but we could not take away from the Ilois their right to citizenship of the U.K. and Colonies by way of connection with Chagos…", ibid.
[291] Ibid.
[292] Ibid.

shall not be faced in the future with a growing number of Ilois whose children will be born with only citizenship of the U.K. and Colonies." Therefore the ministries concerned advised "total clearance".[293]

1970

On 16 January, Mr. Aust advised the government to write an "Immigration Ordinance" for the BIOT, giving itself the "power to deport" in order "to maintain the fiction that the inhabitants of Chagos are not a permanent or semi-permanent population."[294]

The year brought the UK a new inconsistency to solve. Mauritius had been independent since 1968, while the Chagos was part of BIOT, as were three islands from Seychelles. British civil servants were engaged in exchanging ideas as to how to avoid the C-24's difficult questions when it started to discuss Seychelles. Telling the C-24 that the people on the three Seychelles islands were 'transient' workers "would beg the question in relation to the Chagos where we are faced with third generation Ilois."[295]

Glad that the C-24 asked no questions about the population, the British envoy to the UN took the credit for rebutting the Soviet reference to islands detached "'from Seychelles and Mauritius', by saying that as Mauritius was now fully independent and a fellow Member State of the U.N. the situation in relation to those parts of BIOT which had formerly been administered as part of Mauritius was clearly no concern of the Committee of 24."[296]

1975

A year before the Seychelles became independent, British officials debated giving the three BIOT islands back, because the Treasury saw no reason for increasing costs amounting to £50,000 yearly. However, "[it] became clear that the Americans [had] not thought the matter through", so the arguments had to be explained to them again. Giving back the islands to the Seychelles:

- might fool Mauritius in believing the British "earnest of good intent that the Chagos Archipelago would be handed *back* to Mauritius";[297]
- "might avert the danger of Seychelles and Mauritius making common cause in the OAU and the United Nations on BIOT";
- "might allay suspicion of American intentions in Diego Garcia and in the Indian Ocean more generally";
- "might well be traded for worthwhile concessions, particularly over the American satellite tracking station in Mahé and denial of the main Seychelles islands to hostile powers."[298]

---

[293] Ibid.
[294] PRO FCO 32/725, No 6, A.I. Aust to Mr Knight, "*Immigration legislation for BIOT*", 16 Jan. 1970.
[295] PRO FCO 58/502, No 21, J.D.B. Shaw to A.S. Papadopoulos, "*Committee of 24: Sub-Committee I BIOT*", 10 June 1970.
[296] Ibid.
[297] Emphasis added.
[298] PRO FCO 58/880, No 6, "*BRITISH INDIAN OCEAN TERRITORY: THE EX-SEYCHELLES ISLANDS, Memorandum by the Secretary of State for Foreign and Commonwealth Affairs*", 1 July 1975.

Mr. Thomson feared that, if the islands were to be given back to Seychelles, "Ramgoolam would have to say that he wanted the ex-Mauritian islands back".[299] But he was hushed:

> "We did not include a reference to the possibility that Ramgoolam would ask for the ex-Mauritian islands back because the Secretary of State deleted a passage on this subject when the previous OPD paper … was shown to him in draft. (He minuted on 26 February that Ramgoolam does not want Diego Garcia back and hence there was no need for it.)"[300]

Mr. Ewans stressed that:

> "[I]f we do decide to hand the islands back, Sir Ramgoolam will be likely to ask for the return of the Chagos Archipelago. Left to himself, he would probably not do so with any force or conviction, but the issue would probably be taken up by the Opposition parties in Mauritius and Ramgoolam would feel that he would have to show some activity. Mr Brind would expect him probably to come to London and take the matter up with British Ministers, so that he could demonstrate to his people that he had done his best. […] Mr Brind does not think it likely that Ramgoolam would think in terms of going to the International Court."[301]

The US was still skeptical; as one cable from Washington explained, the Americans' were wondering if it could still be maintained that Mauritius had no claim to sovereignty in the Chagos once the islands had been given back to Seychelles. Moreover, even though Ramgoolam was behaving himself, he would not live forever and future governments might think differently.[302] Indeed, years later, Mauritius wanted to go to the International Court, but the UK quickly changed her declaration under the optional clause of the Court, rejecting being sued by Commonwealth states. And when Mauritius wanted to leave the Commonwealth, the UK rapidly amended her declaration in order to exclude ex-Commonwealth states as well.[303]

Discussion and conclusions

Thus, we might have a couple of factors explaining why the UN lost interest in the Chagos.

First, the C-24 considered the Chagos as belonging to Mauritius and not as a colony apart. Second, in a communication dated 10 June 1968, the British envoy to UN announced that India was informally spreading the 'news' that the UK had abandoned her plans to build military bases in the Indian Ocean.[304] Third, the C-24 was misled by a statement made by the

---

[299] Ibid., No 9, J.A. Thomson to O'Keeffe, *"BRITISH INDIAN OCEAN TERRITORY: EX-SEYCHELLES ISLANDS*", 4 July 1975.

[300] Ibid., No 11, P.L. O'Keeffe to Mr Thomson, *"BRITISH INDIAN OCEAN TERRITORY: EX-SEYCHELLES ISLANDS*", 7 July 1975.

[301] Ibid., No 14, M.K. Ewans to Mr O'Keeffe, *"THE POSSIBLE REACTION IN MAURITIUS TO THE RETURN OF THE BIOT ISLANDS TO THE SEYCHELLES*", 16 July 1975.

[302] Ibid., No 50, TO ROUTINE FCO TELNO 3331 OF 15 OCT, FM WASHINGTON 152218Z, 15 Oct. 1975.

[303] Aust 2005, p. 454.

[304] [W]e know that the Indians have been spreading the word informally in the Committee of 24 that BIOT is no longer an issue since the British have dropped all their plans for defence activities in the area of the Indian Ocean. We ascribe the absence of any Committee of 24 debate on Mauritius at the time of the disorders before independence in the early months of this year largely to helpful Indian lobbying on this and other points. We also believe that the Indian assessment of our intentions in the area has been accepted by others such as the Yugoslavs and that this has contributed to the fact that in this year's discussion of Seychelles and of the general question of military installations in colonial territories in Sub-Committee I

British premier in the House of Commons to the effect that the UK had abandoned her plans to turn Aldabra into a military staging post and that the idea of staging in the BIOT had been dropped.[305]

The C-24 might thus have been blinded by its own fantasized 'success': it had achieved independence for Mauritius and Seychelles and believed that it had prevented the UK from building military bases in the Indian Ocean colonies. But there is no legal reason why the Chagos should not be considered a NSGT.

Returning to *Bancoult(4)*, in 2008, Lord Hoffmann concluded in the House of Lords:

> "[I]t is accepted by the Secretary of State that the removal and resettlement of the Chagossians was accomplished with a callous disregard of their interests. For the most part, the community was left to fend for itself in the slums of Port Louis. The reasons were to some extent the usual combination of bureaucracy and Treasury parsimony but very largely the government's refusal to acknowledge that there was any indigenous population for which the United Kingdom had a responsibility. The Immigration Ordinance, denying that anyone was entitled to enter or live in the islands, was part of the legal façade constructed to defend this claim. The government adopted this position because of a fear […] that the Soviet Union and its 'non-aligned' supporters would use the Chagossians and the United Kingdom's obligations to the people of a non-self-governing territory under article 73 of the United Nations Charter to prevent the construction of a military base in the Indian Ocean."[306]

In 2004, a British Court of Appeal stated that:

> "[t]he deliberate misrepresentation of the Ilois' history and status, designed to deflect any investigation by the United Nations; the use of legal powers designed for the governance of the islands for the illicit purpose of depopulating them; the uprooting of scores of families from the only way of life and means of subsistence that they knew; the want of anything like adequate provision for their resettlement: all of this and more is now part of the historical record."[307]

In *Bancoult (2)*, the Court referred to this statement and confirmed it, saying: "If the defendant seeks a basis for an allegation of deception, it lies in the record and the contemporaneous internal documentation."[308] We might thus posit that the courts have found that the British archives suggest the following:

- the UK was aware of her obligations under Chapter XI;
- she mislead the UN in believing Chagos was unpopulated;
- she removed the population and was thus willing to violate International Law.

---

of the Committee of 24, the few scattered references to BIOT have been confined to expression of welcome for the 'abandonment' of British plans for 'military bases.'", PRO FCO 58/121, J.D.B. Shaw to Sykes, 10 June 1968.

[305] A/7200/Rev.1, Appendix V, p. 89, para. 22.

[306] [2008] UKHL 61 (22 Oct. 2008).

[307] [2004] EWCA (Civ) 997, 22 July 2004, para. 6.

[308] [2006] EWHC 1038 (Admin), para. 29.

CHAPTER 3: THE BRITISH DEFENCE

In this chapter I will try to develop a possible argument for the UK's defence during the pending case before the ITLOS.

3.1. MAURITIUS IS ESTOPPED

The UK could submit that the Court should dismiss the case on the grounds that Mauritius is estopped from making any territorial claim to the Chagos for four reasons:

1. Mauritius agreed that the Chagos would remain under British sovereignty.
2. Mauritius agreed that her government would neither raise the matter nor press for the return of the islands of its own initiative.
3. The Mauritian government acquiesced to British sovereignty over the Chagos.
4. Mauritian leaders have recognized publicly that the UK has sovereignty over the Chagos.

LEGAL FACTS

In 1982, the Legislative Assembly of Mauritius created a Select Committee[309] to conduct an inquiry into the "circumstances which led to and followed the excision of the Chagos Archipelago...".[310]

The Excision Committee noted critically that: "It would be wrong […] to pretend that the excision of the Chagos Archipelago was a unilateral exercise on the part of Great Britain."[311] The UK transmitted minutes of the agreements to the Governor of Mauritius and the statement "The Chagos Archipelago will remain under British sovereignty"[312] "did not strike the attention of any Mauritian Minister as being new and unwarranted."[313]

On receiving the three million pounds, the Mauritian Accountant General booked it as the 'sale' of the Chagos Islands.[314]

Jean-Claude de l'Estrac, former Mauritian Foreign Minister and Chairman of the Excision Committee, published a book in 2011,[315] drawing on new archival material and public domain records. The book is quoted below. During the negotiations:

> "[t]he leader of the PMSD[316] supported Sir Seewoosagur's proposal and reminded those present that Mauritius had always shown great loyalty towards England during the two world wars. He said that he personally would have favoured giving these islands to the UK

[309] Henceforth the 'Excision Committee'.
[310] Larus 1985, p. 133.
[311] Excision Report, p. 4.
[312] Excision Report, p. 58.
[313] Ibid., p. 24.
[314] Ibid., p. 28.
[315] De l'Estrac 2011.
[316] Parti Mauricien Social Démocrate (PMSD).

[…]. Razack Mohamed[317] concurred: If it were only for the UK, he too would have freely handed over Diego Garcia but as the United States were also involved, he expected something 'substantial'."[318]

Fifteen years after the conference, the Mauritian political party MMM[319] proposed an amendment to the Mauritian constitution, declaring the Chagos a part of Mauritius. The government rejected this amendment during the parliamentary debate. The Chairman asked Sir Harold Walter:

"Will the Minister of External Affairs say to this House whether the […] British Indian Ocean Territory forms part of the sovereign totally independent country or not?"[320]

Walter answered:

"It forms part of Great Britain and its overseas territories, just as France has *les Dom Tom*; it is part of British territory there is no getting away from it; this is a fact, and a fact that cannot be denied; no amount of red paint can make it blue!"[321]

In the same debate, Walter seems to have interpreted the principle of *uti possidetis* as preventing Mauritius from disputing the borders inherited at independence.[322] The Chairman reacted:

"I have ruled that the Seychelles being a sovereign country […] as the BIOT forms part of Britain and is, therefore, an independent and sovereign State, this amendment is declared not receivable by me."[323]

De l'Estrac writes:

"The next day, the Prime Minister, Sir Seewoosagur Ramgoolam, gave a press conference in which he commented on the MMM's proposal. He was categorical: Diego Garcia no longer belonged to Mauritius, '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.*'"[324]

---

[317] Abdul Razack Mohamed, leader of the Comité d'Action Musulman (CAM).
[318] De l'Estrac 2011, p. 53.
[319] Mouvement Militant Mauricien.
[320] Mauritius, Hansard, The parliamentary debate in the Mauritian National Assembly, 26 June 1980, p. 3415.
[321] Ibid. p. 3415.
[322] "[T]hose who believe in the OAU […] will be interested to know that the wise men who founded the OAU when the three groups merged in Cairo, laid down a principle in the OAU Charter: that the frontiers inherited at the time of independence will not be disputed; and had there been such respect, Mr. Speaker, today we would not have seen the tearing away of Africa, we would not have seen blood all over Africa, we would not have seen this period of strike through which it is going. On these two principles, Mr. Chairman, I move that the question cannot be entertained.", Ibid. p. 3415.
"You ruled, Sir, that Seychelles was an independent country and, therefore, we had no sovereignty over it and therefore it could not be entertained. If this principle is acceptable, Mr. Chairman, then for the British Overseas Territory excised from Mauritius, your ruling must hold the same and must carry the same weight.", Ibid. p. 3415.
[323] Ibid. p. 3416.
[324] Emphasis added. De l'Estrac 2011, p. 138.

"Sir Seewoosagur believed that 'the country would ridicule itself in the eyes of the world'" [if she claimed Diego Garcia.] " 'Diego Garcia does not belong to us,' he insisted. […] The leader of the PMSD,[325] Sir Gaëtan Duval [who also participated in the negotiations], also believed that Diego Garcia was a British territory, stating that, 'Mauritius may not have been autonomous when it sold Diego Garcia, but the fact is that it kept the forty million rupees that it obtained from the sale. By keeping the forty million, even after independence, the Mauritian government acknowledged that this sale had indeed taken place…The transaction is hence recognised and becomes legal.'"[326]

It was *only* in 1991 that Mauritius changed article 111 of her Constitution claiming Chagos.[327]

RELEVANT INTERNATIONAL LAW

The concept of estoppel

Estoppel is a simple, clear-cut, substantive rule of law[328] originating from five values in international law: equity, consent, stability, predictability, and good faith.[329] ICJ-Judge Alfaro defined it succinctly:

"[I]ts substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible (*allegans contraria non audiendus est*).

Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another State (*nemo potest mutare consilium suum in alterius injuriam*)[…]

Finally, the legal effect of the principle is always the same: the party which by its recognition, its representation, its declaration, its conduct or its silence has maintained an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (*venire contra factum proprium non valet*)."[330]

Stability and predictability

Stability and predictability demand that unchanged matters become custom.[331] Therefore, a lack of protest may result in legal rights to others; stability requires that consent leads to estoppel, "a requirement even more important in the international than in other spheres."[332]

Equity, fairness and good faith

Various Courts have asserted that acquiescence and estoppel flow from good faith and equity.[333] Estoppel defends fairness, for it prevents states from playing 'fast and loose' with

[325] Parti Mauricien Social-Démocratique.
[326] de l'Estrac 2011, p. 139.
[327] Mauritius, Constitution of Mauritius (Amendment No. 3) Act 1991.
[328] ICJ, *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, p. 6; Separate Opinion of Vice-President Alfaro, p. 41.
[329] Ibid., Dissenting Opinion of Sir Percy Spender, p. 143; ICJ, *The Gulf of Maine case*, Judgment, para. 130.
[330] ICJ, *Temple Case,* Separate Opinion of Vice-President Alfaro, p. 40.
[331] ICJ, Fisheries Case, p. 139; PCA, *Grisbadarna Case*, *Maritime Boundary Dispute between Norway and Sweden,* p. 6.
[332] Lauterpacht 1950, pp. 395-96.

situations affecting others.[334] Its equity lies in protection from the expenses and other negative effects that are the result when one party in an agreement changes their position.[335]

The fruits of inconsistency are forbidden.
When a state enjoys the fruits of her recognition or acquiescence, she is precluded from changing her legal position.[336]

Consent
Recognition and acquiescence[337] are expressions of a legally operative consent.[338] Acquiescence is a type of qualified inaction.[339] This inaction has a binding effect when the acquiescing State remains inactive in circumstances where a protest or action would be required,[340] since silence is interpreted as a waiver of rights.[341]

Two kinds of estoppel: by agreement or conduct
"The acts…may take the form of an express written agreement, declaration, representation or recognition, or else that of a conduct which implies consent to or agreement with a determined factual or juridical situation."[342]

ARGUMENT

Point VII of the Lancaster House Agreement provided that "if the need for the facilities in the Chagos Archipelago disappeared, sovereignty would be returned to Mauritius."[343] The British Government accepted this point "provided it is made clear that a decision about the need to retain the islands must rest entirely with the UK Government and that *it would not (repeat not) be open to the Government of Mauritius to raise the matter, or press for the return of the islands on its own initiative.*"[344] Scholars analyzing this have concluded that:

> "The Colonial Office placed restrictions on the right of the government of Mauritius to protest the loss of its sovereignty in public fora once the deal was concluded. It was, in effect, a promise on the part of the Mauritius leadership never to undertake a campaign to regain the Chagos during the period when London unilaterally determined retention was essential for strategic purposes."[345]

---

[333] ITLOS, *M/V Saiga (No 2) (Saint Vincent and the Grenadines v. Guinea)*; ICJ, *Gulf of Maine*, para. 130; ICJ, *Temple Case,* Dissenting Opinion of Sir Percy Spender, p. 143.
[334] Lauterpacht 1950, p. 396.
[335] Ibid., p. 396.
[336] ICJ, *Temple Case*, p. 32; RIAA, *Shufeldt claim* (Guatemala, USA), 1930, 1094.
[337] ICJ, *Temple Case,* Dissenting Opinion of Sir Percy Spender, p. 143.
[338] Jennings 1963, p. 36.
[339] *M/V Saiga (No 2)*, para. 43.
[340] Ibid.; ICJ, *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, pp. 192-217.
[341] ICJ, *Temple Case,* Separate Opinion of Vice-President Alfaro, p. 41.
[342] Ibid., p. 40.
[343] COUNCIL OF MINISTERS - UK/US Defence Interests in the Indian Ocean - MEMORANDUM BY THE CHIEF SECRETARY, CM(65)183.
[344] Emphasis added. Excision Report, p. 65.
[345] Larus 1985, p. 137.

Estoppel arises in this case from the fact that Mauritius abandoned any potential claim and, above all, that she promised never to raise the matter or press for return. This double-sealed promise is a double reason for estoppel.

Case Law

The Norwegian Minister of Foreign Affairs told his Danish counterpart in 1919 that Norway would not make "difficulties" about Denmark's claim of sovereignty over the whole of Greenland. The Permanent Court of International Justice declared this promise as "unconditional and definitive".[346]

Norway signed bilateral and multilateral treaties describing Greenland as a Danish colony "or as forming part of Denmark or in which Denmark has been allowed to exclude Greenland from the operation of the agreement."[347] This was enough for the Court:

> "In accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland."[348]

Fifteen years after the Lancaster House Agreement, Sir Seewoosagur declared before the Excision Committee that the "excision of the archipelago was a most judicious one."[349] He stated publicly that Diego Garcia does not belong to Mauritius, that Great Britain has sovereignty over it, and that Mauritius was consulted and freely agreed to the arrangement. The Mauritian Foreign Minister described the agreement as an undeniable fact. Gaëtan Duval stressed the binding effect of keeping the money. In a similar case, Honduras and Nicaragua signed a treaty stating that the King of Spain would render an Arbitral Award concerning their boundary. Disagreeing about the validity of the award, Honduras and Nicaragua pleaded before the ICJ, which noted "Nicaragua's failure to raise any question with regard to the validity of the Award for several years"[350] and declared:

> "Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award."[351]

Thailand signed a treaty with France regarding the border between Thailand and Cambodia. The border was to follow certain natural lines. The rules laid down in the treaty would place the Temple of Preah Vihear within Thailand. However, France produced a faulty map, with the border on the wrong side of the Temple. The Thai sovereign accepted the map and ordered more copies. Half a century later, Thailand and Cambodia disputed the border before the ICJ, which declared that:

---

[346] PCIJ, *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5), para. 195.
[347] PCIJ, *Eastern Greenland*, para. 183.
[348] Ibid., para. 186.
[349] Excision Report, p. 10.
[350] ICJ, *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, p. 192, p. 213.
[351] ICJ, *Honduras v. Nicaragua*, p. 213.

> "[C]ircumstances were such as called for some reaction, within a reasonable period, on the part of the Siamese [Thai] authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced."[352]

> "Even if there were any doubt as to [Thailand's] acceptance of the map in 1908, […] in the light of the subsequent course of events, Thailand is now precluded by her conduct from asserting that she did not accept it."[353]

Similarly, Libya signed a treaty with France about the future boundary with Chad. For five years, France reported to Libya, describing Chad's territory in a certain way, without Libyan protest. The ICJ rejected the Libyan claim for change. Judge Ajibola noted in his Separate Opinion that "[a]s an acquiescent State, Libya is precluded from denying or challenging the validity of the boundary established by the 1955 Treaty."[354]

Mauritius enjoyed all the comforts flowing from the Lancaster House Agreement. She received several sums of money, used it for the development of her future, enjoyed all the rewards of independence, and entered the society of states. By changing her mind, Mauritius might well also enjoy the fruits of her inconsistency. The ICJ rejected this kind of profiteering in the *Temple Case*:

> "Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier…It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it."[355]

It is unfair to the UK for Mauritius to now play 'fast and loose' with situations affecting others.[356] The UK relied in good faith on the agreement and planned for the future, in the same way that Cambodia relied on Thailand's acceptance of the map.[357] Relying on the agreement, the UK then engaged in other treaties and obligations, such as that with the US, taking on the burden of new responsibilities and expenses. The UK, together with the US, invested billions in the islands. Equity demands that the UK is defended against both the negative impacts and the costs resulting from Mauritius' changing course. Therefore, Mauritius is precluded from changing her mind.

3.2. The UK has a better title to Chagos

The UK could, alternatively, argue that she is the 'coastal state', in the meaning of the UNCLOS, because she has a better title to the Chagos for the following reasons:

1. The Chagos was *terra nullius*.

[352] Ibid., p. 23.
[353] Ibid., p. 32.
[354] ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, paras. 98, 110.
[355] ICJ, *Temple Case*, p. 32.
[356] Lauterpacht 1950, p. 396.
[357] ICJ, *Temple Case*, p. 32; Ibid., Dissenting Opinion of Sir Percy Spender, p. 143.

2. The UK sealed her title by two treaties with France.
3. The UK has governed Chagos peacefully for 200 years.
4. Mauritius gave up any claim during the Lancaster House Agreement.
5. Mauritius recognized and acquiesced to the British title in the years following independence.

RELEVANT INTERNATIONAL LAW

The title tree needs a 'good root' and a 'vigorous trunk'[358]

International Courts treat title to territory as relative rather than absolute;[359] they decide which of the contenders has the better claim. They strike a balance between the law when the territory was occupied and the law at the critical date. They sum up the legality of its acquisition with the length and strength of the effective control.

The relevant modes of acquisition

Occupation

Already, during the fifteenth and sixteenth centuries, a legal act of appropriation by means of landmarks and symbols, conferred a title.[360] In 1933, the PCIJ noted that:

> "in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries."[361]

Prescription by sovereign activities (*effectivités*)

Continuous and peaceful display of State authority over time confers a title of sovereignty[362] that trumps other types of rights, even if the territory was originally acquired illegally.

There are two kinds of prescription: the acquisitive and the extinctive. While the acquisitive increases the weight of the title of the state exercising sovereignty, the extinctive prescription decreases the weight of the title of other claimants.

Cession

"The 'cession' of a territory means the renunciation made by one State in favour of another of the rights and title which the former may have to the territory in question."[363] Its validity depends on the validity of the title of the ceding State.

ARGUMENT

Around 1783, the French established a plantation on Diego Garcia, the most stable sovereignty up to that date. Since there was no indigenous population, the French had a valid title by occupation and *effectivités*.

---

[358] Jennings 1963, p. 35.
[359] Shaw 2008, pp. 490-91; Antunes 2000, p. 2.
[360] Von der Heydte 1935, p. 452.
[361] PCIJ, *Eastern Greenland*, para. 98.
[362] PCA, *Island of Palmas*, p. 869; Shaw 1986, p. 20.
[363] *Reparation Commission v. German Government*, 1924, Case No. 199. 2 ILR 16.

The slaves whom France brought to Chagos did not became indigenous people in the twenty-one years that the French occupied it. The French inhabitants were at least as indigenous as the slaves. The French ceded Mauritius and the Chagos to the UK by treaty. Because the French title was valid, the root of the British title is secure. This title grew stronger through the peaceful exercise of state authority up until the moment that the Mauritian people, driven by the right to self-determination, started competing for it.

Mauritian rights have not displaced the British title.

The new principle of self-determination began giving colonized people rights to decide their future. But the British title has never expired. Excluding *Sureda,* the majority of scholars agree that the Administering State retains the title to territory.[364]

Even if the principle of self-determination were to give Mauritius title over the Chagos, this would not replace the British title; *the Mauritian title would only compete with the British title, which already existed*.

Whatever title Mauritius had in 1965, it is the UK that continues to exercise State authority over the Chagos. This means that, while the weight of the British title has consolidated by *acquisitive prescription,* the Mauritian title has been shrinking for forty-five years by *extinctive prescription*.[365]

The term *uti possidetis* was first used during the decolonization of South America to avoid claims that uninhabited areas were *terra nullius*.[366] In Africa, the colonies contained many different ethnic groups and the principle of *uti possidetis* was used to avoid civil wars after independence.[367] Clearly, the term was not intended to assign rights to territory, but to maintain international peace and stability. None of these issues are relevant to the Chagos.

Even if *uti possidetis* did prevent splitting territories, Mauritius renounced her rights in 1965. This is a form of cession and its consent is recognized as an exception to the rule of *uti possidetis*.[368] As *Shaw* explains, "[t]he *uti possidetis* line, once identified, is not immutable. It can be changed by consent, whether expressed by treaty or by an award or by virtue of contrary practice by one party coupled with acquiescence therein by the other."[369]

Recognition is "an eminently suitable means for the purpose of establishing the validity of a territorial claim in relation to other States. However weak a title may be, and irrespective of any other criterion, recognition estops the State which has recognized the title from contesting its validity at any future time."[370] As the ICJ determined*, uti possidetis* can be "qualified" by

[364] Cassese 1998, p. 186; Shaw 1986, pp. 71-172; Crawford 2007, p. 615.
[365] Jennings 1963, p. 21.
[366] Lalonde 2002; Shaw 2008, pp. 525-26.
[367] ICJ, *Case Concerning the Frontier Dispute (Burkina Faso and Mali)*, para. 20.
[368] Arbitration Commission of the European Conference on Yugoslavia, Opinion No. 2, 92 ILR 168.
[369] Shaw 1996, p. 154.
[370] Schwarzenberger 1957, p. 316.

adjudication, treaty, acquiescence and recognition.[371] All of these elements are present in this case.

As with this case, Honduras and El Salvador both laid claim to island Meanguera, and the court concluded:

> "The Chamber considers that this protest of Honduras, coming after a long history of acts of sovereignty by El Salvador in Meanguera, was made too late to affect the presumption of acquiescence on the part of Honduras. The conduct of Honduras vis-à-vis earlier *effectivités* reveals an admission, recognition, acquiescence or other form of tacit consent to the situation."[372]

Various Courts have attributed title to State A after acquiescence or recognition from State B, whether or not in combination with cession, as in this case.[373]

Stability

The Former President of the ICJ, *Jennings,* wrote in his treatise that "the bias of the existing law is towards stability, the status quo, and the present effective possession; the tendency of international courts is to let sleeping dogs lie."[374] *Shaw* agrees: "It is the legitimisation of a doubtful title by the passage of time and the presumed acquiescence of the former sovereign, and it reflects the need for stability felt within the international system by recognising that territory in the possession of a state for a long period of time and uncontested cannot be taken away from that state without serious consequences for the international order. It is the legitimisation of a fact. If it were not for some such doctrine, the title of many states to their territory would be jeopardised."[375]

3.3. UNGA RESOLUTIONS ARE NOT BINDING

Referring to the aforementioned opinion of Judge Lauterpacht,[376] *Jennings* wrote:

> "Now, of course, it would be wrong to apply this formula, as it stands, to General Assembly Resolutions in general terms. Judge Lauterpacht was dealing primarily at least with a question of the quantum of supervision of Trust Territories. Moreover, this was an individual opinion of Sir Hersch Lauterpacht and cannot therefore be taken as bearing the imprimatur of a dictum of the Court."[377]

The Resolutions addressed by Judge Lauterpacht were related to a Trust Territory and it is generally accepted that sovereignty over such territory rests at the UN. Chapter XII gives the

---

[371] ICJ, *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, para. 67.
[372] Ibid., para. 364.
[373] See *The Temple Case, The Eastern Greenland Case, Case Concerning the Arbitral Award Made by the King of Spain, Libya v Chad.*
[374] Jennings 1963, p. 70.
[375] Shaw 2008, p. 504.
[376] "A Resolution recommending to an Administering State a specific course of action creates some legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation and constitutes a measure of supervision. The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith.", ICJ, *South-West Africa.* Separate opinion of Judge Lauterpacht, p. 118.
[377] Jennings 1963, p. 84.

UN much more responsibility over Trust Territories, and thus the authorization to decide, than Chapter XI does.

Analyzing resolution 2066, it becomes clear that it does not satisfy the criteria necessary for creating or reflecting the *law*; therefore it is not a binding resolution. Only 76% of the states voted affirmatively, which disqualifies the resolution from being universally endorsed. The word 'invite' does not suggest any legal imperative.

The UK refrained from voting on these resolutions and therefore she did not acquiesce to the assertions therein. Hence, the UK is a persistent objector. We have seen in Chapter 1 that the UK was denying *self-determination* as a legal principle and right in this period and that she made her opinion known regularly. A state is not bound by a customary rule as long as she does not accept it and if she rejected it from its inception.

While GA resolutions could consolidate an actual title by confirming it, they are not legal instruments for the transfer of title from one sovereign to another.[378] 'Actual possession' remains the manner in which title is built.[379]

Resolution 1514 did not enjoy any elite status during the Lancaster House Agreement. Only two years prior to the agreement, *Jennings* wrote :

> "Resolution 1514 is essentially a political document, and with its political wisdom or otherwise we are not here concerned. Nor are the 'rights' of which it speaks legal rights of the kind that could be vindicated before a court."[380]

Mauritius thus argues using the *present* legal status of Resolution 1514, unduly applying the law to the year 1965 retroactively.

3.4. The Lancaster House agreement is binding

The Lancaster House Agreement is valid and binding for the following reasons:

1. Traditionally, agreements and treaties lose their validity through coercion, breach, fraud, error, or a violation of *jus cogens* norm. None of these applies to the Lancaster House Agreement.
2. The subsequent Mauritian acquiescence and recognition of the validity of the agreement estops Mauritius from invoking breach, fraud or error.

LEGAL FACTS

The report of the Excision Committee held that the "U.K. Government's definite plans for the militarization of the islands with United States involvement and their possible excision"[381]

[378] Ibid., p. 85.
[379] Ibid., p. 86.
[380] Ibid., p. 83.
[381] Excision Report, p. 30.

were public knowledge at least one year prior to 1965. Only one Mauritian political party was against *the conditions* of the excision and *not against the excision itself*.[382]

Moreover, we have seen in Chapter 2 that the UK had already consulted Ramgoolam about excision by 1964 and the Mauritian cabinet was informed in 1965, months before the Constitutional Conference.

RELEVANT INTERNATIONAL LAW

Consent, given expressly or by acquiescence, is one of the cornerstones of IL. Therefore, treaties and agreements are not binding in the absence of consent. Articles 45, 48, 49, 51, 52 and 53 of the Vienna Convention on the Law of Treaties would apply. These articles are declaratory of CIL as well, except 53.[383]

ARGUMENT

Mauritius has argued that her delegation in 1965 was not competent to sign away the territory of the future state because Mauritius was not yet a state. This argument fails for two reasons.

First, *all* the decolonization agreements were signed by deputies of the colonized before they were recognized as states. All of those agreements are valid and the state practice proves that those agreements were not rejected after independence.[384]

Moreover, it is common practice to enter into treaties with non-state actors. Colonies entered into international treaties all the time. In his work on this subject, Lissitzyn concluded that: "there is no norm of international law that limits the class of territorial entities with treaty-making capacity to independent States, or indeed to 'States' however defined. There is no objective standard of treaty-making capacity." He then gives numerous examples of colonies entering into international treaties.

Article 1 of the Covenant of the League of Nations provided that any dominion or colony could become a member of the League. This proves that the international community accepted that colonies could enter into international treaties. India became a League member in 1918, twenty-nine years before independence. She became a UN member two years before independence and entered into other treaties.

After the Philippines became independent, the US State Department declared that:

> "It has been the policy of the United States to consider that a new state is bound by the international agreements to which it became a party in its own name, and by its own action, even though such action was taken before the new state had achieved complete and formal independence."[385]

---

[382] Excision Report, p. 34.
[383] *Dubai-Sharjah Border Arbitration*, Award of 19 October 1981, 91 ILR (1981) 543, para. 569.
[384] Craven 2007, p. 107.
[385] Lissitzyn 1968, pp. 69-71.

Second, Mauritius was already a state in all bar on paper. Britain was planning for decolonization before World War II had ended[386] and had gradually developed Mauritius' self-government. In 1946, the results were already 'revolutionary'.[387] By 1965, Mauritius had a constitution, a Legislative Assembly and an all-party government, including Sir Ramgoolam as premier. She had:

- Government;
- A defined territory;
- A permanent population.[388]

Therefore, the Mauritian UN seat in 1968 was just a formality.

No Coercion

A classic example of coercion occurred in 1939, when both the Czechoslovakian President and her Foreign Minister were incarcerated without food, intimidated by constant threats of obliteration, and chased around the table until they signed away the independence of their state. There was no chasing around the table in London in 1965. Sir Ramgoolam refused to describe the deal as a blackmail.[389] Sir Gaëtan Duval declared that the choice was between excision and a referendum on independence.[390] Thus, in the worst-case scenario, what the UK threatened Mauritius with was democracy. The Mauritian Excision Committee concluded that "[i]t would be wrong […] to pretend that the excision of the Chagos Archipelago was a unilateral exercise on the part of Great Britain."[391]

The pressure must be substantial.[392]

It is not just any pressure which amounts to coercion or duress. Similar to this case, there was, at one time, an imbalance in power between Britain and Dubai while Dubai was a protectorate. The arbitrators in the *Dubai-Sharjah Case* noted that they accepted as proven that the UK had sanctioned recalcitrant rulers in the past,[393] and the arbitrators accepted that pressure might have been involved in that case. However, "[e]very kind of international negotiation is subject to influences of this kind. Mere influences and pressures cannot be equated with the concept of coercion as it is known in international law."[394]

As scholars have noted, "[t]here must be a causal link between the coercion and the consent: the State representative must have been forced to sign or ratify a treaty which he or she would never have signed in the absence of such threats."[395] But if the choice was between excision

[386] Toussaint 1977, p. 89.
[387] Ibid., p. 89.
[388] Article 1 of the Montevideo Convention on the Rights and Duties of States states: "The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states."
[389] Excision Report, p. 36.
[390] Ibid., p. 36.
[391] Ibid., p. 4.
[392] Villiger 2009, p. 633.
[393] Such as the refusal of courtesies, the refusal to grant travel facilities, and the stoppage of supplies and of port calls made by mail steamers.
[394] *Dubai-Sharjah Border Arbitration*, ILR 91 (1993) 569, para. 46.
[395] Villiger 2009, p. 634.

and a referendum on independence,[396] then there was no causal link between coercion and consent. As the arbitrators commented in the *Government of Kuwait v. American Independent Oil Company Case*: "[t]he pressure must be of a kind to inhibit its freedom of choice."[397]

In *Dubai-Sharjah*, the arbitrators observed that there must be a "very precise proof" of coercion.[398] In the *Government of Kuwait v. American Independent Oil Company Case*, it was also stated that "[t]he absence of protests during the years following upon 1973 confirms the non-existence, or else the abandonment, of this ground of complaint." Similarly, in our case the protest was absent for years after independence.

Fraud

It has been contended that the UK committed fraud because she originally maintained that Diego Garcia would be used for a communications center and then, later, the US built a multi-billion dollar military base there.[399] Fraudulent conduct is very serious and goes beyond mere inaccurate representations of fact. The report of the Excision Committee proves that, long before 1965, it was public knowledge that a military facility would someday be built.

For this to be considered fraud, it would be imperative that the state would not have given its consent had the correct information been available.[400] However, the statements of the participants during the independence conference prove that they were eager to help the UK. Thus, it does not seem likely that the participants would have withheld their consent had they known in advance that a military base was planned.

Error

The only known invocations of error have concerned incorrect maps and other geographical descriptions.[401] However, Courts do not treat these errors as critical. In the *Temple Case*, a faulty map placed the Temple of Preah Vihear on the wrong side of the boundary and, on the basis of the subsequent behavior of the prejudiced state, the Court did not correct the mistake. Acquiescence precluded the State from raising the matter.

Clean slate

Abraham has suggested that Mauritius could invoke the clean slate principle to invalidate the Lancaster House Agreement.[402] Article 16 of the *Vienna Convention on Succession of States in respect of Treaties* provides that "a newly independent State is not bound to maintain in force or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates"[403] However, customary law shows that boundary treaties and territorial agreements constitute an exception to the clean slate principle.[404] Article 11 of the same treaty provides

[396] Riviere 1982, p. 36.
[397] *Government of Kuwait v. American Independent Oil Company Case*, ILR 66 (1984) 570, para. 44.
[398] 1981 *Dubai-Sharjah Border Arbitration*, ILR 91 (1993), para. 569.
[399] Excision Report, p. 10.
[400] Villiger 2009, p. 617.
[401] Ibid., p. 607.
[402] Abraham 2011.
[403] Vienna Convention on Succession of States in respect of Treaties, p. 3.
[404] Shaw 1986, p. 240; Craven 2007, pp. 176-194.

that "A succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary."

The same is the case for the *rebus sic stantibus* rule. Whatever reason Mauritius might invoke as a fundamental change in circumstances, Article 62(2) of the *Vienna Convention on the Law of Treaties* provides that changes of circumstances may not be evoked for treaties establishing a boundary.[405] *Shaw* warns that accepting *rebus sic stantibus* as a valid argument in claims to territory would be opening Pandora's box:

> "To have permitted the revision of nineteenth-century territorial arrangements, or those of any other era, on the grounds of the post-1945 principle of self-determination would have had the effect not only of ignoring inter-temporal law but of opening the door to a large number of territorial claims, particularly in Africa."[406]

Article 52 only refers to threat or use of military force.

The wording 'threat or use of force' is taken from the Charter's Article 2, paragraph 4, and this paragraph can only be interpreted as referring to violence, according to *Dinstein*.[407] The *travaux* also make it clear that it is limited to the use of violence. Nineteen States proposed to add 'including economic or political pressure' after 'force', but this was removed even before being put to the vote.[408] Otherwise, states would have an easy way out of burdensome treaties.

Syria interpreted Article 52 as extending "to the employment of economic, political, military and psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests". The UK, together with other states, objected to this interpretation.[409] Thus, when the UK signed the Vienna Convention, her understanding of article 52 was limited to the use or threat of violence.

Moreover, "boundary provisions of [a] treaty take on a life of their own and continue irrespective of the status of the treaty itself."[410]

Estoppel again

Article 45 of the VCLT provides that a state loses her right to denounce a treaty after she acquiesces or recognizes its validity.[411] Coercion is the only exception to this article. Therefore Mauritius is precluded from invoking breach, fraud or error.

[405] See also Craven 2007, p. 175, 190; Shaw 1986, p. 223, p. 230ff.
[406] Shaw 1986, p. 232.
[407] Dinstein 2011, p. 88.
[408] Corten and Klein 2011, p. 1206.
[409] Ibid., p. 1208.
[410] Shaw 1996, p. 113.
[411] See ICJ, *Arbitral Award by the King of Spain case*, pp. 192, 213–14; the *Temple case*, pp. 6, 23–33; See also the *Argentina–Chile case*, 38 ILR, p. 10.

Chapter 4: Through Chagossian eyes

4.1. Self-Determination

The debates about Chagos tend to forget Wilson's words: "peoples and provinces are not to be bartered about from sovereignty to sovereignty as if they were mere chattels and pawns in a game, even the great game, now forever discredited."[412] The Chagossians are being treated as chattel and cattle, they are being sold and ping-ponged between the UN, the UK and Mauritius. This chapter will give the Chagossian, as group and individual, an argument of her own. It is submitted that the Chagossians should decide the future of their islands.

The Chagos is a colony

The British archives show that the UK was convinced that she had two legal obligations: to report to the UN under article 73(e); and to respect the "paramountcy of the interests of the people concerned and in accordance with the principle of self-determination" under Chapter XI.[413] ILA asserts that only public statements are evidence of *opinio juris*. However, internal documents may be evidence of the State's subjective attitude to the issue in question.[414] Moreover, I submit that there is a relevant distinction between a state believing her official legal arguments, and a state lying expressly in order to break the law.

First, when you argue against your own interests, the argument is more objective, and thus internal arguments are more credible than external ones.

Then, custom in IL changes by breaking the law. But only two kinds of law-breaking should change it: First, there are violations that serve the common good. For instance, trying foreign officials in national courts for grave human rights violations when the trial might conflict with the immunity laws; Second, there are violations in exceptional situations where respecting the law would violate fundamental rights. This dilemma has come before the ICJ, and the Court refrained from stating that the law forces a state to face extinction when it is able to survive by using nuclear weapons.[415] Neither of these two cases applies here.

In our case, the violation of the law also violates the international community's interests. Others have legitimate interests in maintaining stability and predictability. Those legitimate interests would only be counterbalanced by British legitimate interests.[416] This is why custom changes through violations of the law; it is because the legitimate interests of the violators outweigh the majority's interest in stability and predictability. But in our case, because the British public statements were aimed at obtaining illegitimate advantages for the violator, they weigh less than the values of stability and predictability.

---

[412] Scott 1921, p. 269.
[413] PRO CO 936/947, F.D.W. Brown to C.G. Eastwood, 2 Feb. 1966.
[414] ILA 2000, p. 15.
[415] ICJ, *Legality of the Threat or Use of Nuclear Weapons*.
[416] See the philosophical argument below for a definition of legitimate interests.

Moreover, Mauritius and the Chagossians have rights that make the fact that the UK was internally aware that she was breaking the law relevant, especially since the documents prove British bad faith when interpreting the law. For all these reasons, the official British statements should not contribute to changing the law, and her internal belief concerning her obligations under the Charter should be relevant.

The Chagos is a colony because the criteria from resolution 1541 apply. The Chagos is geographically separate and is distinct ethnically and/or culturally from the UK.[417] It is arbitrarily subordinated to the UK.[418] And the Chagos has not attained a "full measure of self-government" yet.[419]

The Chagos was on the UN list of NSGTs, together with Mauritius. When Mauritius became independent, the UN forgot to place the Chagos on the list as a new colony. We have seen in Chapter 2 that the UN lacked a legal reason to skip this step. We have seen in Chapter 3 that the UK successfully misrepresented the situation, asserting that the Chagos was unpopulated. The UN was pleased, believing the UK's had renounced the idea of building military bases on Chagos. So the sub-text of the situation suggested that the UK would give the Chagos to Mauritius sooner or later.

Is the absence of Chagos from the list relevant? No. "Chapter XI does not state how and by whom it should be decided whether a territory is self-governing or not."[420] Chapter XI does not state that a territory has to be on any list in order to be considered a NSGT. By 1963, the UN had started to list territories without the consent of the Administering State.[421] It also repeated, in a yearly resolution, that a territory is an NSGT until the GA decides, by way of a resolution, that it is not. The GA has never decided that the Chagos is not. Moreover, there is nothing in either the Charter or subsequent practice to suggest that only listed territories are a NSGT. *Hillebrink* has argued that being removed from the list is irrelevant for the Dutch colonies.[422] And *Tong* has argued absence from the list is irrelevant for Chagos.[423]

The *Chagos Refugees Group* allegedly demanded in a letter to British premier Tony Blair that "Her Majesty's government takes its obligations under Chapter XI of the UN Charter […] seriously".[424] This suggests that the Chagossians consider the Chagos a NSGT. The Chagossians have also pleaded, during the litigation in British courts, that the UK had duties

[417] Resolution 1541, Principle IV.
[418] Ibid., Principle V.
[419] Ibid., Principle II.
[420] Hillebrink 2008, p. 22.
[421] Ibid., p. 34.
[422] "[I]t would be hard to deny that Chapter XI of the UN Charter still applies to the Kingdom of the Netherlands, as well as the law of decolonization and self-determination as codified in GA Resolutions 1514, 1541 and 2625. This means that the political decolonization of the Dutch Caribbean is not yet complete under the terms of international law, and that there still exists an international obligation for the Kingdom under Article 73 of the UN Charter to strive towards the completion of the process of decolonization. Only when it becomes clear (preferably through a referendum) that each island has obtained a status that enjoys the support of the populations could the Kingdom be considered a successful form of decolonization.", Hillebrink 2007, p. 238.
[423] Tong 2009, p. 137.
[424] Chagos Refugees Group's letter to Tony Blair, 10 Oct. 2001.

under Chapter XI, for instance the duties to "secure the advancement of the Chagossians in various ways, and to protect them, to develop their self-government and to send certain information about their condition to the UN Secretary-General on a regular basis".[425]

Not being on the list is also irrelevant because the Law of Decolonization is *more* than the Charter. The Human Rights Covenants guarantee the right to self-determination. The Human Rights Committee regularly considers Chagos under Article 1, although it is not clear whether the Committee considers Article 1 as applying to Chagos or Mauritius.[426] However, the Committee asked Mauritius in 1999 "whether the population of the Archipelago had been asked its opinion about self-determination".[427]

Shaw considered that "the principle of self-determination has now become established as an international legal principle…[by] traditional methods of international law creation, that is by treaty, custom and, arguably, by virtue of constituting a general principle of law."[428] *Cassese* states that resolution 1514 "was a powerful impetus to the crystallization of a customary rule […and] it could be contended that perhaps in late 1960 the two Chapters of the UN Charter were in the process of being supplemented at both normative levels."[429] *Raič* believes that Resolution 1514 reflected an existing rule of customary law in respect to the right to self-determination,[430] and "[i]n any event, it is beyond doubt that the right of self-determination in the sense of a right of Non-Self-Governing Territories and Trust Territories to choose either independence, association or integration developed into a rule of customary law in the course of the 1960s."[431]

Cassese believes that the principle of self-determination is a customary principle. This principle "sets out a general and fundamental standard of behaviour: governments must not decide the life and future of peoples at their discretion. Peoples must be enabled freely to express their wishes in matters concerning their condition."[432]

The ICJ has called the right to self-determination an *erga omnes* right. There is no treaty declaring this; the ICJ could thus only have concluded it from custom.[433]

Many scholars believe that self-determination is a *jus cogens* norm,[434] and, since there is no treaty declaring self-determination a *jus cogens* norm, they could have concluded this only from

---

[425] *Chagos Islanders v Attorney General Her Majesty's British Indian Ocean Territory Commissioner*, EWHC 2222 (QB) (09 October 2003 [2003], para. 630.
[426] For instance: "The Committee takes note of the continuing dispute between the State party and the United Kingdom Government with respect to the legal status of the Chagos Archipelago, whose population was removed to the main island of Mauritius and other places after 1965 (Covenant, art. 1).", CCPR/CO/83/MUS, para. 5.
[427] A/44/40, para 494.
[428] Shaw 2011, p. 599.
[429] Cassese 1998, p. 59.
[430] Raič 2002, p. 217.
[431] Ibid.
[432] Cassese 1998, p. 128.
[433] The assertion that right to self-determination "as it evolved from the Charter and from United Nations *practice*, has an erga omnes character, is irreproachable.", my emphasis. ICJ, *East Timor*, para. 29; ICJ, *Construction of a Wall*, paras. 155-156.
[434] See Footnote 135.

custom. Cassese argues it from custom.[435] *Raič* writes that "the prohibition of the denial of the right of (external) self-determination for colonial territories and peoples, or put differently, the prohibition of the maintenance or establishment of colonial domination, is a rule of customary international law having the character of *jus cogens*, and must consequently be respected *erga omnes*."[436]

Thus the absence of the Chagos from the list is irrelevant. Chagos is still a colony for the purposes of the Law of Decolonization.

4.2. The consequences of Chagos being a colony

The first consequence is that the Chagossians have the right to self-determination. The United Kingdom acknowledged this right in a White Paper:

> "First, our partnership must be founded on self-determination. Our Overseas Territories are British for as long as they wish to remain British. Britain has willingly granted independence where it has been requested; and we will continue to do so where this is an option."[437]

The UK states in the White Paper that the Chagos "has no permanent population", but this is irrelevant. Rapporteur Cristescu explained that the right to self-determination "implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population".[438] If it were so easy to take away the right to self-determination, all the colonial powers would have deported the populations and would have had the territories to themselves. It would defeat the purpose of the Law of Decolonization. The GA has "condemned the colonial practice of promoting the systematic influx of foreign immigrants and displacing, deporting or transferring the indigenous inhabitants."[439]

In 1972, the C-24 recommended:

> "The Special Committee strongly condemns the eviction of the Seychellois from the so-called 'British Indian Ocean Territory' as a violation by the administering Power of its obligations to safeguard the rights of the people of the Territory and their well-being, and urgently calls on the administering Power to cease immediately this action."[440]

While the UK census from 1962 asserted that there was a permanent population on Chagos,[441] the UK misinformed the C-24 by stating that the population on the BIOT was not permanent, and this is the best explanation as to why the C-24 did not condemned the eviction earlier and more forcefully. The Fourth Committee and the C-24 might have also been caught in the

[435] Cassese 1998, pp. 133-40.
[436] Raič 2002, p. 219.
[437] Partnership for Progress and Prosperity: Britain and the Overseas Territories, 17 Feb. 1999.
[438] E/CN.4/Sub.2/404/Rev.1, p. 41.
[439] Sureda 1973, p. 182.
[440] A/8723/Add.4 (Part I), p. 8.
[441] PRO DEFE 68/310.

paradigm of territorial integrity and therefore have been unable to see the new situation as a new colony.

Allen asserts that "[c]ustomary international law provides that the Chagossian societal group is a distinct people for the purpose of exercising the right of self-determination. Consequently, the UK government is under an obligation to take all measures to progressively facilitate the exercise of this right."[442] *Tong* has argued the same.[443] *Vine* has shown that the Chagossians are a distinct people from the Mauritians.[444] Certainly, the Chagossians' experience since 1965 has made them so.

In conclusion, there is no reason to believe that eviction would put an end to the right to self-determination.

What does the Chagossian right entail?
Here we can be brief by citing Article 1 of the Human Rights Covenants. They may freely:

- determine their political status;
- dispose of their natural wealth and resources;
- pursue their economic, social and cultural development.

This right corresponds to a duty for the UK. She "shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

How should the Chagossian right be fulfilled?
They have to attain "full measure of self-government" through independence, association, integration or other status freely determined by the Chagossians.

I submit that, in 1965, there was no 'free and genuine' expression of the will of the people. The UK traded independence for Chagos, despite one major opposition party's preferring a referendum. Parti Mauricien boycotted the last meeting because the UK had discarded the referendum.[445] Even if the elections before independence could be considered an expressed will of the people, they were given a limited choice: independence or the Chagos.

Craven reports the ambivalence of Milan Bartoš in his paper on devolution agreements for the ILC Sub-committee. On the one hand, some of them involved the rights of third states and voiding them would run against the principle of *pacta sunt servanda*. On the other hand:

> "they also seemed to represent 'the price of independence', the terms of which were largely dictated under conditions of inequality, and were frequently oppressive (continaining, for example, obligations concerning military alliances and the maintenance of foreign bases). Upholding their validity, in other words, would run counter to the principles of the UN Charter. Bartoš's equivocation, on this score, was to result in the

[442] Allen 2008, p. 690.
[443] Tong 2009.
[444] Vine 2003.
[445] Simmons 1982, p. 168.

> suggestion that they be regarded neither as effective nor as void, but rather as a special class of 'voidable' agreements whose terms could be successfully attacked if they could be shown to be incompatible with the status of the newly independent State."[446]

Moreover, the sale of Chagos violated the Chagossians' right to self-determination. As we have seen, they were excluded from the elections and in the political decisions on Mauritius. In *Chagos Islanders v Attorney General*, the Court concluded that "[t]here was no process of consultation with the islanders and no part of the Mauritian islands were included within any constituency for the Mauritius Legislative Assembly".[447] Thus the Mauritian delegation to the Lancaster House did not represent the Chagossians.

It would defeat the purpose of the Law of Decolonization if one group in the colony could sell another group into continuous colonization without the latter's consent. As Tanzania stated in the Fourth Committee in 1965:

> "[Self-determination] would be meaningless if it could be circumvented and if, by the payment of compensation to the majority of the inhabitants of a colony, a colonial Power could retain in perpetuity a part of the territory of that colony inhabited by a minority. The right of colonial peoples to self-determination could never be subject to financial dealings, which were particularly reprehensible when their purpose was the establishment of foreign bases in a colonial Territory."[448]

Besides, even if the excision and the Lancaster House Agreement were legally valid, the Chagossian right to self-determination trumps them. The rights and duties provided by the Law of Decolonization are concerned with the well-being and freedom of the current people of a colony, regardless of how the territory became a colony. The right to self-determination of a people under military occupation, regardless of the legality of the use of force resulting in that occupation, is analogous.

The UN's practice when territorial integrity conflicts with self-determination is inconsistent, but Blay has noticed that self-determination generally wins. Let me present a couple of examples. The UN has deemed the excision of Mayotte as illegal, but stopped talking about it in 1995 and a referendum in 1999 resulted in its incorporation into France. West Irian, as a colony, was governed together with Indonesia and only a plebiscite reunited it with Indonesia. Belize became independent after a referendum, despite a Guatemalan claim based on *uti possidetis*.

The UN has decided otherwise in the cases of colonial enclaves such as Ifni, Goa and Walvis Bay. And, in the case of Goa, it acquiesced to the situation only after strong protests. The cases of Ifni and Goa are cases of 'strong' historical claims dating from before the

[446] Craven 2007, p. 123.
[447] [2003] EWHC 2222 (QB), APPENDIX A, para. 36.
[448] A/C.4/SR.1557, p. 229.

colonization. Moreover, they have powerful geographic, economic, ethnic and cultural ties[449] with the claimant state, and might not be able to survive as enclave.

Gibraltar and the Falklands are also exceptional. In both cases, the UN faces a dilemma because the Law of Decolonization was meant to end colonialism, but self-determination in these cases would reward instances of colonizing a territory and expelling its original population.

Gibraltar is contiguous to Spain and was ceded by treaty, with a provision that Spain would have priority should the UK renounce sovereignty. The UN only asked for a negotiated solution originally, but then sided with Spain, declaring, in resolution 2353, that any colonial situation which partially destroys the national unity and territorial integrity of a country is incompatible the Charter and paragraph 6 of Resolution 1514.[450] However, *Cassese* argues that self-determination trumps territorial integrity in this situation:

> "[T]he wishes and free choice of the people concerned constitute the decisive test. This is the crux of the principle and it overrides any other factor, even the 'anti-colonial' element. Consequently, in complex cases where self-determination and 'anti-colonial' claims collide, the former should always prevail […]. [O]ne cannot stretch anti-colonialism to such a point as to claim that, for the sake of making good past 'colonial' domination, one should ignore the free will of the population of the territory concerned."[451]

Blay has argued that article 103 of the Charter trumps other agreements; thus self-determination trumps the treaty between the UK and Spain.[452] Fawcett claims that such pre-emption treaties do not trump the "transfer of the title by operation of law as, for example, transfer by succession upon independence."[453] *Sureda*, examining state practice, also concludes that the right to self-determination trumps such 'right of pre-emption'.[454] Similarly, self-determination would also trump the Lancaster House Agreement.

Shaw stresses that people must be consulted before changes in their status:

> "Their national obligations could well be altered, for example, the new State may have a system of conscription and it is not impossible that the range of human rights protection would be diminished under the new dispensation. Accordingly, for reasons related to human rights, including the right to self-determination as defined with regard to independent States in terms of participation in governance rights, it is suggested that any

[449] For instance A/RES/32/9 about Walvis Bay.
[450] A/RES/2353(XXII).
[451] Cassese 1998, p. 212.
[452] Blay 1985, p. 471.
[453] Fawcett 1967, p. 250.
[454] Sureda 1973, pp. 285–8.

cession agreement between two States of territory clearly belonging to one of them to the other requires the consent of the population affected."[455]

Cassese would agree:

> "[O]ne of the consequences of the general principle of self-determination relates precisely to changes of territory, that is, to cases where sovereignty over a particular territory is transferred by one State to another by mutual agreement […]. In the case of such transfers, the States involved are duty-bound to ascertain the wishes of the population concerned, by means of a referendum or plebiscite, or by any other appropriate means that ensure a free and genuine expression of will. It follows, of course, that any inter-state agreement that is contrary to the will of the population concerned would fall foul of the principle of self-determination. On account of the legal status that the principle has now acquired in international law, the agreement would be in conflict with *jus cogens.*"[456]

Thus "[i]n cases in which the expression of the free and genuine will of these populations is not permitted, the treaty providing for territorial change is contrary to *jus cogens* and can therefore be subsequently declared null and void…"[457] The GA has adopted two resolutions declaring that any agreements between Egypt and Israel violating the Palestinian right to self-determination would be invalid.[458]

As Judge Dillard famously put it: "[i]t is for the people to determine the destiny of the territory and not the territory the destiny of the people."[459] *Higgins,* commented that this dictum would apply to the Falklands, even if Argentina had a legitimate claim: "if there has emerged the sort of political, social and cultural identity of a people that gives rise to a right of self-determination, then that right must surely be the guiding principle."[460]

Two things follow. First, the UK cannot transfer the Chagos to Mauritius without consulting the Chagossians. Second, the ITLOS cannot change the status of the Chagos without consulting the Chagossians unless it is prepared to violate a *jus cogens* norm.

In *Western Sahara*, the ICJ stated that:

> "The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain

[455] Shaw 2011, p. 608.
[456] Cassese 1998, p. 190.
[457] Ibid., p. 335.
[458] A/RES/34/65 (A); A/RES/33/28 (A).
[459] ICJ, *Western Sahara,* Separate Opinion of Judge Dillard, p. 122.
[460] Higgins 1982, p. 391.

population did not constitute a 'people' entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances."[461]

The Court did not provide a list of the special circumstances, but Jude Nagendra Singh elaborated to the effect that "the principle of self-determination could be dispensed with only if the free expression of the will of the people was found to be axiomatic in the sense that the result was known to be a foregone conclusion or that consultations had already taken place in some form or that special features of the case rendered it unnecessary."[462]

But, in our case, it is not evident what the Chagossians want. Olivier Bancoult, leader of the Chagos Refugee Group, and elected representative of the Chagossian community in Mauritius, who sued the UK in the British courts, testified before the British Foreign Affairs Committee. When pressed on what the Chagossians want, Bancoult answered: "Frankly, most of us want to stay British."[463]

In 2011, Allen Vincatassin claimed to be the Chagossians' elected President-in-exile. He claims the same:

- Chagossians see themselves as a distinct people;
- Chagossians believe in their right to self-determination;
- Chagossians want to exercise this right as part of the UK;
- Mauritius collaborated in the violation of their human rights;
- Chagossians do not recognize Mauritian sovereignty over their islands;
- They are prepared to stand in court and fight for this right.[464]

Higgins argues that the wish of a population not to reintegrate with the original sovereign is a reason for not "turning back the clock".[465]

Vincatassin claims that Mauritius wants to lease Diego Garcia to the US. Transferring the Chagos to Mauritius might therefore result in a new injustice and the Chagossians might remain in the Mauritian slums.

Thus, one cannot assume that the Chagossians want to unite with Mauritius. As Bancoult testified: "In the past, all decisions were taken without consultation of the Chagossians. The wish of our people is that we would not like any decision to be taken without consultation."[466] And this is what the right to self-determination commands.

---

[461] ICJ, *Western Sahara*, para. 59.
[462] Ibid., Separate Opinion of Judge Nagendra Singh, p. 81.
[463] House of Commons, Select Committee on Foreign Affairs, Minutes of Evidence, Examination of Witnesses (Questions 160-175), 23 Jan. 2008, Q172.
[464] Statement of Allen Vincatassin at the Chagos Regagne Conference at the Royal Geographical Society of London, on 19 May 2011.
[465] Higgins 1982, p. 393.
[466] House of Commons, Select Committee on Foreign Affairs, Minutes of Evidence, Examination of Witnesses (Questions 160-175), 23 Jan. 2008, Q171.

4.3. Philosophical argument

No matter what the judges may decide that IL demands, there is always the question as to what the law should be. And so, in this section, I will present a philosophical argument that the Chagossians should decide the future of their islands.

Tesón concluded that, while there has been an "exponential" growth of individual liberty following World War II, an "impressive expansion of human rights", this "enlightened moral and political global reality is ill-served by the traditional model of international law. The model promotes states and not individuals, governments and not persons, order and not rights, compliance and not justice."[467] "The […] positivist paradigm, by clinging to the deceptively simple notion of the unrestrained practice of states as the touchstone for legitimacy, ends up surrendering to tyranny and aggression, the evils that international law was intended to control in the first place."[468]

Many jurists believe the same, that IL should be created from the point of view of the individual. For *Grotius*, International Law was also between groups of citizens and private individuals.[469] Some states proposed that individuals should have legal standing before the PCIJ.[470] In 1941, *Hambro* argued that individuals should receive a "greater competence to defend their rights", especially stateless people and minorities.[471] In 1944, *Murdock* proposed permanent international tribunals in each capital.[472] In the period between 1946 and 1951, Australia made a very serious proposal for an International Court of Human Rights (ICHR).[473] She drew her inspiration from *Bentwich* and *Kaeckenbeeck*. *Bentwich* proposed an international court to deal with statelessness.[474] *Kaeckenbeeck* was a passionate believer in giving individuals access to international courts.[475] While India, the Netherlands and the Philippines agreed, the veto-states rejected the Australian idea.

Hersch Lauterpacht wrote of the positivistic view that: "Once the cobwebs of that antiquated theory have been swept aside, the procedural incapacity of individuals is deprived of its logical foundation."[476] *Sohn* and *Grenville* wrote an alternative UN Charter,[477] giving individuals direct access to international courts. Judge *Cançado Trindade* dissented in a recent ICJ case, *Germany v. Italy*, because the decision was against "fundamental human values". In his writings, he claims the same as *Lauterpacht*; that the individual is the ultimate unit of law, the law is made to serve individual wellbeing.[478] Former ICJ president, *Olawale Elias* revived the

[467] Tesón 1998, p. 25.
[468] Ibid., p. 26.
[469] Parlett 2011, p. 10.
[470] See *the Procès-Verbaux of the Proceedings of the Committee* (16 June-24 July 1920), p. 205ff, p. 723.
[471] Hambro 1941, p. 25.
[472] Murdock 1944, p. 378.
[473] Martoiu Ticu 2010, p. 30.
[474] Bentwich 1944, p. 176.
[475] Kaeckenbeeck 1942.
[476] Lauterpacht 1951, p. 57.
[477] Clark and Sohn 1966.
[478] For instance Cançado Trindade 2011.

Australian proposal for an ICHR.[479] Judge *Buergenthal* also envisaged a United Nations human rights court "with contentious jurisdiction modeled on the European or Inter-American Court of Human Rights."[480] Dame *Higgins*, agrees "that a right which depended for its enforcement upon the consent of another party, was close to being no legal right at all",[481] and argues, as does *Lauterpacht*, that "there is nothing *in the nature of international law* which" dictates that individuals should not be parties to the ICJ. "[T]he very notion of international law is not predicated upon this assumption, and the international legal system survives conceptually even were this to change. Additionally, these assumptions about access to international tribunals and force are in fact changing rapidly, with significant consequences in the delicate balance between the state and the individual."[482]

And numerous other jurists have pleaded for individuals to be given more power against states.[483] *Brownlie* would not reject the proposal, either.[484]

Lauterpacht argues that the purpose of state, democracy and the IL is the fullest development of the potential inherent in the human personality.[485] His argument appeals to *natural law* on the basis of the following "objective factors" present in the nature of humankind: "[t]he social nature of man; the generic traits of his physical and mental constitution; his sentiment of justice and moral obligation; his instinct for individual and collective self-preservation; his desire for happiness; his sense of human dignity; his consciousness of man's station and purpose in life."[486] Natural law must set limits to any law.[487]

We have come full circle. John Locke's *social contract* between individuals in a *state of nature* inspired the idea of self-determination. My argument will do the same and is inspired by John Rawls' 'Original position' thought-experiment.

The Heaven Position

Imagine that you are a smart spirit, like the one conceived by Plato, dwelling between rebirths in some kind of heaven, and that you are going to be born soon, but you don't know where, nor do you know what properties you will have in the actual world. You have no idea whether you will be born British, American, Mauritian or Chagossian. Rawls would also say that you have no knowledge of your future conception of good. You know that everybody's capacity to know the truth will be limited. You are allowed to have general knowledge. You know something about human psychology, about group dynamics and about how politics works.

---

[479] Elias 1968.
[480] Buergenthal, p. 483.
[481] Higgins 1978, p. 15.
[482] Ibid.
[483] Das 1979, p. 141; Kutner 1954; Brennan 1962; Goldberg 1965, p. 621; Nowak 2009; Ulfstein 2008; Scheinin 2006; Fitzmaurice 1996, pp. 303-04; Meron 1983, p. 403; Korowicz 1956, p. 562; Tesón 2000, p. 79; Bruegl 1953, p. 558; Whitfield 1988, p. 46. Ferguson 1968; Schapiro 1951, p. 79; Brunet 1947; de Zayas 1992, p. 267; Cowles 1954; Gormley 1966; Wright 1954; Kleffner 2002, p. 238; Christol 1961, pp. 67-68; Turlington 1943; Orrego Vicuña 2001, p. 57.
[484] Brownlie 1962, p. 719.
[485] Lauterpacht 1951, p. 123.
[486] Ibid., p. 101.
[487] Ibid., p. 74.

In a conference room in that heaven, you debate and negotiate with all the other future citizens of the world as to which conduct rules should govern the world, the relations among states, among individuals, and among individuals and states. These rules are the contract.

It is rational to accept before being born that, after birth, you will respect the already existing rules of law. However, if one of the parties rejects one of the existing laws and can provide a reason why a new rule would be accepted by everyone in the heaven position, the parties rejecting the change bear the burden of proof that the current law would be accepted by rational spirits in the heaven position. If there is no good reason to preserve the law, the law should be changed. The contract provides that the arguments appealing to the heaven position would weigh heavier than unargued preference for the *status quo*.

My argument appeals to *human nature*, which has been proven by science, and to universal shared intuitions. Science can prove that we have a survival instinct and a fundamental physical and psychological need for freedom. We value life, either as the highest value in itself, or as a condition for achieving our other life-goals. Freedom is either one of the highest values in itself or a condition necessary in order to find food, shelter, mates and other survival essentials. Political freedom serves the same goals; to enable us to survive better and to achieve our life-goals.

The above can be proven by biology and evolutionary psychology, but I assert that all people at all times, in every corner of the world and with other world views, share these intuitions. These are universal human values. For instance, nobody wants to be killed, robbed, enslaved, or lied to; everybody demands that others respect their contracts.

There are no examples of societies where murder or theft or lying and so forth is encouraged. There are no examples of people in any period of history sending messages to other people, crying out: "Please come, invade us, rape us, and kill us." Whenever groups of people have started a war, the attacked have defended themselves. The same goes for slavery. There are no examples of people swarming to the seashores, waving at the incoming ships and shouting "Please take me as a slave." Nor are slaves renowned for refusing liberation.

Now, it is true that some people believed that you may do such things to strangers, especially if they were far away. But our real values are not reflected in the deeds which we believe we could do to others, but in those which we would freely accept that others could do to us. This is the Golden Rule. The same goes for colonialism. The countries believing that it was normal did not set a good example. The French did not go to the British and say: "You are a superior culture. Please colonize us." Nor did the other colonial powers ask for this favor.

These examples suggest that all people, in all epochs, have valued life and freedom, despite denying it to others.

Would you, in the heaven position, sign a contract with rules allowing some to uproot others, ship them to faraway islands and, after using them as tools, throw them away as trash?

Some argue that it is impossible to imagine not being yourself, to imagine being in the heaven position. However, this intuition can be tested empirically. Take a group of Chagossians and let them walk through the UK and ring the doorbells of the British and say: "We want to build a military base on this island, to defend the free world. Could you please leave?" Would the British reaction be "Just give me a second to grab my family album"? Would the British accept the idea of somebody else 'sterilizing' the British islands, without even asking their consent? Would they accept it if their government did it? Imagine the Queen on TV: "My children; by Order, in Council, we have given the British Isles to the US. For as long as they please. To build a military base and to defend the free world. You will be shipped, free of charge to the Parisian *banlieue*. You may take two suitcases with you. No pets allowed. We will be keeping the islands pristine, so no fishing around here."

In the heaven position, we would not weigh the chances of being born as a colonialist or colonized; we would not play Russian roulette, because our lives and freedom are much too important to gamble with. We would only sign a contract with rules that would help us if we turned out to be the underdog. There is nothing new to this. (Moral) Laws are made from the point of view of the victim, not of the wannabe killer, the liar, the thief, the cheat, or anyone else having the power to do whatever she likes to others.

In the heaven position, you would not accept rules that make it impossible for you to go to an International Court and demand that the colonist gives you the island back. You would not permit the UK to change her declaration at the ICJ and set herself beyond the reach of the law. You would not permit any person like Ramgoolam to decide your fate for his personal gain. Not without your consent. You would not accept a rule of IL to permit a change in the status of your territory without your consent.

You would accept a rule whereby everyone is free to do whatever she wants, together with other consenting adults, as long as they respect the legitimate interests of others.

The legitimate interests are of two kinds. The first kind is either obviously related to our fundamental needs, such as those connected with the survival instinct, or can be scientifically proven to be so. The second kind is the result of debate and negotiation, and is established by democratic means. For instance, in a state, we could decide that developing the arts is a legitimate interest, even if we could not prove that they are related to survival. Internationally, we could democratically decide that we have an interest in saving the whales, even if this might not be related to our survival. There are thus primary survival and secondary, freely-chosen interests.

I assert that during arguments, in most situations, the survival interests trump the freely-chosen ones. No referendum could oblige me to respect a law giving the others the power to kill and enslave me, or to rape a little child. Genocide and torture are outside the reach of the *volonté générale*.

The non-derogable articles from the ICCPR are related to our survival instinct. The first non-derogable right is the right to life. Then come the protections against torture, slavery and servitude. Then fundamental freedoms, without which our lives would be insecure and not worth living. You would sign a contract in the heaven position to guarantee those rights to everyone on earth, especially given that you would not risk not having them yourself.

The creators of the Law Of Decolonization had similar intuitions. They had the intuition that one should respect the genuine, freely expressed will of the people. They put the word *freedom* in Article 1 of the HR Covenants twice. The people are free to decide their future, free to dispose of their natural resources and may never be deprived of their own means of subsistence.

When rules in IL contradict each other, we should ask ourselves what would we choose in the heaven position. Paragraph 6 of resolution 1514 and the principle of *uti possidetis* are in conflict with the Chagossians' right to self-determination. What would we choose in the heaven position if we did not know in which country we would be born? I assert that we would let the Chagossians choose their future. This is because the principle of *uti possidetis* was not meant as a right to a territory, it was meant to prevent fratricidal wars in Africa during decolonization. And in South America, at the outset, it was meant to prevent European powers from recolonizing the continent by claiming that *terra nullius* existed when some states became independent. There is some logic in these reasons, but this logic does not apply to the Chagos. The second reason we would allow the Chagossians to choose is that this choice is more closely related to their survival needs than to those of the British or the Mauritians.

The UK does not do to her subjects what she does to others, and she has one of the highest rule of law rankings in the world. She is a bit ahead in the democracy index and further ahead in the Human Development Index, compared to Mauritius. Therefore we cannot force the Chagossians to accept less. But the Chagossians might chose to become independent, lease Diego Garcia to the Americans and spend their lives on the beach. Or they might choose to unite with Mauritius.

Seen from the heaven position, Paragraph 6 of Resolution 1514 can only have two meanings. It prevents the Colonial Powers from splitting territories before independence, and other states from annexing parts of the newborn state. But the wishes of the population should count. Paragraph 6 would not create a right for Mauritius to acquire the Chagos against the will of the Chagossians. Certainly not after fifty years, during which the Chagossians have evolved as a more distinct people because of their shared historical grief. Scholars conclude that:

> "Chagossians self-identify themselves and have been accepted by the international movement of indigenous peoples as an indigenous people of the Chagos archipelago. They consider themselves ethnically different from the rest of the population of Mauritius.

> Mauritians regard Chagossians as people who come from somewhere else, namely the Chagos archipelago."[488]

Mauritius did not treat them as Mauritians, but she quarantined them in slums, discriminated against them and treated them as the British did. Statistically, Chagossians are above the average in terms of joblessness, homelessness and landlessness. They have: Increased morbidity and mortality; Food insecurity and malnutrition; Severe, chronic impoverishment; Economic and social-psychological marginalization; Sociocultural fragmentation, educational deprivation, and ethnic discrimination. These are the words Vine uses when concluding his research on the Chagossians.[489]

Ramgoolam told the Mauritian Excision Committee that "he could not then assess the strategic importance of the archipelago which consisted of islands very remote from Mauritius and virtually unknown to most Mauritians."[490] We can thus read the premier's belief that Mauritius was neither territorially nor emotionally attached to the Chagos. Again, from the report:

> "Sir Seewoosagur Ramgoolam […] made no bones of submitting that his main concern at Lancaster House was the independence of Mauritius and that he was prepared to achieve that aim at any costs. He stated: 'A request was made to me. I had to see which was better to cede out a portion of our territory of which very few people knew, and independence. I thought that independence was much more primordial and more important than the excision of the island which is very far from here, and which we had never visited, which we could never visit.' He added: 'If I had to choose between independence and the ceding of Diego Garcia, I would have done again the same thing.'"[491]

The Committee "strongly" condemned those present in Lancaster House for their "indifference towards the displaced Ilois".[492]

I thus conclude that the Chagossians interest in choosing for themselves outweighs the Mauritian interest in enforcing either paragraph 6 of resolution 1514 or the principle of *uti possidetis*.

[488] Tong 2011, p. 173; Vine 2003.
[489] Vine 2005, p. 268; Jeffery 2011.
[490] Excision Report, p. 10.
[491] Ibid., p. 22.
[492] Ibid., p. 28.

CONCLUSIONS

The excision of Chagos violated resolution 1514, or at least its spirit. "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." And Independence was to be granted "without any conditions or reservations". When voting for this resolution, states wanted to prevent the "cajoling nationalist leaders [from signing] military treaties permitting the establishment of military bases". The Lancaster House Agreement has all the patina of cajolement. And from today's perspective, it was foolish to enter it. But cajoling and foolishness do not invalidate international agreements. The agreement is not manifestly void. A better way to consider the agreement invalid is to view it from the Chagossian perspective. The Chagossians did not consent to it and it violated their right to self-determination. Moreover, the legality of the excision is irrelevant to the current Chagossians' right to self-determination.

Bibliography

Abraham 2011

G. Abraham. "Paradise claimed: disputed sovereignty over the Chagos Archipelago." 128 *South African Law Journal* 63-99 no. 1 (2011).

Allen 2008

S. Allen. "International Law and the Resettlement of the (Outer) Chagos Islands." 8 *H.R.L. Rev.* 683-702 no. 4 (2008).

Antunes 2000

N.S.M. Antunes. "Estoppel, acquiescence and recognition in territorial and boundary dispute settlement." 2 *Boundary and Territory Briefing* no. 8 (2000).

Asamoah 1967

O.Y. Asamoah. *The legal significance of the declarations of the general assembly of the United Nations*. The Hague: Martinus Nijhoff, 1967.

Aust 2005

A. Aust. *Handbook of International Law*, Cambridge, UK; New York: Cambridge University Press, 2005.

Bentwich 1944

N. Bentwich. "Statelessness Through The Peace Treaties After The First World-War." 21 *BYIL* 171-76 (1944).

Blay 1985

S.K.N. Blay. "Self-Determination Versus Territorial Integrity in Decolonization." 18 *N.Y.U. J. Int'l L. & Pol.* 441 (1985).

Brennan 1962

W.J.J. Brennan. "International Due Process and the Law Comments." 48 *Va. L. Rev.* 1258 (1962).

Brownlie 1962

I. Brownlie. "The Individual before Tribunals Exercising International Jurisdiction." 11 *International & Comparative Law Quarterly* 701-20 no. 03 (1962).

Brownlie 2008

I. Brownlie. *Principles of public international law,* 7th ed ed. Oxford: Oxford University Press, 2008.

Bruegl 1953

J.W. Bruegl. "Right to Petition an International Authority, The." 2 *Int'l & Comp. L.Q.* 542 (1953).

Brunet 1947

R. Brunet. *La garantie internationale des droits de l'homme d'après la Charte de San Francisco*, Genève: Grasset, 1947.

Buchanan 2004

A.E. Buchanan. *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford: Oxford University Press, 2004.

Buergenthal 1997

T. Buergenthal. *Implementation, compliance and effectiveness: proceedings of the 91st annual meeting, April 9-12, 1997*. Washington, DC: American Society of International Law.

Calder 2008

K.J. Calder. *Britain and the Origins of the New Europe 1914-1918*, Cambridge University Press, 2008.

Cançado Trindade 2011

A.A. Cançado Trindade. *The access of individuals to international justice,* Oxford: Oxford University Press, 2011.

Cassese 1998

A. Cassese. *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge: Cambridge University Press, 1998.

Cassese 2008

A. Cassese. *The human dimension of international law: selected papers*. New York: Oxford University Press, 2008.

Castañeda 1969

J. Castañeda. *Legal effects of United Nations resolutions*. New York: Columbia University Press, 1969.

Christol 1961

C.Q. Christol. "Remedies for Individuals under World Law." 56 *Nw. U. L. Rev.* 65 (1961).

CLARK AND SOHN 1966
G. Clark, and L.B. Sohn. *World peace through world law; two alternative plans*. 3d ed. Cambridge: Harvard University Press, 1966.
CLARK 1980A
R.S. Clark. "Decolonization of East Timor and the United Nations Norms on Self-Determination and Aggression." 7 *Yale J. World Pub. Ord.* 2 (1980).
CLARK 1980B
R.S. Clark. "Self-Determination and Free Association-Should the United Nations Terminate the Pacific Islands Trust." 21 *Harv. Int'l. L. J.* 1 (1980).
CORTEN AND KLEIN 2011
O. Corten, and P. Klein. *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford: Oxford University Press, 2011.
COWLES 1954
W.B. Cowles. "Review of the United Nations Charter and the Adjudication of International Claims." 48 *AJIL* 460-64 no. 3 (1954).
CRAVEN 2007
M.C.R. Craven. *The Decolonization of International Law: State Succession and the Law of Treaties*, Oxford: Oxford University Press, 2007.
CRAWFORD 2001
J. Crawford. "The Right of Self-Determination in International Law: Its Development and Future." In *People's Rights*, edited by P. Alston, 7-67, Oxford; New York: Oxford University Press, 2001.
CRAWFORD 2007
J. Crawford. *The Creation of States in International Law,* Oxford: Oxford University Press, 2007.
DAS 1979
K. Das. "Some reflections on implementing human rights." In *Human rights: thirty years after the Universal Declaration,* edited by B. G. Ramcharan, 131-157, The Hague: Martinus Nijhoff, 1979.
DE L'ESTRAC 2011
J.C. de l'Estrac. *Next year in Diego Garcia,* Mauritius: Elp Publications, 2011.
DE WET 2012
E. De Wet. *Hierarchy in international law: the place of human rights,* Oxford: Oxford University Press, 2012.
DE ZAYAS 1992
A. de Zayas. "International Court of Human Rights, An Part Two: Papers and Reports from the Eighth and Ninth Nordic Seminars on Human Rights: IV: Background Papers for the Seminars." 61-62 *Nordic J. Int'l L.* 267 (1992).
DINSTEIN 2011
Y. Dinstein. *War, aggression and self-defence,* Cambridge: Cambridge University Press, 2011.
ELIAS 1968
T.O. Elias. "International Institutions and Machinery of Implementation in the Field of Human Rights." *U.N. Doc A/Conf.32/L.3* (1968).
EVERS AND KOOY 2011
S. Evers, and M. Kooy. *Eviction from the Chagos Islands: displacement and struggle for identity against two world powers,* Leiden; Boston: Brill, 2011.
EXCISION REPORT
Mauritius. Legislative Assembly. *Report of the Select Committee on the Excision of the Chagos Archipelago,* Port Louis, Mauritius: L.C. Achille, 1983.
FASTENRATH 2002
U. Fastenrath. "Article 73." In *The Charter of the United Nations: A Commentary*, edited by B. Simma, 1089-93, Oxford: Oxford University Press, 2002.
FAWCETT 1967
J.E.S. Fawcett. "Gibraltar: The Legal Issues." 43 *International Affairs* 236-51 no. 2 (1967).

FERGUSON 1968
C.C.J. Ferguson. "United Nations Human Rights Covenants: Problems of Ratification and Implementation, The Panel: The United Nations Human Rights Covenants: Problems of Ratification and Implementation." 62 *Am. Soc'y Int'l L. Proc.* 83-96 (1968).
FITZMAURICE 1996
M. Fitzmaurice. "Environmental Protection and the International Court of Justice." In *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, edited by V. Lowe and M. Fitzmaurice, 293-315, Cambridge: Cambridge University Press, 1996.
FRANCK AND HOFFMAN 1975
T.M. Franck, and P. Hoffman. "Right to Self-Determination in Very Small Places, The." 8 *N.Y.U. J. Int'l L. & Pol.* 331 (1975).
FROWEIN 1993
J.A. Frowein. "Self-determination as a limit to obligations under international law" In *Modern law of self-determination*, edited by C. Tomuschat, 211-24, Dordrecht; Boston: M. Nijhoff Publishers, 1993.
GILCHRIST 1945
H. Gilchrist. "V. Colonial Questions at the San Francisco Conference." 39 *The American Political Science Review* 982-92 no. 5 (1945).
GOLDBERG 1965
A.J. Goldberg. "Need for a World Court of Human Rights, The Closing Address." 11 *Howard L.J.* 621 (1965).
GOODRICH AND HAMBRO 1946
L.M. Goodrich, and E.I. Hambro. *Charter of the United Nations: Commentary and Documents*, Boston: World Peace Foundation, 1946.
GORMLEY 1966
W.P. Gormley. *The procedural status of the individual before international and supranational tribunals,* The Hague: M. Nijhoff, 1966.
HAMBRO 1941
E. Hambro. "Individuals before International Tribunals." 35 *Am. Soc'y Int'l L. Proc.* 22 (1941).
HANNUM 1993
H. Hannum. "Rethinking Self-Determination." 34 *Va. J. Int'l L.* 1 (1993).
HARRIS AND JOSEPH 1995
D.J. Harris, and S. Joseph. *The International Covenant on Civil and Political Rights and United Kingdom law,* Oxford: Clarendon Press, 1995.
HIGGINS 1978
R. Higgins. "Conceptual Thinking about the Individual in International Law." 24 *N.Y.L. Sch. L. Rev.* 11 (1978).
HIGGINS 1982
R. Higgins. "Judge Dillard and the Right to Self Determination In Memory of Hardy Cross Dillard." 23 *Va. J. Int'l L.* 387 (1982).
HILLEBRINK 2007
S. Hillebrink. "Political decolonization and self-determination: the case of the Netherlands Antilles and Aruba.", PHD Thesis, Leiden University, 2007.
HILLEBRINK 2008
S. Hillebrink. *The Right to Self-Determination and Post-Colonial Governance: The Case of the Netherlands Antilles and Aruba,* The Hague; Cambridge: T.M.C. Asser Press, 2008.
ILA 2000
International Law Association, Statement Of Principles Applicable To The Formation Of General Customary International Law, London Conference, 2000.
JEFFERY 2011
L. Jeffery. "'A Lost People'? Chagossian onward Migration and Echoes of Marginalisation in Crawley." In *Eviction from the Chagos Islands: displacement and struggle for identity against two world powers,* edited by S. Evers and M. Kooy, 219-38, Leiden; Boston: Brill, 2011.
JENNINGS 1963
R.Y. Jennings. *The acquisition of territory in international law,* Manchester, New York: Manchester University Press, 1963.

KAECKENBEECK 1942
G. Kaeckenbeeck. *The international experiment of Upper Silesia: a study in the working of the Upper Silesian Settlement, 1922-1937,* London etc.: Oxford University Press, 1942.
KEITNER AND REISMAN 2003
C. Keitner, and W.M. Reisman. "Free Association: The United States Experience." 39 *Tex. Int'l L.J.* 1 (2003).
KEITNER 2007
C.I.R. Keitner. *The paradoxes of nationalism: the French Revolution and its meaning for contemporary nation building,* Albany, NY: State University of New York Press, 2007.
KELSEN 1950
H. Kelsen. *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems,* New York: F.A. Praeger, 1950.
KIRGIS 1994
F.L. Kirgis. "The degrees of self-determination in the United Nations era." 88 *AJIL* 304 (1994).
KLEFFNER 2002
J.K. Kleffner. "Improving Compliance with International Humanitarian Law Through the Establishment of an Individual Complaints Procedure." 15 *Leiden journal of international law* 237-50 (14) no. 1 (2002).
KOHEN 2006
M.G. Kohen. *Secession: international law perspectives*, Cambridge: Cambridge University Press, 2006.
KOROWICZ 1956
M.S. Korowicz. "Problem of the International Personality of Individuals, The." 50 *AJIL* 533 (1956).
KUTNER 1954
L. Kutner. "A Proposal for a United Nations Writ of Habeas Corpus and an International Court of Human Rights." 4 *Tul. L. Rev.* 417 (1954).
LALONDE 2002
S. Lalonde. *Determining boundaries in a conflicted world: the role of uti possidetis,* Montreal etc.: McGill-Queen's University Press, 2002.
LANSING 2003
R. Lansing. *The Peace Negotiations,* The Project Gutenberg, 2003.
LARUS 1985
J. Larus. "Negotiating Independence? Mauritius and Diego Garcia." 74 *The Round Table* 132-45 no. 294 (1985).
LAUTERPACHT 1950
H. Lauterpacht. "Sovereignty over Submarine Areas." 27 *BYIL* 376 (1950).
LAUTERPACHT 1951
H. Lauterpacht. *International law and human rights,* London: Stevens, 1951.
LISSITZYN 1968
O.J. Lissitzyn. "Territorial entities other than independent States in the law of treaties." 125 *Recueil des cours* 1-91 (1968).
LOUIS 1978
W.R. Louis. *Imperialism at bay: the United States and the decolonization of the British Empire, 1941-1945,* New York: Oxford University Press, 1978.
MARSTON 1983
G. Marston. "United Kingdom Materials on International Law 1983." 54 *BYIL* 361-559 no. 1 (1983).
MARSTON 1985
G. Marston. "United Kingdom Materials on International Law 1985." 56 *BYIL* 363-542 no. 1 (1985).
MARTOIU TICU 2010
M. Martoiu Ticu. "See the Pink Elephant in the Courtroom?: Private individuals should have legal standing before international courts.", Master Thesis in Practical Philosophy, Utrecht: Utrecht University, 2010.

MCCORQUODALE 1995
R. McCorquodale. "Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination." 66 *BYIL* 283-331 no. 1 (1995).
MCDOUGAL 1979
M.S. McDougal. "Contemporary Views on the Sources of International Law: The Effect of U.N. Resolutions on Emerging Legal Norms: Discussion." 73 *Am. Soc'y Int'l L. Proc. 73rd Annual Meeting* 327 (1979).
MERON 1983
T. Meron. "Human Rights-Effective Remedies: Remarks." 77 *Am. Soc'y Int'l L. Proc.* 397-404 (1983).
MOYN 2010
S. Moyn. *The Last Utopia: Human Rights in History,* Cambridge, Mass.: Belknap Press of Harvard University Press, 2010.
MURDOCK 1944
J.O. Murdock. "International Judicial Organization." 69 *Annu. Rep. A.B.A.* 373 (1944).
MUSGRAVE 1997
T.D. Musgrave. *Self-determination and national minorities,* Oxford: Clarendon Press, 1997.
NORMAND AND ZAIDI 2008
R. Normand, and S. Zaidi. *Human Rights at the UN: The Political History of Universal Justice,* Bloomington: Indiana University Press, 2008.
NOWAK 2009
M. Nowak. "Eight Reasons why we need a World Court of Human Rights." In *International Human Rights Monitoring Mechanisms*, edited by G. Alfredsson, 697-706, Leiden; Boston: Martinus Nijhoff 2009.
ORAKHELASHVILI 2009
A. Orakhelashvili. *Peremptory Norms in International Law,* Oxford; New York: Oxford University Press, 2009.
ORREGO VICUÑA 2001
F. Orrego Vicuña. "Individuals and non-state entities before international courts and tribunals." 5 *Max Planck Yearbook of United Nations Law* 53-66. (2001).
PARLETT 2011
K. Parlett. *The individual in the international legal system: continuity and change in international law,* Cambridge, UK; New York: Cambridge University Press, 2011.
POMERANCE 1982
M. Pomerance. *Self-Determination in Law and Practice: The New Doctrine in the United Nations,* The Hague; Boston: M. Nijhoff, 1982.
RAIČ 2002
D. Raič. *Statehood and the Law of Self-Determination*, The Hague; New York: Kluwer Law International, 2002.
RIVIERE 1982
L. Riviere. *Historical dictionary of Mauritius,* African historical dictionaries; no. 34. Metuchen: Scarecrow Press, 1982.
ROOSEVELT 1946
F.D. Roosevelt, and B.D. Zevin. *Nothing to fear: the selected addresses of Franklin Delano Roosevelt, 1932-1945,* Boston: Houghton Mifflin, 1946.
ROSENSTOCK 1971
R. Rosenstock. "Declaration of Principles of International Law Concerning Friendly Relations: A Survey, The." 65 *AJIL* 713 (1971).
ROTHERMUND 2006
D. Rothermund. *The Routledge companion to decolonization,* London; New York: Routledge, 2006.
RUSSELL 1958
R.B. Russell. *A history of the United Nations Charter; the role of the United States, 1940-1945,* Washington: Brookings Institution, 1958.
SAND 2009
P.H. Sand. *United States and Britain in Diego Garcia: the future of a controversial base,* New York: Palgrave Macmillan, 2009.

SCHAPIRO 1951
L.S. Schapiro. "European Court of Human Rights, The Note." 2 *U.W. Austl. Ann. L. Rev.* 65 (1951).
SCHEININ 2006
M. Scheinin. "Proposed Optional Protocol to the Covenant on Economic, Social, and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform - without Amending the Existing Treaties, The United Nations and Regional Human Rights Systems: Recent Developments." 6 *Hum. Rts. L. Rev.* 131 no. 1 (2006).
SCHWARZENBERGER 1957
G. Schwarzenberger. "Title to Territory: Response to a Challenge." 51 *AJIL* 308 (1957).
SCHWEBEL 1994
S.M. Schwebel. "Aggression, intervention, and self-defense in modern international law." In *Justice in international law: selected writings*, Cambridge: Cambridge University Press, 530-91, 1994.
SCOTT 1921
J.B. Scott. *Official Statements of War Aims and Peace Proposals, December 1916 to November 1918,* Washington, DC: Carnegie Endowment for International Peace, 1921.
SHAW 1986
M. Shaw. *Title to territory in Africa: international legal issues,* Oxford etc.: Clarendon Press, Oxford University Press, 1986.
SHAW 1996
M. Shaw. "The Heritage of States: The Principle of Uti Possidetis Juris Today." 67 *British Yearbook of International Law* 75-154 no. 1 (1996).
SHAW 2011
M. Shaw. "Self-determination, Human Rights, and the Attribution of Territory." In *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma*, edited by R.G. Ulrich Fastenrath, Daniel-Erasmus Khan, Andreas Paulus, Sabine von Schorlemer, and Christoph Vedder, 590-608, Oxford: Oxford University Press, 2011.
SHERWOOD 1948
R.E. Sherwood. *Roosevelt and Hopkins, an intimate history,* New York: Harper, 1948.
SIMMONS 1982
A.S. Simmons. *Modern Mauritius: the politics of decolonization,* Bloomington: Indiana University Press, 1982.
SIMPSON 2001
A.W.B. Simpson. *Human rights and the end of empire: Britain and the genesis of the European Convention,* Oxford; New York: Oxford University Press, 2001.
SLOAN 1991
B. Sloan. *United Nations General Assembly resolutions in our changing world,* Ardsley-on-Hudson, N.Y.: Transnational Publishers, 1991.
SPIJKERS 2011
O. Spijkers. *The United Nations, The Evolution of Global Values and International Law,* Cambridge, U.K.; Portland, Or.: Intersentia, 2011.
STARUSHENKO 1961
G. Starushenko. *The principle of national self-determination in Soviet foreign policy,* Moscow: Foreign Languages Publ. House, 1961.
SUREDA 1973
A.R. Sureda. *The evolution of the right of self-determination: A study of United Nations practice,* Leiden: Sijthoff, 1973.
TESÓN 1998
F.R. Tesón. *A philosophy of international law*, Boulder, Colo.: Westview Press, 1998.
TESÓN 2000
F.R. Tesón. "The Project of Reconfiguration: How Can International Law Be Reconstituted: Remarks." 94 *Am. Soc'y Int'l L. Proc.* 78-79 (2000).

THORNBERRY 1993
P. Thornberry. "The democratic or internal aspect of self-determination with some remarks on federalism." In *Modern law of self-determination*, edited by C. Tomuschat, 101-38, Dordrecht; Boston: M. Nijhoff Publishers, 1993.
TOMUSCHAT 2006
C. Tomuschat. "Secession and Self-determination." In *Secession: International Law Perspectives*, edited by M.G. Kohen, 23-45, New York, NY etc.: Cambridge University Press, 2006.
TONG 2009
M.K. Tong. "Le droit à l'autodétermination et à restitution L'affaire du peuple de l'archipel des Chagos (territoire britannique de l'Océan Indien)." PHD Thesis, Université de Strasbourg, 2009.
TONG 2011
M.K. 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*, edited by S. Evers and M. Kooy, 157-81, Leiden; Boston: Brill, 2011.
TOUSSAINT 1977
A. Toussaint. *History of Mauritius,* London: Macmillan, 1977.
TURLINGTON 1943
E. Turlington. "A Neglected Phase of International Judicial Organization." 37 *AJIL* 648-51 (1943).
ULFSTEIN 2008
G. Ulfstein. "Do we need a World Court of Human Rights?" In *Law at War: the Law as it was and the Law as it should be*, edited by O. Engdahl, P. Wrange and O. Bring, 261-72, Leiden etc.: Nijhoff, 2008.
US DELEGATION 1945
Chairman of the United States Delegation. *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State,* Washington, DC.: U.S. Govt. Print. Off., 1945.
VILLIGER 2009
M.E. Villiger. *Commentary on the 1969 Vienna Convention on the Law of Treaties,* Leiden: Brill, 2009.
VINE 2003
D. Vine. "The Former Inhabitants of the Chagos Archipelago as an Indigenous People: Analyzing the Evidence. Expert report for American University Law School, Washington, DC, and Sheridans Solicitors, London." (2003).
VINE 2005
D. Vine. "Dérasiné: The Expulsion and Impoverishment of the Chagossian People [Diego Garcia]. With S. Wojciech Sokolowski and Philip Harvey. Expert report for American University Law School, Washington, DC, and Sheridans Solicitors, London, April 9, 2005".
VINE 2009
D. Vine. *Island of shame: the secret history of the U.S. military base on Diego Garcia,* Princeton: Princeton University Press, 2009.
VON DER HEYDTE 1935
F.A.F. Von der Heydte. "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law." 29 *AJIL* 448-71 no. 3 (1935).
WHITFIELD 1988
J.H. Whitfield. "How the Working Organs of the European Convention Have Elevated the Individual to the Level of Subject of International Law." 12 *ILSA J. Int'l L.* 27 (1988).
WRIGHT 1954
Q. Wright. "Human Rights and Charter Revision." 296 *Annals of the American Academy of Political and Social Science* 46-55 (1954).

UNITED KINDOM ARCHIVE DOCUMENTS

RESEARCH DEPARTMENT 1983
FCO RESEARCH DEPARTMENT NOTE NO 17/83 QUESTION OF THE BRITISH INDIAN OCEAN TERRITORY AT THE UNITED NATIONS FROM 1964. Nov. 1983. INTERNATIONAL SECTION RESEARCH DEPARTMENT. Obtained via FOIA.

PRO CAB 129/107/53, United Nations Debates and Resolutions, 1 Dec. 1961.
PRO CO 936/947, Discussion on British Indian Ocean Territories in the UN.
PRO CO 1036/1150, Defence brief.
PRO DEFE 68/310, British Indian Ocean territories: policy; includes paper presented to the Chiefs of Staff Committee 'US Defence Interests in the Indian Ocean'.
PRO FCO 32/484, Events leading to the establishment of British Indian Ocean Territory in November 1965.
PRO FCO 32/725, Resettlement of inhabitants of British Indian Ocean Territory.
PRO FCO 58/121, British Indian Ocean Territory: briefing.
PRO FCO 58/351, British Indian Ocean Territory (BIOT): discussions.
PRO FCO 58/352, British Indian Ocean Territory (BIOT): discussions.
PRO FCO 58/353, British Indian Ocean Territory (BIOT): discussions.
PRO FCO 58/354, British Indian Ocean Territory (BIOT): discussions.
PRO FCO 58/502, Discussions on British Indian Ocean Territory at UN.
PRO FCO 58/880, United Nations and British Indian Ocean Territories (BIOT).
PRO FCO 141/1428, British Indian Ocean Territory (BIOT): political matters, including United Nations.
M.C.C.(65), Mauritius Constitutional Conference papers, 1965.
PRO PREM 13/3320, MAURITIUS. Visits of Sir S Ramgoolam, Prime Minister of Mauritius, to UK: records of meeting with Prime Minister.

UN Documents

A/44/40, Report of the Human Rights Committee, 1989.
A/64/70, Implementation of decolonization resolutions adopted since the declaration of the 1st and 2nd International Decades for the Eradication of Colonialism / report of the Secretary-General, 23 Apr. 2009.
A/2910/Add.1, Draft International Covenants on Human Rights: observations by Governments, 27 July 1955.
A/6700/Add.8, Report 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 (covering its work during 1967), 1967.
A/7619, Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, 1969.
A/8723/Add.4 (Part I), Chapter XI, Report 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 (covering its work during 1972), 21 Sep. 1972.
A/AC.109/PV.284, Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples : verbatim record of the 284th meeting, 30 Sept. 1964.
A/C.4/SR.1557, General Assembly, 20th session, 4th Committee: 1557th meeting, 16 Nov. 1965.
A/C.4/SR.1558, General Assembly, 20th session, 4th Committee: 1558th meeting, 16 Nov. 1965.
A/RES/33/28 (A), Question of Palestine, 7 Dec. 1978.
A/RES/34/65 (A), Question of Palestine, 29 Nov. 1979.
A/RES/637(VII)A-C, The right of peoples and nations to self-determination, 1953.
A/RES/1541(XV), Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter, 15 Dec. 1960.
A/RES/2066(XX), Question of Mauritius, 16 Dec. 1965.
A/RES/2592, Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Brunei, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Montserrat, New Hebrides, Niue, Pitcairn, St. Helena, St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent, Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands, 16 Dec. 1969.

A/RES/2625(XXV), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 Oct. 1970.
CCPR/C/GBR/CO/6, Concluding observations of the Human Rights Committee : United Kingdom of Great Britain and Northern Ireland, 30 July 2008.
CCPR/CO/73/UK-CCPR/CO/73/UKOT/Add.1, Comments to the concluding observations of the Human Rights Committee on the United Kingdom of Great Britain and Northern Ireland and the Overseas Territories / by the Government of Mauritius, 28 May 2002.
CCPR/CO/83/MUS, Concluding observations of the Human Rights Committee to the submission of Mauritius 2005.
E/CN.4/Sub.2/404/Rev.1, The right to self-determination: historical and current development on the basis of United Nations instruments: study / prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1981.
E/CN.4/Sub.2/405/Rev.1, Héctor Gros Espiell, The right to self-determination: implementation of United Nations resolutions.
HRI/GEN/1/Rev.1, Compilation of General Comments and General Recommendations adopted by human rights treaty bodies: note / by the Secretariat, 29 July 1994.
S/PV.2366, Security Council official records, 37th year, 2366th meeting, 25 May 1982, New York, 25 May 1982.