A critical appraisal of Chagos Advisory Opinion rendered by the International Court of Justice

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Prepared under the supervision of

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Declaration

I, NYANGI YVONNE WAMBUI, do hereby declare that this research is my original work and that to the best of my knowledge and belief; it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: Y.W.N

Date: 8th January 2021

This dissertation has been submitted for examination with my approval as University Supervisor

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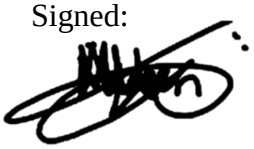

Allan Mukuki

Abstract

The concepts of equal sovereignty and territorial integrity have formed the bedrock of delegitimizing imperial rule. Despite some success of the decolonization movement, colonial rule endures in territories such as the Chagos Islands. The Islands were detached from the colony of Mauritius following an unconsented agreement between the United Kingdom and Mauritius. Later on, the UK engineered the transfer of Diego Garcia – the largest island on the Chagos Archipelago – to the US for the establishment of a military base. In February 2019, the ICJ issued an Advisory Opinion that rendered the continued colonial administration of the Islands by the UK unlawful. The Court referred itself to specific legal aspects; the right to self-determination, the principle of sovereignty and the *uti possidetis* principle. This paper analyses the validity of the Court's opinion by examining the development of the right to self-determination, colonially and post-colonially, in relation to the principle of sovereignty and *uti possidetis* and finally concludes by assessing the impact the Advisory opinion bears on international law.

List of abbreviations

ICCPR - International Covenant on Civil and Political Rights

ICESCR- International Covenant on Economic and Social and Cultural Rights

ICJ- International Court of Justice

UK- United Kingdom

UN- United Nations

UN Charter- United Nations Charter

UNGA- United Nations General Assembly

List of cases

1. *Legal consequences of the separation of Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports, 2019.
2. *Legal consequences of the separation of the Chagos Archipelago,* Verbatim Record, ICJ Reports 2018.
3. *The Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland,* Permanent Court of Arbitration, 2015.
4. *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970),* Advisory Opinion, ICJ Reports 1971.
5. *Case concerning East Timor (Portugal v Australia),* Judgement, ICJ Reports 1995.
6. *Legal consequences of the construction of a wall in the occupied Palestinian territory,* Advisory Opinion, ICJ Reports 2004.
7. *United Kingdom v Albania,* Individual opinion by Judge Alvarez, ICJ Reports 1949.
8. *United States v The Netherlands* (1928), Permanent Court of Arbitration.
9. *The Corfu channel case,* Judgement, ICJ Reports 1949.
10. *Legal consequences of the separation of Chagos Archipelago from Mauritius in 1965,* Written statement of Mauritius, ICJ Reports 2019.
11. *Fisheries case* (United Kingdom v Norway), Judgement, ICJ Reports 1951.

List of legal instruments

1. Convention on the rights and duties of states
2. *Treaty of Saint Germain-en-Laye,*
3. International Covenant on Civil and Political Rights
4. International Covenant on Economic and Social and Cultural Rights
5. United Nations Charter

CHAPTER 1

1. Introduction to research

1.1 Introduction

Decolonisation efforts derive from the principle of 'equal rights and self-determination of people.[1] Without a doubt, the development of the peoples' right to self-determination has a special place in the corpus of international law.[2] From its inclusion in the United Nations Charter, the concept of self-determination has evolved from a legal principle to a right of peoples that is not only invoked in the decolonisation context but also post-colonially.[3]

Defined in simpler terms, the right to self-determination is the principle by which people freely determine their political status, freely pursue their economic freedom and their cultural development.[4] With the acceptance of the right to self-determination, the process of decolonisation became a human right and lent the moral legitimacy of human rights to the anti-colonial struggles in Africa.[5] However, the claims for self-determination persisted even after the decolonisation process (with reference to Non-Self Governing Territories).

Despite the International Court of Justice ruling that the continued administration of the *Chagos Islands* by the British is a violation of the right to self-determination, the administration still persists. This paper delves into the analysis of the customary international law right of self-determination and how the continued British administration over the Chagos Islands violated this right.[6]

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[1] Article 1(2), *United Nations Charter*, 24 October 1945, 1 UNTS 16.
[2] Zyberi G, 'Self-determination through the lens of the International Court of Justice' 1(1) *Netherlands International Law Review*, 2009, 3.
[3] Zyberi G, 'Self-determination through the lens of the International Court of Justice' 2.
[4] Blay S, 'Changing African Perspectives on the Right of Self-Determination in the Wake of the Banjul Charter on Human and Peoples' Rights' 29(2) *Journal of African Law*, 1985, 147.
[5] Burke R, *Decolonisation and the Evolution of International Human Rights*, University of Pennsylvania Press, Pennsylvania, 2010, 34.
[6] *Legal consequences of the separation of Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports, 2019.

1.2 Background

Between 1814 and 1965, the Chagos Archipelago Islands (herein referred to as the Chagos Islands) were administered by the United Kingdom as a dependency of the colony of Mauritius. In 1965, as part of negotiations leading up to the granting of independence to Mauritius in 1968, the Mauritian government agreed to the detachment of the Chagos Islands on condition that it would not be ceded to a third party and would later be returned to Mauritius.[7]

Consequently, the Chagos Islands remained under British administration through the British Indian Ocean Territory Order of 1965.[8] Later on, the United Kingdom signed an agreement with the United States that allowed the latter to establish a military base on the island. The agreement provided that the people of the Chagos Islands (herein referred to as Chagossians) would be resettled. However, between 1967 and 1973, the entire population was forcibly removed and prohibited from returning to their home by virtue of the agreement.[9]

Efforts by successive Mauritian governments to assert sovereign rights over the Chagos Islands have proven to be futile.[10] The European Court on Human Rights held that because Mauritius had accepted compensation and renounced seeking further local remedies, they cannot claim victim and assert sovereignty rights over the Chagos Islands. On 30 January 2017, the African Union adopted a resolution that aimed to decolonise Mauritius and consequently the United Nations General Assembly (UNGA) requested the International Court of Justice (ICJ) to provide an advisory opinion that later opined that the U.K. is illegally administering Chagos Archipelago and is in violation of the Chagossians' human rights and should therefore exit the Chagos Islands and return sovereignty to Mauritius.

The United Kingdom however rejected the ICJ's advisory opinion by stating that it would only cede sovereignty when they no longer need the territory to help them keep safe.[11] The United Nations (UN) states that the decolonisation of Mauritius was done in a manner inconsistent with the right to self-determination hence continued administration consists of a wrongful act under

[7] Sterio M, 'ICJ advisory opinion in the Chagos Archipelago case: A case of self-determination re-examined?' International Law Girls, 6 March 2019 -< https://ilg2.org/tag/chagos-archipelago/> on 7 December 2020.
[8] *Chagos Archipelago,* ICJ, 14, para. 33.
[9] *Chagos Archipelago,* ICJ, 15, para. 43.
[10] See *The Republic of Mauritius v The United Kingdom of Great Britain and Northern Ireland* (1928), Permanent Court of Arbitration.
[11] -<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-questions-answers/ > on 23 March 2020.

international law. Despite this, the UK has been reluctant in relinquishing control over the Chagos Islands.

1.3 Statement of the problem

Predominantly central to the history of modern Africa is the right to self-determination because of the colonial period that many African states went through. With the dawn of the United Nations Charter, the right to self-determination heralded a new dawn for African colonies and non-self-governing territories such as the Chagos Islands. This included the right to self-government and territorial integrity - to freely determine one's political status, a hope for the African states. Self-determination was therefore identified as the tool that facilitated decolonisation in Africa.[12]

Although international instruments such as the UN Charter and the International Covenant on Civil and Political Rights (ICCPR) recognise the right to self-determination, the continued administration of the Chagos Islands still persists. The British government is reluctant to relinquish control over the Chagos Islands.

This research intends to analyse the resonance of the jurisprudence of self-determination in the context of decolonisation. In particular, the substantive aspects of the self-determination and its crystallisation under the auspices of international law. It further analyses the legality of the continued administration in light of the decolonisation process predominantly, that the continued administration hinders the Chagossians from exercising their right to self-determination and how this opinion can be harnessed in liberating the Chagossians.

1.4 Justification of the study

The debates around the right to self-determination exhibit a relationship between anti-colonialism campaign for Third World State and the right itself. Anti-colonialism necessitates the need for the decolonisation of states. The centrality of this right is evident through the

[12] Blay S, 'Changing African perspectives on the right to self-determination in the wake of the Banjul Charter on Human and People's Rights' 1.

Bandung Conference that recognised it was one of the central articles in the Final Communique.[13] With the official acceptance of the right to self-determination, the process of decolonisation itself became a human right and lent its moral legitimacy.

Unlike most inquiries into the right to self-determination that concern themselves with the aspect of secession, this paper concentrates on analyzing the same right under the context of the decolonisation of non-self-governing territories – The Chagos Islands. This research provides academic relevance into the inquiry of the origins of self-determination and the fact that the right goes beyond the aspect of secession.

1.5 Statement of aims and objectives

In order to shed more light on the *Chagos case,* the aim of the research is to analyse the impact of the British government's decision to continue administering the Chagos Islands.

The objectives of the paper are to;

1. Analyse the origin and development of the right to self-determination under international law.
2. Assess how self-determination is linked to international law concepts, particularly statehood.
3. To analyse the right of self-determination in the decolonisation context.
4. Assess the legal implications of continued British Administration of the Chagos Archipelago.

1.6 Research questions

1. At what point does customary international law, particularly the right to self-determination crystallizes as a rule under international law?
2. What is the link between the right to self-determination and the concept of statehood in international law?

[13] Burke R, *Decolonisation and the evolution of international human rights,* 35.

3. Does the right to self-determination apply in the light of decolonisation apply post-colonially?
4. What are the effects of the continued administration of the Chagos Islands?

1.7 Research methodology

The study will use a doctrinal methodology. The doctrinal approach will involve the review of relevant primary and secondary sources. These include statutes, case law, books, journals, case law, newspapers and online internet resources. Documents will be read and analysis done to avail information on the study.

1.8 Theoretical framework

Originally coined from the Greek term *autonomia,* autonomy was originally used in a political sense to refer to the independence or self-determination of a state.[14] Jean-Jacques Rousseau provides the basis for the extension of the concept of autonomy through his definition of freedom – 'a law that one prescribes to oneself'. Jean-Jacques Rousseau argues that freedom is obedience to a law that we prescribe to ourselves – implying some form of sovereignty. The challenge posed by such a conceptualization is the need to reconcile the individual's right to autonomy with the existence of the state, and in particular the state's right to create and enforce laws. He offers a 'simple and elegant' solution to this; that all must equally play a part in the creation of laws to which all will be equally subject. In Rousseau's world, an ideal state is self-governing.[15]

The concept of freedom and autonomy (synonymously used with the idea of self-rule) is conceptualized by Immanuel Kant as the ability to give oneself moral laws. An autonomous agent has the freedom from external constraints-freedom of action-[16] and has the capacity to take

[14] Allison H, 'Autonomy in Kant and German Idealism' in Sensen O (ed), *Kant on moral autonomy,* Cambridge University Press, Cambridge, New York, 2013, 129.
[15] Rousseau J, *Du Contrat Social,* Garnier Flammarian, Paris, 1966.
[16] Dworkin G, 'The concept of autonomy' in Christman J (ed), *The inner citadel: Essays on individual autonomy,* Oxford University Press, New York, 1989, 54.

and make responsible choices.[17] The freedom of the will is in indeed autonomy and a consequence of the self-determining structure of man to give himself his own formal principles.[18] The autonomy or sovereignty of the will leads directly to the sovereign status of individual agents as ends in themselves – a status describable as their moral autonomy. Agents with the power of self-volition are self-determining.[19]

To Immanuel Kant, agents are autonomous only if they choose principles of their action as the most adequate expression of his nature as a free and rational being. Kant's argument states that the fundamental assumption of moral philosophy is that actors are responsible for their action. From this assumption, it necessarily follows that agents are capable of choosing how they shall act. The fact that he may do what another asks of him is purely accidental and contingent. For the autonomous agent, there is no such thing as a command by another agent. A Kantian autonomous agent may listen to the advice of others but must decide for himself whether it is good advice.[20] In his ideal world, agents are self-legislating.

Freedom not only refers to this notion of non-interference in making decisions but also the fact that there ought not to be domination upon an individual or community. People's eagerness for freedom stems from a desire to not be ruled – the absence of a slave-master relationship.[21] If a community is controlled by the interest and opinions of another entity then such interference is arbitrary and impairs their political freedom.[22] Such a conceptualization of freedom requires a political structure that protects its citizens from arbitrary or illegal interference.[23]

Autonomy has three primary justifications; communitarian, democratic and protective. These justifications can respectively be formulated as follows: autonomy promoted identity within a group; enhances democratic participation; and autonomy protects groups.[24] Under the

[17] Dworkin G, 'The concept of autonomy'54.
[18] Reath A, 'Kant's conception of the autonomy of the will' in Sensen O (ed), *Kant on moral autonomy,* Cambridge University Press, Cambridge, New York, 2013, 51.
[19] Reath A, 'Kant's conception of the autonomy of the will' 51.
[20] Kant I, *Critique of practical reason*, 1788 as cited in Wiberg M 'Ambiguities in and clarifications to the concept of autonomy' in Skurbaty Z (ed), *Beyond a one-dimensional state: An emerging right to autonomy?* Martin Nijhoff Publishers, Netherlands, 2005, 182-183.
[21] Pettit P, *Republicanism: A theory of freedom and governance*, Oxford University Press, Oxford, 1997, 57.
[22] Pettit P, *Republicanism: A theory of freedom and governance*, 35.
[23] Honohan I, *Civic Republicanism*, Routledge, London, 2002, 184.
[24] Simon T, 'Paradoxes of autonomy: Tensions, traps and possibilities' in Skurbaty Z (ed), *Beyond a one-dimensional state: An emerging right to autonomy?* Martin Nijhoff Publishers, Netherlands, 2005, 197.

communitarian justification, the underlying goal of autonomy is to enable and to enhance individual development within a group. The communitarian political theory posits that individuals find meaning in their lives against a background of culture and tradition. People define themselves within the context of a community.[25]

In modern political theory, the concept of autonomy is linked with inviolability. The domain of human autonomy is defined in terms of putting aside constraints upon how other human beings may behave towards me and me towards them. These side constraints will define the class of rights which an individual has to protect their own domain of autonomy. With the duty to respect another individual's rights, there is some form of forbearance on some range of actions. Rights are therefore defined in terms of non-interference.[26]

The conceptualizations of autonomy leave out the social aspect and concentrate on individual autonomy.[27] This understanding is faulty as the autonomy of an agent is always constrained by the extent of the freedom of others- an assertion that will be investigated later on in this paper. Self-determination is never exercised in a vacuum but always on relation to others who have the same or competing rights. The idea of collective autonomy seeks to protect the interests of a group as whole. As such, tensions may arise between individual and collective autonomy.[28]

The extension of autonomy from an individual right to a collective one was envisioned by Vladimir Lenin who posited self-determination as a right on which communities would collectively determine their political status. In the context of decolonisation, the liberation and emancipation of peoples was of particular importance. He envisioned the right has having three components. Firstly, it could be invoked by ethnic groups on deciding their own destiny freely. Secondly, it was a principle to be applied during the aftermath of military conflicts and lastly, as an anti-colonial postulate to liberalize colonized countries.[29]

[25] Simon T, 'Paradoxes of autonomy: Tensions, traps and possibilities' 199.
[26] Nozick R, *Anarchy, state and utopia,* Basic Books, New York, 1974.
[27] Roepstorff K, *The politics of self-determination,* 60.
[28] Roepstorff K, *The politics of self-determination,* 54-56.
[29] Cassese A, *The right to self-determination: A legal appraisal,* 1st ed, Cambridge University Press, 1995, 16.

1.9 Literature review

Alfred Cobban argues that the development in theoretical and political thinking that took place during the second half of the eighteenth century emphasized the link between the state as a political organisation and the people as a social and cultural group - nationalism.[30] The State was no longer perceived as a juristic and territorial concept but also the fact that 'nationalities' ought to have their own states, so that the society composing a State should be congruent with the ethnically homogenous nationality.

He bases his analysis on the Wilsonian conceptualization of self-determination that is based on a Western democratic theory that advocated for popular sovereignty. People were free to choose their sovereign and the form of government they would want and eventually constitute a state. The foundation of the Wilsonian conceptualization of self-determination coincided with the breakup of Austria-Hungary after World War 1 and is based on the notion of sovereignty of the people.[31] He spoke against the unilateral power of the Austro-Hungarian Emperor to strip away the group rights.[32] Self-government according to Wilson meant that people from the same ethnicity had the right to self-determination. According to him, self-determination was a universal principle[33] and its object rested upon self-government and the protection of minorities.[34]

This meant that to achieve self-government, ethnically identifiable peoples or nations should have the right to select their own *democratic* government. It is only through a democratic government that people would be guaranteed against oppression and eventually ensures that the state does not infringe upon the rights and interests of the people.[35]

Cobban argues that territorial integrity, with regard to statehood, refers to the effective control over and possession of territory by a State. Hence, the forced loss of control of the state over part

[30] Cobban A, *The nation state and national self-determination,* 1st ed, Collins Publishers, 1969, 34-35.
[31] Batistich M, 'The right to self-determination and international law' 1 *Auckland University Law Review,* 1995, 1016.
[32] Sterio M, *The right to self-determination under international law*, 1st ed, Routledge Publishers, Canada, 2013, 10.
[33] Notter H, *The origins of the foreign policy of Woodrow Wilson*, Russell and Russell Publishers, New York, 1937, 291.
[34] Raic D, *Statehood and the law of self-determination,* 1st ed, Kluwer Law International, Martin Nijhoff Publishers, 2002, 181.
[35] Musgrave T, *Self-determination and national minorities,* 1st ed, Clarendon Press, Oxford, 1997, 22.

of its land, airspace or sea in any case implies the impairment of the State's territorial integrity.[36] The inclusion of Resolution 1514 in the United Nations Charter[37] – that prohibits any attempt aimed at the partial or total disruption of the national unity of a country – defeats attempts by some States to carve up territories under their administration. The impairment of the territorial unity was unaccepted in the absence of consent of the majority of the population.

While international practice may support the fulfillment of the traditional criteria of statehood before a State is recognised, modern developments of international law prove that the acknowledgement of statehood is based on the operation of the law of self-determination.

Nevertheless, Yoram Dinstein views self-determination as the ability of the self to formulate the criteria for belonging to a people. It has economic, social and cultural connotations, but its quintessence is the political status of the people entitled to independence from foreign domination.[38] Antonio Cassese particularly refers to the external facet of self-determination, with regard to non-self-governing territories. External self-determination requires an expression by the people, free form governmental authorities of others.[39] Therefore, the question of territorial integrity comes into play while considering external self-determination.

Politically, the concept of autonomy - as discussed by Matti Wiberg - is synonymous to self-determination. An autonomous agent is one who is exempt from arbitrary or coerced control and is especially free to choose, without intervention by external facts or agents. Notably, an autonomous entity needs not to be self-sufficient or self-sustaining. Autonomy does not require isolation from other agents and external fact but self-direction is of more importance than self-sufficiency. It is understood as both a necessary condition for moral activity and being free from coercion.[40]

Issa Shivji argues that the conceptualization of self-determination is a by-product of the bourgeois democratic revolutions and therefore represents an eminently western democratic

[36] Cobban A, *The nation state and national self-determination* as discussed in Raic D (ed), *Statehood and the law of self-determination,* 295.
[37] UNGA, *Declaration on the granting of independence to colonial countries and peoples,* UN A/Res/15/1514, 14 December 1960.
[38] Dinstein Y, 'Self-determination and the Middle-East conflict' in Alexander Y and Friedlander R (eds), *Self-determination: National, regional and global dimensions,* Westview press, Colorado, 1980, 247-250.
[39] Cassese A, 'The self-determination of peoples' in Henkin L (ed), *The International Bill of Rights: The covenant on civil and political rights,* Columbia University Press, New York, 1981, 98-101.
[40] Wiberg M 'Ambiguities in and clarifications to the concept of autonomy' 178.

principle. Closely related to the European concept of nation-state and state sovereignty, the right of self-determination is largely a western political and legal concept and its history, to the extent that it unfolds in Africa is tied to decolonisation.[41]

As discussed by Hillebrink Steve, it can well be argued that decolonisation is incomplete until the people have had an opportunity to make a free choice. The freedom of choice has been considered as the essence of self-determination.[42] International law has been reluctant in granting populations the status of 'peoples' entitled to self-determination and has only developed the right to free choice for the benefit of decolonisation. In order to effectively eradicate all forms of colonialism, the populations of the overseas territories of Western States have been given an unconditional right under international law to choose their own political status.[43]

Notably, the enforcement of such a right can be challenging, since no state would accept such an absolute right for its overseas populations, and the international community would not be prepared to enforce it in an absolute form.

1.10 Hypotheses

1. The right to self-determination is a *jus cogens* norms that applies *erga omnes* to all states and should therefore be upheld by each state.
2. The right to self-determination in the context of decolonisation does apply post-colonially.
3. The continued administration of the Chagos Islands is a violation of the right to self-determination that formed part of customary international law.

1.11 Limitations of the study

[41] Shivji I, 'The right of peoples to self-determination: An African perspective' in Twinning W (ed), *Issues of self-determination,* Aberdeen University Press, Aberdeen, 1991.
[42] Pomerance M, *Self-determination in law and practice,* Martin Nijhoff Publishers, London, 1982, 24-25.
[43] Hillebrink S, *Political decolonisation and self-determination,* Meijers Institute, Leiden, 2007, 43.

This study limits itself to the study of the right to self-determination in the context of decolonisation. It also concerns itself with the analysis of the external aspect of the right to self-determination.

1.12 Chapter breakdown

The introductory chapter lays down the background and justification of this study.

The second chapter analyses the history, origin and development of the right to self-determination.

The third chapter discusses the existing legal framework of the right to self-determination and how it has impacted the international law concept of sovereignty.

The fourth chapter discusses the current plight of the Chagossians with an in depth analysis in to the ICJ Advisory Opinion as well as the continued administration of the Islands by the British government.

Chapter five gives conclusions on the analysis of the research and draws inferences on the findings and provides for recommendations.

CHAPTER 2

2. Principle to right: The development of the right to self-determination

"Self-determination is not a mere phase. It is an imperative principle of action, which statesmen will henceforth ignore at their peril."[44]

Regarded as a *jus cogens* norm,[45] self-determination has provided the basis for political freedom and the formation of states globally.[46] This chapter provides an analysis into the historical origin of self-determination, its evolution in international law and its application post-colonially.

2.1 The emergence and development of the principle of self-determination

a. The American and French Revolutions

The development of the right to self-determination emerged from communities refusing to accept the exercise of power over them by a foreign governmental authority.[47] The exercise of this right came to light in the American and French Revolution.[48]

The United States of America's Declaration of Independence noted that to secure the inalienable rights of life, liberty and the pursuit of happiness can only be achieved if the people consent to the government that is ruling over them.[49] Similarly, the French Revolution was rooted in ideas that reflected and emphasized the right to self-determination. The replacement of the monarchical authority by a popular sovereignty, within the French Territory, led to the

[44] Shaw A, *The messages and papers of Woodrow Wilson,* 1924, 475.
[45] McWhinney E, *Self-determination of peoples and plural-ethnic states in contemporary international law*, Martin Nijhoff Publishers, Boston, 2007, 7.
[46] Raic D, *Statehood and the law of self-determination,* 180-184.
[47] Raic D, *Statehood and the law of self-determination,* 173.
[48] McWhinney E, *Self-determination of peoples and plural-ethnic states in contemporary international law,* 1.
[49] Boyd J, *The papers of Thomas Jefferson,* 1950, 432.

establishment of institutions that directly represented the people. The French Revolution was characterized by the requirement that a State has to have a common government decided upon by a collection of individuals. Hence, the government is a manifestation of the democratic will of a sovereign people.[50]

The proclamation of this right in the American and French Revolutions was significant with regard to the development of the right to self-determination. The political thought that permeated states was the urge to develop political consciousness and separate from foreign authority. The State ceased to be perceived only as a territorial concept and was now beginning to be considered as an entity that recognised and could be constituted by cultural and political communities – 'nation states'.[51] The nation-state concept formed the bedrock for nationalism – that emphasized the right of collectives within the right to self-determination.

During the nineteenth century, nationalistic sentiments globally emerged, with the Ottoman Empire, Greece and Poland seeking sovereignty and statehood. Vladimir Lenin echoes the sentiments that self-determination of nations included the right to politically separate nations from foreign rule and become independent states.[52]

In summation, not only did the fact that democratic governments ought to be a representation of the sovereign will of the people underpin the French and American Revolution but also that there is an objective right of nationalities to claim independence especially in cases of continued foreign administration.[53]

b. Wilsonian conceptualization of the right to self-determination

It was the Wilsonian conceptualization of the right to self-determination that gave the right to self-determination a place in international law. Despite the fact that he equated the right to self-determination with that of self-determination, his reference to the right to self-government meant that ethnically homogenous people have the right to democratically select their government. Such a process would be the only effective insulation against oppression and conflict.

[50] Cobban A, *The Nation state and national self-determination,* 34.
[51] Raic D, *Statehood and the law of self-determination,* 176.
[52] Roepstorff K, *The politics of self-determination,* 11.
[53] Raic D, *Statehood and the law of self-determination,* 177.

With the end of the World War 1, it became imperative for States to define principles by which peace should be settled. In his famous Fourteen Points, not only did he emphasize the nationalistic ideas but also that the conquered states – rather artificial empires – were illegitimate political entities. By doing so, he expanded the right to self-determination from being a nationalistic, internally related right to its application in the external dimension.[54]

The period between 1917 and 1920 saw a sharp escalation of resistance movements to imperial control and domination that would play central roles in anticolonial struggles. The ideas proposed by Wilson circulated around the idea that all peoples had the right to self-determination and that the League of Nations ought to be structured around states that were not only equal in status but power. The rhetoric within this era weakened the imperial conquests undertaken by states. The legitimacy of acquiring and dominating states diminished with the acceptance of the anticolonial language. Admittedly, the end of the World War 1 strengthened the voice of nationalists and weakened that of the Great Powers – it now became imperative for people to gain sovereignty and territorial integrity free from alien domination.[55]

However, the success of the exercise of this right post war was fully dependent on the extent to which one or more Great Powers supported minority rights.[56] Most of the territorial dispositions within this era were based on secret treaties, such as the annexation of South Tyrol by Italy.[57] Unfortunately, even with the end of World War 1, the right to self-determination was not included in the League of Nation's Covenant but it could be generally argued that the Mandate System of the League of Nations was predicated on the right to self-determination. The mandate system was a contemplation of international trusteeship as a step towards phasing out colonialism, introducing the idea of administration of States.[58] Even with this, minorities were not expected to react to the right to self-determination.[59] The minority guarantees that the Mandate system undertook failed to protect linguist and cultural identity and limited the political participation of minorities in exercising their autonomous right to choose a democratic government.

[54] Pomerance M, *Self-determination in law and practice*, 1.
[55] Manela E, *The Wilsonian moment*, Oxford University Press, New York, 2007, 11.
[56] Hannum H, 'Rethinking self-determination' 34(1) *Virginia Journal of International Law*, 1993, 5.
[57] *Treaty of Saint Germain-en-Laye*, 10 September 1919.
[58] Raic D, *Statehood and the law of self-determination*, 194.
[59] Hannum H, 'Rethinking self-determination' 7.

The limitation on its legal scope is best demonstrated in the *Aland Islands case*. In determining the status of the islands, the Commission of Inquiry both noted that the scope of the right to self-determination was vaguely expressed and hence left open to varied forms of interpretation.[60] Of relevance is that the Commission noted that the interests of the Aaland Islands' minority ought to be protected and safeguarded and that only under extreme oppression should the people exercise the right to self-determination. The failure to define what conditions constituted of 'extreme oppression' left the right open to various opinions that could possibly either limit the right or open it to broader forms of interpretation.

2.2 The United Nations and decolonisation

It is only after the establishment of the United Nations that the right to self-determination developed under customary international law. Recognised as one of the principles of the United Nations,[61] the scope of this right is guaranteed to *all* people whether colonized or not. The principle of self-determination, under the UN Charter, is mentioned twice. First in Article 1(2), in the context of developing friendly relations among nations in and second, in conjunction with the principle of equal rights of peoples.[62] In both instances, the reference to 'peoples' and 'nations' carried no connotation of ethnicity and culture and was a mere reflection of the fact that the United Nations comprised of different states.

The evolution of this right from a mere principle to being granted political recognition under international law perhaps can be best attributed to the decolonisation era.[63] Despite this recognition the Charter is vague as to the content of the right to self-determination as well as the application of the right, particularly to which 'people'. It did not define or distinguish between the various forms of self-determination, nor did it impose legal obligations on its Member states.[64] The regime established under the UN Charter did not require the immediate

[60] *The Aaland Islands Question,* Report submitted to the Council of the League of Nations by the Commission of Rapporteurs, 1921, 27.
[61] Article 1(2), *The United Nations Charter*.
[62] Article 1(2), *The United Nations Charter.*
[63] Hannum H, 'Rethinking self-determination' 12.
[64] Sterio M, *The right to self-determination under international law*, 10.

independence of colonies.[65] Colonial rule was characterized as a necessity for progressive development and failed to highlight the fact that it was an impediment to self-determination.[66]

Additionally, the UN Charter failed to protect minority groups seeking independence[67] and it is therefore only through various resolutions that the General Assembly provides insights as to the intended subjects and content.[68]

a. The Declaration on the Granting of Independence to Colonial Countries and Peoples

The Declaration on the Granting of Independence to Colonial Countries and Peoples asserts that that exploitation and subjugation of the right to self-determination is in direct violation of human rights. The right to self-determination is to all peoples and no fetters can be placed upon that right in relation to the achievement of independence and the territorial integrity.

This marked an important step in giving self-determination the legal effect and precision in international law. Here a non-self-governing territory was defined as a territory whose geographical location was separate – ethnically and culturally- from the administering state.[69] In as much as the resolution was an avenue of hope for colonial states, the right to self-determination had a caveat to it. Article 6 of the Declaration emphasized the validity of territorial integrity, and any exercise of the right to self-determination that aimed at the disruption of national unity and territorial integrity was incompatible with the purposes and principles of the United Nations, as stated in Article 2 of the Declaration. This meant that the exercise of this right prioritized territorial integrity over the need of people to form their own nation-state and defy the already existing borders.

However, the United Nations General Assembly adopted Resolution 1541[70] that recognised the free association, integration or independence of colonial territory as an exercise of self-determination. This linked the right to self-determination with the capability to self-govern.[71]

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[65] Batistich M, 'The right to self-determination and international law' 1018.
[66] Batistich M, 'The right to self-determination and international law' 1018.
[67] Sterio M, *The right to self-determination under international law,* 10.
[68] Raic D, *Statehood and the law of self-determination,* 201.
[69] UNGA, *Declaration on the granting of independence to colonial countries.*
[70] UNGA, *Declaration on the granting of independence to colonial countries.*
[71] Roepstorff K, *The politics of self-determination,* 16-17.

b. The declaration on the rights of indigenous peoples

The United Nations General Assembly adopted Resolution 637(VII) of 1952, where they required Member States to recognise and promote the right to self-determination of territories that are under administration.[72] Notably, the right to self-determination was explicitly named as the goal of the administration of non-self-governing territories.

In 1960, the United Nations General Assembly advocated for a gradual development of Non-self-governing territories towards the exercise of the right to self-determination.[73] However, with growing international pressure, it became pressing for the United Nations to abandon this gradual approach to phase out colonialism and replaced it with a policy that asserted an immediate grant of independence. This radical shift could be attributed to the slow progress made by non-self-governing territories toward achieving self-government. Administering states such as the United Kingdom ceased the transmission of information, required under Article 73, with regard to non-self-governing territories.

The ICJ affirmed the right to self-determination with respect to Trust Territories. The court stated that the subsequent development of international law in regard to non-self-governing territories made the principles of self-determination applicable to all territories.[74]

c. The International Court of Justice and its Advisory Opinions

i. The South-West Africa decolonisation case

The first case in which the ICJ considered the right to self-determination was the advisory opinion on Namibia.[75] There had been a longstanding conflict between the General Assembly and South Africa over the mandated territory of South West Africa (Namibia) that extended for a period of three decades. The General Assembly decided to terminate the mandate as South

[72] UNGA, *The right of peoples and nations to self-determination,* UN A/RES/637, 16 December 1952.
[73] UNGA, *Transmission of information under Article 73(e) of the Charter,* UN A/RES/1542 (XV), 15 December 1960.
[74] *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970),* Advisory Opinion, ICJ Reports 1971, 22.
[75] *Presence of South Africa in Namibia,* ICJ.

Africa failed to fulfil its obligations. Consequently, there were several resolutions that called upon South Africa to withdraw from Namibia – declaring that its continued presence in Namibia was illegal.[76] In the subsequent opinion, the ICJ pointed out that the development of international law in regard to non-self-governing territories made the principle of self-determination applicable to all of them.[77] The court validated the practice of the right to self-determination under international law.

The South West Africa case was instrumental in not only reaffirming the right to self-determination but also with regard to understanding the right for non-self-governing territories in the corpus of international law.[78] The Court did not only recognise the aim and scope of the right but also the illegal situation created by the mandatory occupying power.

ii. Western Sahara (Advisory opinion of 16 October 1975)

In the Western Sahara case, after Spain had agreed to decolonize Western Sahara, a dispute arose when both Morocco and Mauritania claimed the territory.[79] Following the General Assembly resolution 3292 (XXIX) of 1974, the ICJ was requested to issue an Advisory Opinion. In its Advisory opinion, the ICJ reaffirmed the practice of the United Nations with respect to the right to self-determination by mentioning the inclusion of the General Assembly Resolution on the granting of independence to colonial countries. The court further stated that the validity of this right is not affected by the fact that the General Assembly failed to consult the inhabitants of a given territory as to their constitutive government.[80] This statement clarified that there was a legal obligation to ensure that the inhabitants of a given territory fully participate in a democratic process to elect a legitimate government.

The Court was also of the opinion that the right to self-determination constituted two requirements, namely that the expression ought to be (a) free and (b) genuine. Unfortunately, the decolonisation process in Western Sahara took another turn in 1976 when Morocco annexed it and rejected all brokered proposals by the United Nations.

[76] UNGA, *Question of South West Africa,* UN A/RES/2145 (XXI), 27 October 1966, para. 3.
[77] *Presence of South Africa in Namibia,* ICJ, para. 152.
[78] Zyberi G, 'Self-determination through the lens of the International Court of Justice' 7.
[79] *Western Sahara,* Advisory Opinion, ICJ Reports 1975, para. 59.
[80] *Western Sahara,* ICJ.

iii. East Timor (Portugal v Australia)

Similarly, in the *East Timor* case, Timor had been under European rule and was eventually separated into West and East Timor. West Timor became part of Indonesia in 1954- ending the Dutch administration. By virtue of the UN General Assembly Resolution, East Timor was declared a non-self-governing territory whose decolonisation process began in 1974. Despite an express demand by the people to secure their territorial integrity and independence, Portugal – the administering state - rejected the claims of independence resulting into a forceful invasion by Indonesia into the territory of East Timor.[81]

This case is particularly important as the ICJ addressed the *erga omnes* character of the right to self-determination. The Court stated that the evolution of the right into that of an *erga omnes* nature makes it irreproachable and recognizable under customary international law.[82] The Court mentioned that the territory of East Timor still remained a non-self-governing territory and retained the right to self-determination. Eventually, the people of East Timor were granted a referendum where they preferred special autonomy within Indonesia.

The pronouncements by the ICJ indeed clarified the status of self-determination under international law. Not only did the Court affirm its existence but also unravelled its essence by recognising that it is paramount to pay due regard to the expressed will of the people. Notably, the Court failed to clarify the scope of *erga omens* obligations with regard to the right to self-determination.

iv. Legality of the construction of a wall in the occupied Palestinian territory

The armed conflict and occupation of Palestine by Israel has subsequently led to the denial of the right to self-determination by the Palestinian people.

It is incumbent upon each state to refrain from any forcible action that would deprive the people from this right, including acts of aggression, foreign military intervention and occupation.[83] Of importance in this case is that the Court failed to clearly define what constituted a Palestinian

[81] *Case concerning East Timor (Portugal v Australia),* Judgement, ICJ Reports 1995.
[82] *East Timor*, ICJ, 16, para. 29.
[83] Zyberi G, 'Self-determination through the lens of the International Court of Justice' 12.

'people'. However, the Court did recall that every state has a duty to jointly and separately promote the realisation of the principle of equal right and the self-determination of peoples.[84]

Ultimately, the ICJ's finding provided guidance in interpreting and developing the right to self-determination. Its legal contribution to the process of decolonisation cannot be overlooked as its opinions have led to political change in some of the cases discussed.

d. International covenants on human rights

There exists a natural linkage between the evolution of human rights and the need to protect the current rights of society is influenced by the expedient needs of the moment.[85] In 1948, the Universal Declaration of Human Rights consciously omitted the right to self-determination and only recognised rights related to the political life, liberty and social, economic and cultural rights.[86] One could argue that, despite whatever pragmatic reasons the United Nations had in omitting the right to self-determination, its absence could indicate reluctance by its Member states in ensuring self-determination of all peoples.

Nevertheless, to remedy this gap within the human rights context, the United Nations General Assembly adopted Resolution 545(VI)[87] that reaffirmed the right of all peoples and nations to have the right to self-determination. A further resolution declared that in all subsequent human rights' covenants, the right to self-determination ought to be a prerequisite to the realisation of all fundamental right.[88] The right to self-determination now is universally recognised as a human right. Article 1 of the International Covenant on Civil and Political Rights (ICCPR) is evidence of the universality of the right to self-determination. This Article recognises that 'all people have the right to self-determine'. Additionally, Article 1 of the International Covenant on Economic and Social Rights (ICESR) expressly recognises the need to freely determine their political,

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[84] *Legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion, ICJ Reports 2004, 182-183, para. 118.
[85] Roy A, 'Sovereignty and decolonisation: Realizing indigenous self-determination at the United Nations and in Canada' Unpublished Master of Arts Thesis, Cornell University, 1998.
[86] Baehr R and Gardenker L, 'Maintaining international peace and security' in *The United Nations: Reality and Ideal*, Praeger Publishers, Toronto, 1984.
[87] UNGA, *Inclusion in the international covenant or covenants on human rights of an article relating to the right of peoples to self-determination*, UN A/RES/545 (VI), 5 February 1952.
[88] UNGA, *The right of peoples and nations to self-determination.*

social and economic status. Undeniably, the inclusion of the right to self-determination meant that it had developed into a positive rule of international law.[89]

2.3 Self-determination under the United Nations Charter (UN Charter)

Being insufficiently defined, self-determination is often left to diverse interpretations and understandings with far-reaching effects on its application in international law and politics.[90] Frequently applied in the decolonisation context, the right to self-determination did not cease with states gaining independence. It has been invoked in disparate contexts by a group of people demanding for their religious, ethnic, cultural or linguistic freedom, almost always being in constant conflict with the principle of state sovereignty.[91] Non-self-governing territories such as the Chagos Islands therefore have a legitimate right to exercise self-determination. Hence, the scope of self-determination extends beyond the decolonisation era.

The success of self-determination – often characterized by a fanatical tendency - in African, Asian and Arab states has been rapid and significant.[92] The list of conflicts regarding nations that are clamouring for the right to self-determination is endless. States such as Western Sahara, Kosovo and South Sudan have been among those claiming this right. In most of these instances, self-determination has often been claimed with regard to separatist movements as an avenue to legitimize their challenge of state authority. The equation of self-determination with secession has ultimately led to the denial of full self-determination in particular contexts. These contexts include situations where people demand for autonomy or self-governance. Groups that invoke the right to self-determination often see secession as the only way to realise self-determination.

There is however one constant with the right to self-determination – the fact that minorities seek a greater degree of autonomy from an oppressive regime.[93] Proclaimed in Article 1(2) of the UN Charter is the right of peoples to exercise their right to self-determination. With regard to

[89] Griffioen C, *Self-determination as human right, Utrecht publishers*, Netherlands, 2010, 16.
[90] Roepstorff K, *The politics of self-determination,* 1.
[91] Roepstorff K, *The politics of self-determination,* 2.
[92] Burke R, 'Transforming the end into the means: The third world and the right to self-determination' in Burke R(ed), *Decolonisation and the evolution of International Human Rights,* University of Pennsylvania Press, 2010, 37.
[93] Roepstorff K, *The politics of self-determination,* 32.

administered states, the administering state ought to ensure that the interests and well-being of the permanent inhabitants of non-self-governing territories is upheld.

a. Short-comings of the law on self-determination

"*Central to the debate – which we do not claim to resolve- on the scope of the principle of self-determination is the fact that, though there is no doubt that all peoples have the right to self-determination, there is no universally accepted definition of the word 'peoples' nor the of the notion of self-determination."*[94]

i. Decolonisation

The right to be free from colonial domination has been primarily expressed by the popular will of the people.[95] Article 73 of the UN Charter requires that:

Members…which have or assume responsibility for the administration of territories whose people have not yet attained…self-government recognise…that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust…to develop self-government and to take due account of the political aspirations of the peoples.[96]

The above objective is achieved through the Special Committee on Decolonisation, the main United Nation's body concerned with the progress of people under colonial rule. Non-self-governing territories can achieve self-determination in three ways – emergence as a sovereign independent state, convergence with an independent state and entrance into free association with an independent state. The Comoro Archipelagos provides a good example of a population's decision to converge with another territory rather than seek independence.

In another dispute, the Special Committee presided over talks regarding the sovereignty dispute of the Falkland Islands between Argentina and the United Kingdom. The Falkland Islands inhabitants were prevented from participating in any decision-making leading the Committee to find that the right to self-determination was been hindered. Based off the two disputes described,

[94] Quebec study, 2007, para. 3.
[95] Batistich M, 'The right to self-determination and international law' 1023.
[96] Article 73, *United Nations Charter*.

one can perhaps view decolonisation as an integrative process[97] and not only in the secessionist light. However, beyond the decolonisation context self-determination is dependent on the territorial integrity of states and is reduced from its nationalistic application. In as much as the United Nations Declaration on Friendly Relations recognised the need for non-self-governing territories to have the right to self-determination, this right was confined to territories that the United Nations expressly recognised as colonies.[98]

ii. The subject of self-determination

It would be linear to only examine the content of the right to self-determination based on international instruments only. Professor James Anaya interrogates the right to self-determination based off a common ground of precepts and patterns of behaviour that are closely linked to the concepts of self-determination. He finds that the international norm of self-determination is grounded in the values of freedom and equality and is consequently applied to people with regard to the institutions of government they live under.[99] The rhetoric surrounding self-determination and independence may bring forth a misplaced focus on the territorial aspect on the right – diminishing its substantive content. The substantive aspect derives its core values from the ability to freely constitute one's government – either through a democratic process or an established monarchical structure - as well as the ability to continuously critic and participate in the legitimate governance structure chosen.[100]

During the decolonisation process, the international community noted that the colonial regimes violated the substance of the right to self-determination – under Anaya's model. The resultant principles of statehood and territorial integrity only came to remedy this violation and should not have evolved to become the core of the right to self-determination.[101] Taking such an understanding, the definition of the 'self' ought not to be narrowly interpreted to the extent of excluding minority groups. The subject of self-determination then become a 'people' whose

[97] Batistich M, 'The right to self-determination and international law' 1025.
[98] Batistich M, 'The right to self-determination and international law' 1025.
[99] Anaya J, 'A contemporary definition of the international norm of self-determination' in 3 (131) *Transnational law and contemporary problems*, 1993, 133.
[100] Anaya J, 'A contemporary definition of the international norm of self-determination' 145-150.
[101] Anaya J, 'A contemporary definition of the international norm of self-determination' 151-157.

constitutive right to form government and participate – economically, socially and politically – in the affairs of the that government are hindered.

In defining the subject of self-determination, there are objective and subjective components that come into play. Preliminarily, it is paramount for group members to think of themselves as being distinct and having objectively determinable characteristics such as a common language and ethnicity.[102] It is quite easy to determine whether a given community is a 'people' without attaching legal consequences to its definition. If a people consist of a community of individuals with identifiable traditions and historic ties to a given territory, then groups like the Kurds and this present dispute – the Chagossians – are the subject of self-determination.

The meaning of 'people' has its historical underpinning in the idea that indigenous people should be allowed to practice modes of self-government.[103] Furthermore, it could prove to be problematic by identifying 'people' with regard to self-determination as solely minority groups that are to be accorded minority rights. The connotation of minority rights may carry a larger set of linguistic, cultural and religious rights but not necessarily political.[104] Minority rights are defined as those rights that protect the existence of national, religious, linguistic or ethnic groups and facilitate the development of their identity and ensure that they can fully and effectively participate in all aspects of public life within the state.[105] This right is not synonymous to that of self-determination. For example, some states may view minority groups as populations attached to a territory, but do not qualify for protection under international law as those accorded to 'people'.[106] Perhaps Spain and the United Kingdom view the population of Gibraltar as a group inhabiting a territory – and may be accorded minority rights but not the status of a people (and the associated right to self-determination). Hence, not all minority groups qualify as people.[107]

Once the 'self' – rather the subject of self-determination- has been fully identified, full independence of the people can be achieved. With regard to non-self-governing territories, a category in which the Chagos Islands falls under, they may attain independence by emerging as a sovereign state, free association with an independent state or integration with an independent

[102] Hannum H, 'Rethinking self-determination' 35.
[103] Sterio M, *The right to self-determination under international law,* 16.
[104] Sterio M, *The right to self-determination under international law,* 17.
[105] Sterio M, *The right to self-determination under international law,* 17.
[106]Sterio M, *The right to self-determination under international law,* 18.
[107] Sterio M, *The right to self-determination under international law,* 18.

state.[108] Undoubtedly, there is no consensus as to the precise subject of self-determination. A restrictive interpretation allows for the application of this right only to people who have been colonized by an external power. However, a broader interpretation of this right as advanced by Antonio Cassese states that this right can be applied not only to people that have not yet gained independence but also to those living within independent and sovereign states.[109]

2.4 Conclusion

Conclusively, the language of the UN Charter remains ambiguous and despite the various international instruments encouraging this right, non-self-governing territories do not find an expressive right to independence. The state of non-self-governing territories is left to the administering power to decide. Despite Article 75 of the UN Charter calling for the promotion of the political, social, economic and educational advancement of the inhabitants of such territories, their progressive development may be hindered due to the vague definition of the right to self-determination.[110]

Thomas Franck argued that democracy was "on the way of becoming a global international entitlement, one that increasingly will be promoted and protected by international processes".[111] This can be seen throughout many states, just to name a few; when East Timor eventually voted to secede from Indonesia – it was recognised as a state by the international community. Similarly, when Kosovo seceded from Serbia, states globally accepted their secessionist quest. It may be argued, validly, that the right to self-determination ended once the decolonisation movement and foreign domination ceased after the Second World War – a question that the next chapter shall interrogate – however, is as it may, the right to self-determination has indeed evolved under international law.

Despite failures and successes, the fact remains that territorial boundaries have been altered due to the exercise of this right. Additionally, foreign domination has been ended due to communities and states claiming the right to self-determination. The preceding analysis makes it possible to

[108] UNGA, *Declaration on the granting of independence to colonial countries.*
[109] Cassese A, 'The Self-determination of peoples' 186.
[110] Roepstorff K, *The politics of self-determination,* 21.
[111] Franck T, 'The emerging right to democratic governance' 86 *American Journal of International Law,* 1992, 46.

understand and define the meaning of this right. The objective is fundamental – to ensure a free and genuine expression of the will of the people.

Indeed it would be naïve to assume that an understanding of this right would automatically point to how it may be implemented or effectuated among people. The core meaning of this right is indeed phrased generally, leaving open a number of definitive questions of whether it is confined to the colonial context or it extends beyond the decolonisation era – if so what has been its application thus far?

CHAPTER 3

3. Understanding self-determination in the post-colonial context

3.1 Introduction

In the Chagos Advisory Opinion, one of the prominent divergent views was whether the dispute, as characterised by the United Kingdom, is a bilateral dispute concerning the sovereignty over the Chagos Archipelago. The ICJ was of the opinion that the genuine issue between the two states was not solely on territorial sovereignty but the consequential effect of detachment on the decolonisation of Mauritius.[112] Such a stance received a myriad of reactions from the UN members, some of whom regarded sovereignty over administration of territories to be superior to the right to self-determination.

In contemporary international law, decolonisation implies the implementation of the right to self-determination. Mauritius submitted that the position in international law, as of 1965, was that no detachment could take place without the express consent of the people.

The aim of this chapter is to interrogate and analyse the concepts of sovereignty and territorial integrity in light of the right to self-determination and the role that consent of the people plays in this area. The scope of the application of self-determination post-colonially has been quite unclear and the lack of clarity could be attributed to the period when the Cold War ended and there was practical tension between principles of sovereignty, territorial integrity and the rights of individuals and group self-determination.[113] The tension that persists through the exercise of self-determination could be attributed to the rise and preoccupation with the idea of internationalism that has brought with it recognition that absolute state sovereignty is neither desirable nor possible.[114] Hence, in the decolonisation context, how does the Court balance and apply these principles?

[112] *Declaration of vice-president Xue*, ICJ Reports 2019, 145.
[113] MacFarlane N and Sabanadze N, 'Sovereignty and self-determination: Where are we?' 68(4) *International Journal,* 2013, 610.
[114] MacFarlane N and Sabanadze N, 'Sovereignty and self-determination: Where are we? 610.

3.2 Statehood and self determination

Nationalism dictates that every nation has the right to achieve statehood – to choose its government and to exist as a sovereign state, independent of others.[115] This forms the basis for any political entity – consent.[116] If a people later on realise that they are being economically exploited and culturally oppressed, then they have the right to resist or secede. The authoritative description as to the constitutive elements of statehood is contained in Article 1 of the 1993 Montevideo Convention of the Rights and Duties of State.[117] The traditional criteria of statehood are that a state ought to constitute of a permanent population, a defined territory, a government and the capacity to enter into relations with other states. Statehood is a legal theory that seeks to justify the attribution of statehood on objective criteria independent from political acts.[118] The territory gained with statehood forms a prerequisite for recognition[119] by the international society.[120]

Central to nationalism is the idea that peoples subjected to foreign domination have a right to self-determination.[121] The UN Charter reaffirms that the interests of the colonial peoples would take first priority in the administration of non-self-governing territories. The administering powers are mandated to develop the political, economic, social and educational advancement of the territories, while taking into account the political aspirations of the people.[122] This provision was met with hostility from the administering powers who maintained that the United Nations ought not to infringe upon their domestic jurisdiction -within the period of 1945 and 1970, many states claimed that the United Nations should not interfere in the administration of their non-self-governing territories – the 'colonial problem' should remain an internal affair of states.[123]

[115] Thiry L, 'Nation, state, sovereignty and self-determination' 19.
[116] Thiry L, 'Nation, state, sovereignty and self-determination' 19.
[117] Article 1, *Inter-American Convention on the rights and duties* (Montevideo Convention), LNTS, 19.
[118] Sterio M, *The Right to Self-Determination under International Law: Selfistans, secession, and the rule of the great powers*, 45.
[119] Article 1, *Inter-American Convention on the rights and duties.*
[120] Castellino J, 'Territorial integrity and the right to self-determination: An examination of the conceptual tools' 33 (2) *Brooklyn Journal of International Law,* 2008, 1.
[121] Summers J, *Peoples and international law,* Brill Nijhoff publishers, Netherlands, 2013, 533.
[122] Hillebrink S, *Political decolonization and self-determination,* 10.
[123] Hillebrink S, *Political decolonization and self-determination,* 10.

The importance of this analysis is that the UK argued that Mauritius was a state that could enter into binding international agreements. By 1965, Mauritius had a constitution, a legislative assembly, a defined territory and a permanent population.[124]

3.3 The principle of sovereignty

The concept of sovereignty is understood as a body of rule and attributes that a state possesses in its territory, to the exclusion of other states and in relation with other states.[125] It signifies independence – which is no more than the fact that a state has no authority over another[126] and consequently implies that others recognise the state's right to non-intervention.[127] In its Westphalian form, sovereignty includes the equality of states within the international community; a general prohibition on foreign interference with internal affairs; territorial integrity of the national state and an inviolability of international borders.[128]

With sovereignty came various controversial aspects; first, the question of who the rightful holder of sovereignty is; second, the internal and external dimensions of sovereignty and third, the absoluteness of sovereignty.[129] According to Jean Bodin, when people created the body of politic, they denied themselves of their political power and hence could not transfer it to the king who became the sovereign. Eventually, the sovereign prince – who he argues transcends the political whole – ceases to be part of the people and the body of politic. Hence, the concept of sovereignty, according to him is absolute.[130]

In the European medieval era, the political structure was hierarchically organized in terms of feudal obligation and a theological understanding of order and legitimacy, there was no exclusive jurisdiction as territories overlapped territorially and functionally.[131] The Middle Ages was later marked by the emergence of free cities and the consolidation of the existing monarchies began to

[124] Article 1, *Inter-American Convention on the rights and duties.*
[125] *United Kingdom v Albania,* Individual opinion by Judge Alvarez, ICJ Reports 1949, 30, para. 43.
[126] *United States v The Netherlands* (1928), Permanent Court of Arbitration.
[127] MacFarlane N and Sabanadze N, 'Sovereignty and self-determination: Where are we?' 611.
[128] Sterio M, *The right to self-determination under international law,* 50.
[129] Roepstorff K, *The politics of self-determination,* 46.
[130] Thiry L, 'Nation, state, sovereignty and self-determination' 13(1) *Peace Research,* 17.
[131] Bull H, *The anarchical society,* Columbia University Press, New York, 1977, 254.

bring the issue of jurisdiction into light.[132] In the post-modern context, Rousseau argued that sovereignty is vested with the collective people of a state.[133] The argument presented by Rousseau prevails in the form of popular sovereignty – for a state to be sovereign; it has to have supreme authority in its internal and external affairs free from foreign interference.

3.4 Territorial integrity and the *uti possidetis* principle

"…between independent States, respect for territorial sovereignty is an essential foundation of international relations".[134]

In the international system, territorial integrity reflects the need for stability and finality in boundary questions. This principle enables a state to exercise sovereign control over its independent territory.[135] In Resolution 1514, territorial integrity is mentioned four times. The first instance is the last preambular paragraph that speaks of the inalienable right that all peoples have to their national territory. Second, the fourth paragraph requires colonial states to respect the integrity of the national territory of dependent peoples. The third instance is in paragraph 6 that declares any attempt by an administering power to dismember partially or totally the national unity and territorial integrity of a country is in violation of the UN Charter principles. Lastly, paragraph 7 calls for the respect for the sovereign rights of all peoples and their territorial integrity. The relevance is that such provisions clarify that the unit for self-determination for colonial peoples is their entire territory.

However, in an ideally (perfectly) sovereign state system, states can act in any manner with respect to the territory of others because they are sovereign.[136] Such instances are evidenced through historical moments like the Napoleonic war- where states were at liberty to start wars for the purposes of conquering territory. This link between sovereignty and territorial integrity

[132] MacFarlane N and Sabanadze N, 'Sovereignty and self-determination: Where are we?' 612.
[133] Roepstorff K, *The politics of self-determination,* 46.
[134] *The Corfu channel case,* Judgement, ICJ reports, 15 December 1949, 35.
[135] Nanodkar S, 'Self-determination: A conflict between territorial integrity and secession' 7.
[136] MacFarlane N and Sabanadze N, 'Sovereignty and self-determination: Where are we? 613.

strengthened the principle of *uti possidetis juris*[137] – that suggests, in the case of newly independent states, their territory should match that of the previous dependent territory.[138]

More specifically, in the context of decolonising non-self-governing territories, the change from colonial status to an independent state was not to include any territorial change.[139] Hence, any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the UN Charter, except in cases where there has been consent from the people.

The United Nation's preference for independent statehood as the proper content of self-determination is tempered by the organization's need to protect the territorial integrity of its Member states.[140] When self-determination is primarily based on statehood then the subject of self-determination must be territorially based.[141] The narrative of decolonization in Africa, as advanced by the United Nations was based on the national self.[142] This means that independence was granted based on the colonial boundaries drawn by the colonial masters.

On one hand, the right to self-determination champions the idea that people have the right to freely express their will to determine their, political, economic and cultural status and on the other, *uti possidetis* maintains the idea of sanctity of borders inherited from colonial powers.[143] The fact the Declaration on Non-self-governing territories lacks a clear definition for a non-self-governing territory and fails to articulate the specific steps in dealing with the negligent administration of territories, presents a challenge in decolonising these territories. The UN Charter vaguely defines non-self-governing territories as those that have not yet attained full measure of government[144] – leaving no specific criteria for what 'attainment of a full measure of self-government' is.

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[137] MacFarlane N and Sabanadze N, 'Sovereignty and self-determination: Where are we? 613.
[138] Zacher M, 'The territorial integrity norm: International boundaries and the use of force' 55(2) *International Organisation*, 2001, 215-250.
[139] resolution 1514 (XV)
[140] Roy A, Sovereignty and decolonization: Realising indigenous self-determination at the United Nations and in Canada, 25.
[141] Hannum H, *Autonomy, sovereignty and self-determination*, 49.
[142] Neuberger, *National self-determination*, 70.
[143] Fadilah I and Adirespati, 'Self-determination and territorial integrity revisited: Reflecting Chagos Advisory opinion and its comparison with West Papua' 71.
[144] Article 73, *The United Nations Charter*.

The UN Charter makes it clear that self-determination of non-self-governing territories is to proceed at a pace dictated by the colonial administrators. More specifically, Article 73(b) of the UN Charter calls on the administrative powers to 'develop self-government…according to the particular circumstances of each territory and its peoples and their varying stages of advancement.'[145] Such paternalistic language can be explained by either economic self-interest concerns or concerns of premature independence. Content with incremental steps from the administrative powers, the Afro-Asian states drowned in their little influence instead of demanding for the right to self-determination.[146] Territorial integrity took precedence as can be seen in the example of the Soviet Union that denied independence to several countries such as Lithuania, Latvia and Estonia.[147]

3.4.1 Modification of the uti possidetis principle

The territorial boundaries drawn by the colonial powers are subject to change under strict conditions. First, if there is consent between the two parties; second, modification by international recognition; third; by acquiescence and fourth, in the interest of peace and security.[148] The practice on international law generally prohibits an administering power to detach colonial territories based on the right to self-determination and the principle of territorial integrity.[149]

The right to self-determination is principally defined territorially, nullifying arrangements that encroached on the political, social and economic life of a 'people' or taking back control of territories under the administrative powers.[150] Resolution 1514 affirmed the view that territorial integrity applied not only to states but also colonial territories that are yet to achieve independence and statehood.[151] At this particular point, the role of *uti possidetis* was already in

[145] Article 73(b), *United Nations Charter*.
[146] Simpson G, 'Diffusion of sovereignty: Self-determination in the post-colonial age' 267.
[147] Simpson G, 'Diffusion of sovereignty: Self-determination in the post-colonial age' 268.
[148] Shaw M, 'The heritage of states: The principle of *uti possidetis juris* today' 67(1) *British yearbook of international law*, 1996, 141-150.
[149] Fadilah I and Adirespati, 'Self-determination and territorial integrity revisited: Reflecting Chagos Advisory opinion and its comparison with West Papua' 75.
[150] Fadilah I and Adirespati, 'Self-determination and territorial integrity revisited: Reflecting Chagos Advisory opinion and its comparison with West Papua' 75.
[151] UNGA, *Declaration on the granting of independence to colonial countries.*

play as it recognised the fact that a colony was not yet a state hence the detachment of colonial territories was a violation of territorial integrity.[152]

In situations where decolonisation had already taken place, even with the change of sovereignty, international boundaries operated under the principle of continuity – based on the need to advance and protect the principle of territorial integrity.[153] Ultimately, one can conclude that Non-self-governing territories were protected under the principle of territorial integrity even before achieving independence. Subsequently, any attempt to impair or detach a colonial territory constitutes a breach of international law.

International practice reveals that almost always, claims of the right to self-determination take precedence over claims to a particular colonial territory. A closer analysis of such cases would be instructive.

a. Western Sahara

In 1974, when Spain had agreed to grant self-government to the colony of Western Sahara, both Morocco and Mauritania demanded the incorporation of the colony into their own territories. These claims were founded on the view that the historic ties with the colony dated from pre-colonial times; hence a grant of self-determination would violate the principle of territorial integrity.[154]

The UNGA requested an advisory opinion from the ICJ concerning the following issues; (1) whether Western Sahara, at the time of colonisation, belonged to no one, if not (2) whether there exist legal ties between Morocco and the Mauritian entity.[155] The Court found that there existed no legal ties of sovereignty and the process of decolonisation should be completed in line with the right to self-determination.

The Court, however, failed to establish the threshold for determining when there exist legal ties between two territories. In effect, there was no rule established as to the relationship between self-determination and territorial integrity. The implication of this is that there is a possibility

[152] Fadilah I and Adirespati, 'Self-determination and territorial integrity revisited: Reflecting Chagos Advisory opinion and its comparison with West Papua' 76.
[153] Raic D, *Statehood and the law of self-determination,* 296.
[154] *Western Sahara,* ICJ.
[155] *Western Sahara,* ICJ.

that self-determination claims can be curtailed by precolonial sovereign legal ties.[156] Nevertheless, the overall stance of the Court was that the right to self-determination was the overriding principle in the decolonisation principle.

In considering the separate opinions of the judges, it is evident that the Court favoured the primacy of self-determination. Judge Castro noted that, in as much as colonisation created ties and rights, these circumstances must be judged in accordance with the law in force at the time.[157] Therefore, whatever legal ties existed legally, they must be subject to the intertemporal changes in law.[158] The argument proposed by Judge Castro can be simplified as follows. When colonialism displaced precolonial sovereign ties, colonial authorities created new regimes that changed the status of territories in international law. In the decolonisation context, a new regime of rights has emerged, replacing the colonial era.[159]

This interpretative approach suggests that the purpose of decolonisation is not the restoration of political ties that existed in the colonial or precolonial era. Rather, decolonisation creates a new law of emancipation.[160]

The next section brings into perspective the interrelation between the principles of sovereignty and territorial integrity by analysing the role of consent, explicit or tacit, in catalysing or barring the exercise of the right to self-determination in the decolonisation context.

3.5 Self-determination in the decolonisation context: The role of consent

Decolonisation is often cited as the success story of the exercise of self-determination.[161] If the basis for the operation of the decolonisation process is self-determination, then its operations should be defined under the substantive criteria of socio-cultural needs.[162] Such a definition leads

[156] Shaw M, 'The Western Sahara case' 49(1) *British Yearbook of International Law,* 1978, 143.
[157] *Western Sahara,* ICJ.
[158] Blay S, 'Self-determination versus territorial integrity in decolonisation' 462.
[159] Blay S, 'Self-determination versus territorial integrity in decolonisation' 462.
[160] Blay S, 'Self-determination versus territorial integrity in decolonisation' 462 -463.
[161] Fadilah I and Adirespati, 'Self-determination and territorial integrity revisited: Reflecting Chagos Advisory opinion and its comparison with West Papua' 17 (1) *Indonesian Journal of International Law,* 2019, 70.
[162] Fadilah I and Adirespati, 'Self-determination and territorial integrity revisited: Reflecting Chagos Advisory opinion and its comparison with West Papua' 17.

to the implication that the decolonisation process did not come to an end after the Cold War but is an ongoing process of ensuring the social and cultural needs of a people are upheld.[163]

a. The legal status of Eastern Greenland

In the above dispute, the Norwegian Minister of Foreign Affairs informed his Danish counterpart that Norway would not make any challenges to Denmark's claim of sovereignty over the whole of Greenland. The Permanent Court of International Justice declared such a promise as unconditional and definitive. Norway then signed bilateral and multilateral treaties describing Greenland as a Danish colony. The PCIJ found that these treaties were binding upon Norway and she had barred herself from contesting Danish sovereignty over Greenland.

Similarly, the Lancaster House Agreement concluded between Mauritius and the UK provided that the British government would only issue sovereignty over the Chagos Islands to Mauritius if the matter remained unprotested in the public fora. At the Lancaster House Agreement, the then Premier of Mauritius during the detachment of the Chagos Islands declared that the excision of the Archipelago was a 'most judicious one.'[164] He publicly admitted that Diego Garcia does not belong to Mauritius and that the British government has full sovereignty over it.

Mauritius had enjoyed the comfort flowing from the Lancaster House Agreement by receiving several sums of money that was used for development. Therefore, it could be argued that any act by the Mauritian government in asserting claims over the sovereignty of the UK over the Chagos Island violated the principle of good faith as the agreement was on a quid pro quo basis.

The bias of the existing law towards stability in the international system explains the status quo that the sovereignty of an administering power or state in possession of a territory over a period of time cannot be contested without serious consequences for the international order. Such a conclusion begs the question of; when can the *uti possidetis* principle be circumvented?

b. The Chagos Advisory opinion

[163] Cristescu A, *The right to self-determination: Historic and current development on the basis of the United Nations instruments,* UN Doc E/CN, 23, para.54 from Fadilah I and Adirespati, 'Self-determination and territorial integrity revisited: Reflecting Chagos Advisory opinion and its comparison with West Papua' 71.
[164] Mauritius legislative assembly, *Report of the select committee on the excision of the Chagos Archipelago,* 1983, 10.

The overarching principle in exercising the right to self-determination in the above discussion is the need for the peoples consent. The Court is of the opinion that consent cannot be realised when one party is under the authority of the latter. Since the Chagos Archipelago was administered until November 1965 as a dependency of Mauritius, the decolonisation of the territory had to include the island. Under Article 73 of the UN Charter, an administering power of a non-self-governing territory is mandated to promote the well-being of the inhabitant and their self-government. By establishing a new colony (the BIOT), in order to construct a military base, were steps contrary to the aim of the UN.

In the Chagos Advisory Opinion, the Court concluded that the process of decolonisation of Mauritius was not lawfully completed in 1968.[165] Judge Iwasawa argues that this conclusion was based on the fact that the detachment of the Chagos Islands was not based on the free and genuine expression of the people and that the detachment was contrary to the principle of territorial integrity. At the time of detachment, the Court finds that the Chagos Archipelago was an integral part of the non-self-governing territory of Mauritius.

Furthermore, the will of the people was absent in the process that led to the separation of the Archipelago from Mauritius. Following a meeting between the British Prime Minister and the Premier of Mauritius was clouded with the ultimatum of detachment or no independence for Mauritius.[166] The intent was to use power to frighten the Premier into submission. The circumstances surrounding the consent were wholly unethical and repugnant to the free expression of his will. The subversion of this meant that the Premier of Mauritius' decision could not reflect the collective will of the people of Mauritius including the Chagossians.[167] In as much as the UK argued that the Mauritian Council of Ministers consented to the detachment, this could not be possible based off of how the Council was constituted. The Council consisted of 10 to 13 members who were appointed by the Governor. The important point about this Council is that every member owed his appointment to the Governor. He could act in his own discretion and

[165] *Chagos Opinion*, ICJ.
[166] United Kingdom foreign office, Record of a conversation between the Prime Minister and the Premier of Mauritius, 23 September 1965, 3.
[167] Separate opinion of Judge Robinson, ICJ Reports 2019, 329, para. 94.

show utter disregard for democratic governance.[168] This lack of real and effective power ultimately meant that Mauritius was in the hands of the United Kingdom and its representatives.

Besides, even if the detachment and the Lancaster House Agreement were legally valid, the Chagossian right to self-determination trumps them. The UN's practice when territorial integrity conflicts with self-determination is inconsistent. Nevertheless, self-determination generally prevails.

3.7 Conclusion

Territorial integrity and self-determination are competing principles in modern international law. Often times, the endorsement of one claim may imply a rejection of the other. In the decolonisation context, a balance is struck upon determining the nature of the intended beneficiaries in each case. This means that territorial integrity generally pre-empts claims of people residing within a state and similarly overrides self-determination where an administering power unlawfully detaches territories prior to independence.[169]

Over the past years, claims by states of territorial integrity have either triumphed or have been given serious consideration over those of self-determination – outside the decolonisation context.[170] The international community was more inclined to uphold the *uti possidetis* rule over claims that self-determination would lead to the growth of irredentist movements by the newly formed states.[171] If such developments persist in the international field, then it is highly likely to see more violent claims to this right and more people being oppressed under colonial regimes.[172] The right to self-determination has played a pivotal role in the widespread decolonisation. The application of this right is corollary to the principles of sovereignty, territorial integrity and *uti possidetis.* The right to self-determination has not been immune to varying interpretations that have led to inconsistent applications by the international society.

[168] Separate opinion of Judge Robinson, ICJ Reports, 329, para. 95.
[169] Blay S, 'Self-determination versus territorial integrity in decolonisation' 472.
[170] Gunter M, 'Self-determination or territorial integrity: The United Nations in confusion' 141 (3) *World Affairs*¸ 1979, 1.
[171] Fadilah I and Adirespati, 'Self-determination and territorial integrity revisited: Reflecting Chagos Advisory opinion and its comparison with West Papua' 72.
[172] Gunter M, 'Self-determination or territorial integrity: The United Nations in confusion' 1.

A failure to balance these principles has already resulted in a cluster of unsatisfied minorities, indigenous people and communities. Admittedly, there is no easy solution to the dilemmas posed by the claims to the right to self-determination in the post-modern world. There is however a need to critically analyse how these principles develop the application of the right to self-determination.

In the Chagos Advisory Opinion, the colony of Mauritius argued that its colonial territory was protected as a whole by the right to self-determination via an associated entitlement to territorial integrity. The Court upheld this claim over the territorial claims by the UK government. The understanding of these principles in this chapter provides an exploratory basis of analysing how the ICJ formed its rationale in determining that the continued administration of the Chagos Islands is a violation of the right to self-determination.

Undoubtedly, the development of the right to self-determination clearly introduced constraints upon the authority and capacity of the administering power. To permit the Colonial power 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 the peoples.

CHAPTER 4

The Chagos Advisory Opinion

4.1 Introduction

"…in the same way that a hot cup of coffee always cools (and never heats spontaneously), complex systems always move from the future, through the present and on to the past…"[173]

Following the discussion on decolonization, territorial integrity and the right to self-determination, the Chagos Advisory opinion demonstrates how administering powers had a duty not to detach administering territories unless there was explicit consent from the people. The Advisory opinion states that the decolonization process of Mauritius was not lawfully completed due to the United Kingdom's action.[174]

A central question in the ICJ advisory proceedings is whether there were existing obligations that ought to have prevented the United Kingdom from separating the Chagos Islands from the non-self-governing territory of Mauritius. This chapter attempts to answer this question on two bases. First, by examining how the Court applied the intertwining functionalities of the right to self-determination in the decolonization context in relation to the principle of territorial integrity and *uti possidetis.* Second, by analysing the place of the intertemporal doctrine in determining whether the continued administration of the Islands by the United Kingdom is indeed unlawful.

4.2 The Chagos Opinion and the principle of territorial integrity

Between 1814 and 1965, the Chagos Archipelago was under the United Kingdom's administration as a dependency of Mauritius.[175] As per section 90(1) of the Mauritian Constitution Order the colony of Mauritius is defined as the '…island of Mauritius and the dependencies of Mauritius.'[176] The Chagos Islands existed as part of Mauritius until 1964 when the United Stated expressed interest in establishing military facilities on the Diego Garcia Island – the largest island on the Chagos Archipelago. Following a series of discussions between the

[173] Mainzer K, *The little book of time*, Springer publishers, New York, 2002, 103-105.
[174] *Legal consequences of the separation of Chagos Archipelago from Mauritius in 1965*, ICJ.
[175] *Legal consequences of the separation of Chagos Archipelago from Mauritius in 1965*, ICJ, 13, para. 28.
[176] *Legal consequences of the separation of Chagos Archipelago from Mauritius in 1965*, ICJ, 13, para. 28.

United States and the United Kingdom, on 23 September 1965 the Lancaster House Agreement was concluded.[177] The agreement led to the detachment of the Chagos Archipelago from Mauritius to form a new and separate colony – British Indian Ocean Territory – that was set aside for defence purposes.[178]

At this particular point, the status of the colony of Mauritius was rather uncertain.[179] Their independence modalities had not been conclusively discussed, especially at a time where the United Kingdom expressed concerns of granting it independence.[180] The United Kingdom's stance drastically changed when negotiation began with the United States. In fact, the United Kingdom had been trying to obtain acquiescence from Mauritius to detach the island.[181] They did this by proposing independence to Mauritius in exchange for their consent to detach the Chagos Archipelago.[182]

After Mauritius gained independence in 1968, there have been several attempts to redress the separation of the Chagos Islands. The ICJ has interpreted the legality of this detachment in the light of the right to self-determination in the decolonization context in relation to the principle of territorial integrity. The Court noted that with regard to non-self-governing territories, the right to self-determination is territorially define, making the territorial integrity a corollary right to self-determination.[183] Any detachment process ought to have been sanctioned by the will of the people. The consent of the Mauritian people was ineffective at that particular time since they were unequally placed during the process. The Mauritian delegation did not possess any real executive or legislative powers, as all authority rested in the hands of the United Kingdom government.[184]

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[177] *Legal consequences of the separation of Chagos Archipelago from Mauritius in 1965,* ICJ, 13, para.32.
[178] Trinidad J, *Self-determination in disputed colonial territories,* Cambridge, Cambridge University Press, 2019, 84.
[179] Fadilah I and Adirespati P, 'Self-determination and territorial integrity revisited: Reflecting Chagos Advisory opinion and its comparison with West Papua' 77.
[180] *Legal consequences of the separation of Chagos Archipelago from Mauritius in 1965,* Written statement of Mauritius, ICJ reports, 2019, 42.
[181] Fadilah I and Adirespati P, 'Self-determination and territorial integrity revisited: Reflecting Chagos Advisory opinion and its comparison with West Papua' 77.
[182] Fadilah I and Adirespati P, 'Self-determination and territorial integrity revisited: Reflecting Chagos Advisory opinion and its comparison with West Papua' 78.
[183] Fadilah I and Adirespati P, 'Self-determination and territorial integrity revisited: Reflecting Chagos Advisory opinion and its comparison with West Papua' 79.
[184] *Fisheries case* (United Kingdome v Norway), Judgement, ICJ reports, 18 December 1951.

The United Kingdom argued that the right to self-determination did not become customary international law until the adoption of the Friendly Relations Declaration in 1970. It stressed that this Declaration was adopted by consensus after six years of negotiations and, hence, was more carefully considered than Resolution 1514. Whereas the former addresses the territorial integrity of a country, the UK notes that paragraph 7 speaks to the territorial integrity or political unity of sovereign and independent states. Accordingly, the UK argued that what was protected by customary international law was the territorial integrity of a non-self-governing territory prior to independence.

The Court also referred itself to the fact that the right to self-determination had been considered as a part of international law even before the adoption of Resolution 1514. The validity of this argument shall be interrogated in the next section through an analysis of the intertemporal doctrine.

4.3 The intertemporal doctrine

Max Huber in the 1928 Island of Palmas case outlined two branches of the intertemporal doctrine.[185] The first branch requires that the legality of an act be evaluated against the law in force at that particular time. The second branch demands that any change in the applicable law at that time be taken into account. The first element recognizes that a valid acquirer of a right or title, in line with the law at the time retains the subsequent right to continue exercising that right. However, the second branch acts as a caveat by recognising the fact that law in itself is dynamic and the manifestation of such a right cannot be kept constant.[186]

The doctrine of intertemporal law can only be understood through the concept of time.[187] It would be sufficient to show that the former law has yielded place to the new law – clearly established by general state practice or international treaties laying down the specific change in customary international law.[188] This stance is properly elucidated by Max Huber where he states:

As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case…a distinction must be made between the creation of rights and the

[185] *United States v The Netherlands* (1928), Permanent Court of Arbitration.
[186] Elias T, 'The doctrine of intertemporal law' 74 *The American Journal of International Law* 2, 1980, 292.
[187] Wheatley S, 'Revisiting the doctrine of intertemporal law' *Oxford Journal of Legal Studies,* 2020, 2.
[188] Elias T, 'The doctrine of intertemporal law' 293.

existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.[189]

To refer to law as dynamic could mean one of two things. First, the law at that time has moved from far past through the near past to the present and then the near and eventually far future.[190] Metaphysician, John McTaggart refers to this as the 'A-series'. Second, the dynamic nature of law can be somewhat static, in that it can be described as being permanently fixed in a relationship with other events – those happening earlier or later.[191] He refers to this as the 'B-series'. He seems to advance the A-series more as it possesses the idea that all events must have the intrinsic nature of evolving. This conceptualization of time forms a basis for the philosophical analysis of the evolution of events and law.[192]

James Crawford tries to reconcile the problems created with the intertemporal doctrine by using the Truman Proclamation made on 29 September 1945. The Proclamation enabled the United States to declare that it claimed exclusive right to exploit its continental shelf, making it the only state at that particular point to make such a claim. A day prior to the Proclamation the international legal position was that no state can claim exclusive rights to its continental shelf. This law eventually evolved and gave exclusive right to states to explore their continental shelves. Crawford notes that it would be odd to treat the Truman Proclamation as being unlawful. He posits the question that: 'If it was unlawful, at what point did it become unlawful?'[193]

Perhaps such a dilemma can be further explore through the 'B-series' conceptualization of time. In that if (1) The Truman Proclamation is adopted by United States in 1945 then (2) the law applicable is that which prevents the exploration of continental shelves (3) the Truman Proclamation is invalid and the United States cannot have the exclusive right to exploit its continental shelf.[194] Well, it is quite evident that a paradox exists – The Truman Proclamation

[189] *United States v The Netherlands* (1928), 845.
[190] McTaggart J, 'The unreality of time' 17 *Mind* 68, 1908, 458.
[191] McTaggart J, 'The unreality of time' 458-459.
[192] Wheatley S, 'Revisiting the doctrine of intertemporal law' 10.
[193] Crawford J, 'International law on a given day' in Crawford J, *International law as an open system: Selected essays,* 2002, 92.
[194] Wheatley S, 'Revisiting the doctrine of intertemporal law' 13.

did in fact lead to change in international law. Can it remain an invalid act? We ought to understand that customs evolve and the conclusions given by law may be subject to change over time.[195]

Evidently, the ICJ did not explicitly discuss the intertemporal doctrine in its 2019 Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius*, its conclusion in finding that the United Kingdom's continued administration largely depended on when the right to self-determination crystallised under international law.

4.4 The Chagos Advisory Opinion and the intertemporal doctrine

i. Arguments

Mauritius was initially a French administered territory in 1715 until it was ceded to the United Kingdom in 1814 by the Treaty of Paris. Between 1814 and 1965, the Chagos Islands were administered by the United Kingdom as dependency of the colony of Mauritius. On 8 November 1965, the UK established the British Indian Ocean Territory, eventually detaching the Chagos Island from Mauritius. In 1968, Mauritius gained independence without the Chagos Islands.[196]

In the Chagos Archipelago case, the United Kingdom argued that the detachment of the Chagos Archipelago Islands from Mauritius was not unlawful as international law did not recognise the right of the peoples to self-determination at the time. The point of contention between the two parties was *when* the right crystallised under international law and which law ought to be applicable. The arguments posited by the UK revolved around the consideration of the intertemporal principle. They pleaded that the Court should apply customary law as it stood at that time and not in light of how it has developed.[197] In recent cases, the ICJ refused to examine the legality of South Africa's extension of the apartheid policy to the trust territory of South

[195] Wheatley S, 'Revisiting the doctrine of intertemporal law' 14.
[196] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius,* 144-148.
[197] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius,* Written statement by the United Kingdom, 15 February 2018, para. 8.

West Africa[198] and the international lawyers had not accepted the customary status of the right to people's self-determination.[199]

The ICJ disagreed by stating that self-determination had crystallised as a norm in international following the adoption of General Assembly resolution 1514 (XV), and its customary status was affirmed by the adoption of the Declaration on Friendly Relations (1970).[200] According to the Court, this was a defining moment in international law and in consolidating state practice. In its 2019 Chagos Archipelago Opinion, the ICJ observed that international custom is closely linked to state practice and *opinion juris.*[201] The International Law Commission establishes that as long as there is proof of wide state practice, then there is no particular duration of time for a rule, right or principle to crystallise under international law.[202]

ii. Was the ICJ correct?

Following the thinking of the B-series conceptualization of time, one can summarise the United Kingdom's arguments as follows. (a) there is no consensus on the customary status of the self-determination norm as at the adoption of resolution 1514 in 1960 (b) the first consensus is the Declaration on Friendly Relations adopted in 1970 (c) the detachment of the Chagos Archipelago occurs in 1965 – earlier than the adoption of the 1970 Declaration – there is no violation of international law at this time.

On the other hand the ICJ represents a thinking that embodies the A-series. The Court begins by explaining that of importance is the determination of the relevant time period for the purposes of identifying the applicable law.[203] Consequently, the Court states that the period in focus is that from 1965-1968[204] and that it may also rely on legal instruments that postdate the period in question, when those instruments confirm or interpret the pre-existing rules and principles.[205] The Court's reference to the 1970 Declaration on Friendly Relations may be attributed to the fact that the ICJ could only look at materials that postdate the period in question, there was also no

[198] *Presence of South Africa in Namibia,* ICJ
[199] Wheatley S, 'Revisiting the doctrine of intertemporal law' 16.
[200] Wheatley S, 'Revisiting the doctrine of intertemporal law' 1.
[201] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius,* para. 149.
[202] ILC, *Draft conclusions on the identification of customary international law, 2018*, UN Doc A/73/10.
[203] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius,* ICJ, para. 139.
[204] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius,* ICJ, para. 142.
[205] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius,* ICJ, para. 155.

way of knowing which documents were to be adopted in future and the reference to pre-existing rules confirms that the doctrine of intertemporal law is non-retroactive.[206]

The development of international law is possible because international lawyers are constantly labelling, recognizing and characterizing it.[207] Looking back from the position of the ICJ now, the Court is correct in finding that there is an existence of a general practice accepted as law, including the materials that post-dated the detachment of the Chagos Archipelago in 1968. There are numerous examples where past precedents have affected present day arguments; the difference drawn between *lex lata* (the law that presently exists) and the *lex ferenda* (the law for the future).

iii. Implications of the intertemporal doctrine

The A-series conceptualization of time indicated that it is possible to solve the problem of the intertemporal doctrine by recognising that the ICJ can determine the applicable law with the benefit of hindsight.[208] The evolution of customary international law is marked by three distinct phases. The first being the period where there is consensus that the 'old' rule must be applied; second is the period of transition where some state practice and *opinion juris* will support either the old rule or the new rule and the third is when there is an agreement that the new rule ought to be applied. During the period of transition, the Court must apply the old rule as the evidence that the law is changing is insufficient and there could be a possibility where the law does not change at all.

When the third phase of the evolution of customary international law has been reached then the Court is free to acknowledge state practice and when the law crystallised under international law. The recognition of a shift in customary international law is earmarked by the following (a) period when there is an agreement that the old customary norm is to be applied (2a) the period when the new rule was crystallizing, but had not completed the process, when the old rule must still be applied (2b) the period after crystallization but the agreement on the existence of a new general practice had not been reached (3) the period where there is consensus as the application

[206] Wheatley S, 'Revisiting the doctrine of intertemporal law' 18.
[207] Schultz T, 'Life cycles of international law as a noetic unity: The various times of law thinking' King's College London law school, 2017, 6.
[208] Wheatley S, 'Revisiting the doctrine of intertemporal law' 22.

of the new rule.[209] Wheatley argues that the ICJ must apply the old rule until after there is consensus that a new rule has crystallised – this is all dependent on *when* the Court examines the issue.[210]

In the Chagos Advisory Opinion, the detachment of the Chagos Islands took place in 1965, three years before Mauritius gained independence in 1968. The ICJ dated the period of transition to the adoption of the General Assembly resolution 637 (VII) on 16 December 1952. This transition period ended in 1970 when the Declaration on Friendly relations confirmed the customary status of the right to self-determination. Had the ICJ examined this issue in the 1960s, then it would have concluded that there existed no right to self-determination. However, from 2019, the Court is in a position to determine when the crystallization took place.

4.5 Conclusion

The objective of this chapter was to determine whether the ICJ opined correctly concerning the issue of self-determination in the Chagos case. The intertemporal doctrine presents a problem of selecting which law is to be applied in determining a situation where customary norms have evolved. Similarly the principle of territorial integrity perhaps can draw its force of application from an understanding of the conceptualization of time by the intertemporal doctrine.

The UK not only succeeded in coercing Mauritius to agree on the separation of the Chagos Island but went ahead to create a new colony, the British Indian Ocean Territory that consisted of the Chagos Archipelago Island. This was all done despite the existing decolonization framework of the United Nations. The Chagos case is an illustration of how the principle of consent was manipulated to preserve supremacy of the UK within the international order.

Customary international law emerges from the actions of states; state practice and *opinio juris.*[211] The changed in behaviour that states exhibits in response to the actions of other states and events in the world, either constrains or frees the very same states that brought the customary rules into existence in the first place. This evolution is evidence by the development of the law on self-

[209] Wheatley S, 'Revisiting the doctrine of intertemporal law' 22.
[210] Wheatley S, 'Revisiting the doctrine of intertemporal law' 22.
[211] Wheatley S, 'Revisiting the doctrine of intertemporal law' 20-21.

determination from the President Woodrow Wilson's call for an independent state; to the decision to establish the League of Nations Mandate scheme in 1919; to the recognition of the special status of colonized territories in the UN Charter; to the adoption of the 1960 General Assembly resolution 1514(XV) and, finally, the agreement on the content of the 1970 Declaration on Friendly Relations which confirmed the existence of the right of peoples to self-determination.

Where the law changes over time to make new demands for the continued enjoyment of existing rights, states must comply with the requirements or risk the loss of rights already established. Following the crystallization of the right to people's self-determination, valid title could only be maintained where there was express consent from the people to the continued exercise of sovereign administrative power over them. This position was confirmed in the Chagos Archipelago Advisory Opinion.

CHAPTER 5

5.1 Conclusions and recommendations

European colonialism has been in existence for over 400 years and has resulted in inequality, loss of liberty, untold human suffering and flagrant violations of fundamental human rights in Africa. In the post-colonial context, the continued administration of the Chagos Archipelago Island as well as the displacement of the Chagossians is a direct contribution to the colonial narrative.

The United Nations, however, envisioned state practice that would ensure all states were placed on an equal platform, capable of enabling their inhabitants to freely and willingly determine their political, economic and social status. The right to self-determination has delegitimized the underlying concepts of trusteeships. Nevertheless, ideas and practices of colonialism have permeated the post-colonial world through the manifestation of international territorial administration by the administrative powers. This manifestation is characterized by the fact the colonial powers, in this case the United Kingdom, have refused to end territorial administration in the Chagos Islands

The Chagos Archipelago case is a battle for decolonisation of a people who have been systematically uprooted from their homeland and have been prevented from returning to the island. The ruling that the continued administration is in direct violation of the right of peoples to self-determination recognizes the plight and struggles of the Chagossian peoples. The wider ramifications of this advisory opinion extend to the legacies of colonialism and whether agreements struck between colonial powers and their colonies in the final stages before independence was granted could be seen as legitimate.

Perhaps one of the biggest flaws of the right to self-determination becomes evident in the post-colonial world; more specifically in the identification of non-self-governing territories under colonial rule. There is no clear cut definition, other than ‘a territory that has not achieved self-government’. The ICJ fails to unpack this statement, as to what it means to not have achieved self-government. Does it only encompass independence? If so, does it mean that the ability to

exercise this right is extinguished upon attainment of independence? Such pertinent questions expose the loopholes that the ICJ failed to critically address when tackled with the question on self-determination.

The discussions highlighted in this paper are a manifestation of the semantic block that exists when defining the right to self-determination. This block is evidenced by the court's silence on the *jus cogens* nature of the right to self-determination, and to whom it specifically applies to- often attributed to an agenda that strives to shrink the application of this right as it has been viewed to be quite radical, especially in the exercise of secessionist claims.

Undoubtedly, the ICJ delivered robust answers as to the question on decolonisation. More importantly, clarifying the crystallization of the right to self-determination in international law. However, the nuance of crystallization can only be understood through the intertemporal doctrine – that which was absent in the advisory opinion.

Objectively, it may seem that the ICJ advisory provides hope for the Chagossians to return home. However, the court's nature to directly address pertinent definitions and issues discussed in the above two paragraphs present a challenge in the realm of international law. The settlement of international disputes will reoccur as a challenge in either analogous or different cases relating to the right to self-determination and the need to end decolonisation in the post-modern world. The Chagos advisory opinion is more than a bilateral dispute between the UK and Mauritius. It provides an avenue where the UN has to reconcile its role in decolonisation with the material reoccurrence that take place in the global sphere.

Beyond calling the UK into compliance with the right to self-determination, there needs to be a collective effort by the UN to oversee the complete decolonisation of the Chagos Archipelago as well as a clearer definition of the *jus cogens* nature of the right to self-determination by the ICJ.

Conclusively, with respect to the interests of the Mauritians and the Chagossians, greater attention needs to be paid to the protection of their rights and interests as pressure mounts on the UK to withdraw from the Archipelago. This can only be assured through (a) a robust supervisory regime by the UN in overseeing the decolonisation of the Chagos islands (b) a clear outline of the resettlement programs of the displaced Chagossians that the UK and the Mauritius

government are to agree on (c) a more pronounced stance by the ICJ on the *jus cogens* nature of the right to self-determination and its role in the decolonisation process.

CHAPTER 6

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