Chagos and the ICJ – The Marine Protected Area

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1. Introduction

There has been considerable debate, presented before the International Court of Justice (ICJ or Court), regarding the scope of the request to the ICJ and the powers of the Court to express an opinion on the matter.¹ There does, however, seem to be general consensus in the arguments put before the ICJ, that it is now a rule of customary international law that there is a right to self-determination for former colonies. When it became so is debated. Integral to this is the self-determination of the whole of the territory encompassed in the current or former colony.² UNGA Resolution 2066(XX), registers the ‘deep concern’ of the GA in respect of ‘any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base’ and invited the UK (the administering Power) ‘to take no action which would dismember the Territory of Mauritius and violate its territorial integrity’.³ Arguably, the establishment of the Marine Protected Area (MPA) around the Chagos Archipelago on 1 April 2010, does this just as much as the establishment of a military base on Diego Garcia, because it evidences the exercise of sovereignty over the territory (which

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² The African Union refers to not only the right to self-determination but also other fundamental rights including permanent sovereignty over natural resources, Written comments of the African Union para 15 (11 May 2018). All written and oral submissions can be found on the International Court of Justice web site under Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion); see <www.icj-cij.org/en/case/169>.

³ See Written Statement of Brazil para 22 (28 February 2018).
must include its seas) by the UK. This article focuses on that Marine Protected Area.

2. The Chagos Marine Protected Area

In its submission to the ICJ, Mauritius stated that the MPA was established by unilateral announcement, Mauritius having no prior knowledge of this proposal until an article in the UK media dated 9 February 2009, was brought to its attention. It was made clear to the UK government in a Note Verbale of 10 April 2009, that such a proposal would require the consent of the government of Mauritius. When the UK pressed ahead without this consent, Mauritius instituted proceedings against the UK under Article 287 and Annex VII, Article 1 of UNCLOS. These were referred to arbitration (see below). Although, in the various written pleadings put before the ICJ, there is very little direct reference either to the MPA, or the UNCLOS Arbitral Tribunal award, both are relevant to Mauritius’ ‘interest in significant decisions that bear upon the possible future uses of the Archipelago’. In particular, it might be argued, that the rights to self-determination of former colonised people; the right to control over the territories and seas of a sovereign state; and the right of resettlement are all linked to the determination and consequences of an MPA in the EEZ around the islands of the territory. The only area excluded from the MPA is the waters around Diego Garcia, the locus of the American military base. The creation of the MPA – which

6 See however Written Statement of Brazil, para 26, in which the establishment of an MPA is described as ‘impairing the feasibility of a possible return of the indigenous population’ cross-referring to the Arbitral Tribunal Award 18 March 2015, see below (n 8).
7 The Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) Case Number 2011-03 (18 March 2015) Permanent Court of Arbitration, paras 298 and 547.
8 The establishment of the MPA was the culmination of a process of environmental measures taken to control the use of the sea around the Chagos Archipelago starting with the establishment of a Fisheries Conservation and Management Zone in 1991, and an Environment Protection and Preservation Zone in 2003. Mauritius objected to both. In 1977, Mauritius declared an EEZ around the Chagos Archipelago under the Maritime Zones Act 1977 (replaced by the Maritime Zones Act 2005). In 2009 Mauritius submitted preliminary information under the United Nations Convention on the Law of the Sea
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is a “no-take” marine reserve where all extractive uses are forbidden and where ‘(C)ommercial fishing is prohibited and strict limits are placed on fishing for personal consumption’, is clearly evidence of ‘UK administration’ referred to under the UN request, and goes to the heart of ‘territorial integrity’, ‘resettlement’ and the principle that self-determination includes the right of the people in those territories to freely express their wishes.

In the case of BIOT of course the Chagossians had been forcibly removed and their wishes do not seem to have featured in the separation of the Chagos Islands from Mauritius in 1965, nor do they seem to have been given a ‘free and genuine choice’. Even when the MPA was being proposed, representation from both Chagossians and Mauritius was limited. Indeed the drivers for an MPA were large national and international charities and research organisations. The wikileaks cable and indeed the overview provided by the UK Supreme Court in Bancoult reveals the extent to which the UK government was swayed by the environmental lobby. This is also apparent in the arguments raised before the UNCLOS Arbitral Tribunal by the UK:

“The idea of a large-scale marine reserve in BIOT waters originated with a private environmental charity, the Pew Environment Group (Pew) based in the United States. Pew identified BIOT as a candidate for its Global Ocean Legacy project … Pew and the CCT (Chagos Conservation Trust) continued to lobby the BIOT Administration, joining forces in April 2008 to form the Chagos Environment Network (CEN) with the aim of promoting a robust long-term conservation framework for regarding the extended continental shelf in the Chagos Archipelago Region (MCS-PID DOC May 2009) <www.un.org/depts/los/clcs_new/submissions_files/preliminary/mus_2009_preliminaryinfo.pdf>. There was no response from the UK.


11 Contrary to UNGA Resolution 1541 (XV), 1960.

12 R (On the Application of Bancoult No 3) v Secretary for Foreign and Commonwealth Affairs [2018] UKSC 3. In this case the Supreme court was being asked to consider the admissibility or not of this wikileaks cable and the information therein.

the BIOT. On 9 March 2009, the CEN and CCT formally launched their proposal for the creation of one of the world’s largest conservation zones in the BIOT.\textsuperscript{14}

It was the encroachment on fishing rights that triggered the UNCLOS arbitral proceedings against the United Kingdom brought by Mauritius. Indeed Mauritius has, from the outset, linked the MPA and its impact on fishing rights with questions of sovereignty.\textsuperscript{15} Documents presented to the International Arbitral Tribunal\textsuperscript{16} include extracts from various information papers, including one from the Commonwealth Heads of Government Meeting on 9 December 2009.\textsuperscript{17} In this it was made clear by the Mauritian Prime Minister: ‘Mauritius does not recognise the British Indian Ocean Territory and therefore, we cannot even discuss the issue of a Marine Protected Area with them’.\textsuperscript{18} The UK Prime Minister of the time, Gordon Brown, is reported in this communication as follows: ‘On the issue of Marine Protected Area, he assured me that nothing would be done to undermine resettlement and the sovereignty

\textsuperscript{14} Preliminary Objections to Jurisdiction Submitted by the United Kingdom, 31 October 2012. Arbitration under Annex VII of the United Nations Convention on the Law of the Sea: Mauritius v United Kingdom para 2.29 The Chagos Conservation Trust is a registered UK charity. It was claimed by the UK in its preliminary objections that the proposal for the MPA was that of the Chagos Environment Network not that of the UK government – para 2.32. It was also argued that the establishment of the MPA should have no impact on the question of resettlement – para 2.35.

\textsuperscript{15} The constitution of Mauritius includes the Chagos archipelago within the territory of Mauritius.


\textsuperscript{17} Information Paper CAB (2009) 953.

\textsuperscript{18} Mauritius v United Kingdom of Great Britain and Northern Ireland (n 7), para 35.
claim of Mauritius over the Chagos Archipelago and that he would put on hold this project’.  

Further litigation about the establishment of the MPA was pursued in Bancoult 3. In February 2018, the UK Supreme Court delivered its judgment. 

The Supreme Court was primarily concerned with the evidential admissibility, or not, of a ‘wikileaks’ cable, which suggested that one of the prime motivations for declaring an MPA around the BIOT was to prevent the resettlement of Chagossians. However, the case is also interesting for the light it throws on the processes leading up to the declaration, the players involved and the communications that took place. 

As indicated above, from the outset, Mauritius made a clear link between issues of sovereignty and the declaration of an MPA. When the MPA was first proposed in 2008/2009 the Mauritian government made it clear that its consent would be required as the Chagos Islands were under its sovereignty. Indeed the ‘risk’ of Mauritian sovereignty claims was recognised by the UK. In fact, the fishing rights of Mauritius (which included Chagossians as crew and boat owners) had been gradually choked off through the expiry of licences and non-renewal exercised under legislation which pre-dated the declaration of the MPA. Arguably,

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19 ibid para 36.
20 ibid note 12.
21 R (on the application of Bancoult No 3) (appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent) [2018] UKSC 3 (Bancoult 3). Judgment given on 8 February 2018.
22 By Proclamation No 1 of 2010, issued by Mr Colin Roberts, Commissioner for BIOT acting ‘in pursuance of instructions given by Her Majesty through a Secretary of State’, in this case David Miliband.
23 The EEZ over which the MPA was declared, had been established by Proclamation No 1 2003.
24 The extent to which Mauritius was aware of discussions before this date is unclear (Bancoult 3 para 25). See also note 5 above. It does however appear that UK and Mauritian officials met in July 2009 (Bancoult 3 para 55) and that matters were still unresolved when the MPA was declared in 2010.
25 Bancoult 3 (n 21) paras 26 and 34.
26 The law that applied was the Fishery Limits Ordinance and Proclamation No 8 1984. In 1991 the fisheries (Conservation and Management) Ordinance together with Proclamation No 1 1991 established a Fisheries Conservation and Management Zone of 200 miles under which licences, for which a fee was payable, were necessary for any fishing. The licensing of fishing continued under further Ordinances in 1998 and 2007.
therefore, there was no need to declare an MPA to frustrate Mauritian fishing - a point which gives some credence to the wikileaks material.

While the Supreme Court held that the leaked cable would have been admissible as evidence having been placed in the public domain through publication in various media sources, and no longer carried the confidentiality or privilege attached to diplomatic communications, the majority of the court held that its admissibility would not have led to a different outcome. Whether there was in fact an improper motive (to frustrate resettlement) behind the declaration of the MPA was less clear. The wikileaks cable clearly suggests that this was so. In the course of evidence it had been argued that resettlement was ‘off the table anyway as a result of the 2004 Order’. Lord Mance, in the Supreme Court, seems to have accepted that rather than disclosing an improper motivation, the Commissioner for BIOT was indicating the ‘practical consequences of an MPA to the Americans’. Lord Kerr, however, who gave a dissenting judgment, questioned why it would be necessary to declare an MPA over the whole of the Chagos Archipelago, if the Americans were not using all of it for a military base. He further states – referring to the meeting between United States Representatives and those of the British government on 12 May 2009 – ‘It is plain, … that the establishment of the MPA would prevent any resettlement of the islands’.

At present it would seem that the MPA is in limbo. The Arbitral Tribunal has found that it was declared in breach of UNCLOS procedure, and that ‘the United Kingdom is under a positive obligations to “ensure” that fishing rights “would remain available” to Mauritius’. The UK has

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27 Bancoult 3 (n 21), per Lord Mance, para 40. The 2004 Order referred to was the British Indian Ocean Territory Constitution Order 2004 which denied any right of abode in the islands.
28 ibid.
29 Lord Kerr, as above (n 28) para 84. See for example an admission by Mr Roberts, Commissioner for BIOT, with reference to his cross examination before the Divisional Court, that he had said to US officials that ‘the establishment of an MPA would in effect put paid to the resettlement claims’ Bancoult 3 (n 21), para 82.
30 Details can be found in Bancoult 3 (n 21) at para 82.
31 See Lord Mance, above (n 28) at para 55. The award was made under Annex VII of the United Nations Convention on the Law of the Sea, dated 18 March 2015, see (n 8).
32 Reports of International Arbitral Awards, Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland (18 March 2015) vol XXXI 359-606, para 453.
held that the arbitral award did not require the termination of the MPA.\textsuperscript{33} However, if the ICJ expresses an opinion that UK breached its international obligations to enable the Mauritian people (including Chagossians living in Mauritius) to effectively exercise their right to self-determination, then it has been suggested to the ICJ that the UK would have an obligation to ‘wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’.\textsuperscript{34}

It has been argued by a number of countries,\textsuperscript{35} that the ICJ has the power not only to express an opinion on the questions put before it by the UNGA but also on the consequences for the administering power of the resolutions of the General Assembly.\textsuperscript{36} What might these consequences be? If the ICJ’s opinion favours the UK, the question will be how the procedural steps necessary for the implementation of the MPA are to be achieved, especially if Mauritius refuses to come to the negotiating table.\textsuperscript{37} Certainly, it would seem that the fishing rights of Mauritius will have to be discussed and within these the fishing rights of Chagossians involved in the fishing industry. Indeed it is being recognised more broadly by the UK government that if it wants support for MPAs in its overseas territories it needs to consult ‘more effectively and transparently with governments and local communities … It should ensure that any concerns of the UKOTs are given due consideration before designating MPAs in their waters.’\textsuperscript{38} It might be argued ‘too little, too late’ in the case of the MPA around Chagos, but at the very least there will need to be compliance with the Arbitral Tribunal ruling. Any renewal of fishing will run counter to the no-take policy of the MPA so the nature and form of this MPA may need to be reconfigured. Similarly, the management of the

\textsuperscript{33} See for example, J Lunn, ‘Disputes over the British Indian Ocean Territory: August 2018 update’ House of Commons Library, Briefing Paper Number 6908 (22 August 2018) 11, para 2.2.

\textsuperscript{34} Written Statement of Belize (30 January 2018) para 4.4.

\textsuperscript{35} See for example, the Verbatim Record of presentations by Serbia, Thailand and Vanuatu given on 6 September 2018 at the Peace Palace, International Court of Justice, The Hague.

\textsuperscript{36} UNGA Resolutions 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967.

\textsuperscript{37} As claimed by the UK in its written comments to the ICJ, 14 May 2018 para 5.23.

\textsuperscript{38} House of Commons Environmental Audit Committee ‘Marine Protected Areas Revisited’ Tenth Report of Session 2016-2017 (21 March 2017) para 56.
MPA will need to be negotiated to involve a broader range of stakeholders. This is not in itself a major challenge. The International Union for the Conservation of Nature (IUCN) has been advocating for some time that better governance and more inclusive management of MPAs is needed, as have others critical of these large ‘paper’ parks.\(^3\)

If, however, the ICJ’s opinion favours Mauritius then the question is what will Mauritius do about the MPA? Mauritius in its written statement has proposed that ‘the UK should formally bring to an end its purported “MPA”, which was unanimously ruled to have been unlawful by the tribunal’.\(^4\) While it is possible that Mauritius will simply declare that there is no MPA around the islands, it might want to think twice about this for a number of reasons. These include: attracting international recognition for contributing to global targets on preserving marine diversity – at little cost; financial assistance – through the negotiation of reduced international indebtedness in return for declaring an MPA or access to climate change mitigation funding; and because an MPA could be a useful way of planning a phased return of Chagossians which might be less expensive to the Mauritius government. It is to these three possibilities that this paper now turns.

3. Retaining the current Marine Protected Area

The Arbitral Tribunal observed that ‘the MPA’s very existence bears upon the choices that Mauritius will have open to it when the Archipelago is eventually returned.’\(^5\) When that will be is not clear. Originally, the UK’s position was that the territory would be ‘ceded’ to Mauritius when it was no longer needed for defence purposes. If the ICJ expresses the opinion that self-determination was not completed because of the severance of the Chagos islands from Mauritius, this timeline may


\(^4\) Written statement of Mauritius (1 March 2018) para 7.58. The UK disputes this interpretation of the Arbitral Tribunal’s ruling.

\(^5\) Mauritis v United Kingdom (n 7) para 298. See also para 304.
change, although the UK has argued that no time-frame is specified by the arbitral ruling. It is recognised therefore, that what follows may be somewhat speculative at this stage.

Mauritius is a signatory to the Convention on Biodiversity\(^{42}\) and therefore has assumed obligations to contribute to Aichi targets on marine conservation. In fact there are already 21 marine protected areas in Mauritian waters,\(^{43}\) although these only represent a small percentage of the total marine estate of the country.\(^{44}\) The largest of these are Poudre d’Or Fishing Reserve (2,542 ha) and Grand Port Mahebourg Fishing Reserve (1,828 ha). A number of the existing MPAs were established some time ago and most are IUCN category IV.\(^{45}\) There is a Mauritius Marine Conservation Society, which launched a preliminary study into MPAs in 2009. This was completed in 2012, and at various stages Mauritius has received funding to support marine conservation from the EU, UNDP, the Global Environment Facility Trust Fund and the TOTAL foundation, among others. There is a Ministry of Ocean Economy, Marine Resources, Fisheries and Shipping, which has responsibility for marine biodiversity protection and conservation alongside oversight of coastal development, tourism and fishing. Permits are issued for artisanal fishing, other boats, commercial activity linked to tourism such as diving, snorkelling and glass-bottomed boats, and for ‘interference’ in the way of permanent or temporary structures.

Mauritius made clear in its presentations before the UNCLOS Arbitral Tribunal that ‘it places a very high value on the protection of the marine environment’,\(^{46}\) and it has been suggested anecdotally that Mauritius intends to retain the MPA.\(^{47}\)

\(^{44}\) The total area of MPAs is 10.4 square kilometres compared to a total marine estate of 1,278,139.7 square kilometres (above source).  
\(^{45}\) WIOMAS Marine Protected Areas of the Western Indian Ocean <www.wiomsa.org/mpatoolkit/Themesheets/MPA_details.pdf>. The IUCN guidelines on MPAs suggest six categories: 1a – Strict nature reserve; 1b – Wilderness area; II - National park; III - Natural monument or feature; IV - Habitat/species management area; V - Protected landscape or seascape; VI – Protected areas with sustainable use of natural resources. An MPA will fall into one of the categories where at least 75% of its total area meets the definition.  
\(^{46}\) Memorial of the Republic of Mauritius, vol 1 (1 August 2012) para 1.2.  
\(^{47}\) Opinion expressed under Chatham House rules at a workshop held at St Gallen, October 2018. Chagossians living in the Seychelles who have been largely excluded or
Mauritius has also clearly stated that:

‘(A)n MPA project in the Chagos Archipelago should not be incompatible with the sovereignty of the Republic of Mauritius over the Chagos Archipelago and should address the issue of resettlement, access to the fisheries resources, and the economic development of the islands in a manner which would not prejudice an eventual enjoyment of sovereignty. A total ban on fisheries exploitation and omission of those issues from any MPA project would not be compatible with the long-term resolution of, or progress in the talks on, the sovereignty issue.’

Chagossians themselves have argued that the MPA around Chagos is ‘not considered a model of ‘best practice’. Criticisms include unsound scientific/conservation rationale; doubtful conservation value; a hurried and flawed public consultation ‘where key stakeholders, including Chagossians were not adequately consulted’; no evidence of measurable economic value to BIOT – especially compared to the regulated fisheries prior to 2010; and the potential contribution of Chagossians ‘to the effective maintenance of marine conservation is systematically overlooked’. Clearly were they allowed to return Chagossians would want these matters addressed.

4. Using an MPA to reduce a financial burden

Engaging in a debt-swap arrangement has been a way forward for Seychelles. Under this arrangement Seychelles has committed 30% of...
its seas to marine protection,\(^{32}\) in exchange for the discounted transfer of a US$22 million national debt owed to the United Kingdom, Belgium, France and Italy, to the non-state organisation Nature Conservancy. The country has given an undertaking that future debt- repayments by Seychelles will be paid into a trust fund (the Seychelles Conservation and Climate Adaptation Trust) directed at (inter alia) the conservation of the Marine Protected Areas. The question is: would such an arrangement be attractive to Mauritius?

Mauritius is one of the more stable countries of Africa. The Mauritian national debt in 2017 was 64.9 percent of the country’s GDP, the inflation rate in February 2018 was 6.9\% (a considerable increase on the 1.3\% the year before), and the World Bank considers that GDP growth is good (4\% in 2017). Its main activities are off-shore banking and finance and tourism.\(^{53}\) It is regarded as a middle-income country with relatively good economic prospects, and the ambition to become a high-income economy by the 2020s. It is therefore, unlikely to see the need to trade off any foreign debts for a Marine Protected Area, while at the same time it may be hesitant to take on the costs of administering a large-scale MPA.\(^{54}\)

5. **Using an MPA in the context of resettlement**

The current MPA has featured strongly in the debates around resettlement, ranging from the Supreme Court judgment in *Bancoult 3*, considered above, to expert reports commissioned by the UK government.\(^{55}\)

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\(^{54}\) Costs proposed at the time of establishing a no-take MPA were around £1 million a year. Memorial of the Republic of Mauritius, vol 1 (1 August 2012) para 4.61. See more broadly A Balmford, P Gravestock, N Hockley, CJ McClean, CM Roberts, ‘The Worldwide Costs of Marine Protected Areas’ Proceedings of the National Academy of Sciences Jun 2004, 101 (26) 9694-9697.

\(^{55}\) See S Farran (n 14).
As it stands, there is little in the way of employment opportunity for Chagossians (apart possibly from being eco-wardens of some type\(^\text{56}\)). Tourism and commercial fishing have been ruled out under the current MPA model. Although Mauritius has opposed the creation of the current MPA, it has also indicated that it wants protection of the resources of the islands. While a fully no take MPA is clearly incompatible with Mauritius (and Chagossian) fishing rights claims (including but not limited to traditional fishing rights) and resettlement,\(^\text{37}\) this is by no means the only possible type of MPA. Indeed because the term is used so loosely the IUCN has come up with a number of possible types of MPAs.\(^\text{58}\)

Similarly, the IUCN has proposed different models for the management of MPAs,\(^\text{59}\) and clearly were the Chagossians to return to the islands, it would be appropriate to propose a management structure that included Chagossian representatives. It would also be possible to design a framework which supported the livelihoods of those who chose to resettle on the islands. This would require overcoming current objections by non-government environment and marine lobby groups, and others who provided expert opinions to the UK government, to tourism and fishing and probably necessitate choosing a more mixed use Marine Protected Area. Proposing different solutions would be evidence of the exercise of sovereignty by Mauritius and recognition of the indigenous rights of Chagossians. Although the UK claims that ‘a substantial legislative and policy framework was already in place when the MPA was established in April 2010’, this seems primarily to have facilitated ‘the implementation of the ban on commercial fishing’.\(^\text{60}\) Indeed, apart from controlling fishing by not issuing fishing licences, the Ordinances and

\(^{56}\) S Gray, ‘Giant Marine Park Plan for Chagos – Islanders may return to be environmental wardens’ The Independent (9 February 2009).

\(^{57}\) Oil and mineral exploitation has been prohibited under the existing MPA but this may well be an area which Mauritius seeks to develop and arguably has a right to under the 1965 agreement with the UK and the Arbitral award. See Written Statement of the United Kingdom (27 February 2018) para 5.22.

\(^{58}\) See (n 46).

\(^{59}\) Guidelines for applying the IUCN Protected Area Management Categories to Marine Protected Areas (supplementary to the 2008 Guidelines) 2011, <cmsdata.iucn.org/downloads/pa_categories_draft_marine_guidelines_field_testing_version.doc>.

Regulations in place before 2010 continue to apply and have not been replaced by specific legislation enacted for the MPA. If Mauritius regains control of the archipelago, therefore, it would seem that it has a blank canvas to work on.

At the same time, Mauritius might want to consider how it phases a return of Chagossians and/or other Mauritians to the islands and the related costs of doing so. There are no precedents for the unpicking of a Marine Protected Area (although there are no doubt examples of failed or failing MPAs and good and bad models of governance), so there are both opportunities and challenges confronting Mauritius and a range of models on which it might draw.

6. Conclusion

In the ICJ proceedings attention has been drawn to the provision of Article 73 of the UN Charter which refers to ‘due respect for the culture of the peoples concerned, their political, economic, social and educational advancement …’ and which imposes an obligation on an administering nation to adopt policies and measures which meet these aims. Whether the ICJ issues guidelines to the UNGA which appear to favour Mauritius or the UK, in either case it would appear that the Chagos Islands will continue to be administered by non-Chagossians. Mauritius has indicated – and indeed this is one of the matters on which the ICJ’s opinion is being sought, that it will re-settle the islands. In this case the Chagossians will be a minority people within Mauritius and possibly deserving of special human rights consideration. The UK has indicated – albeit somewhat obliquely – that it has not ruled this possibility out. If the Chagossians return to the islands then their well-being must be ensured by the administering power. This may well require a rethink of the MPA and the commercial and other activities that are permitted and supported by whichever authority governs the islands.

The arguments presented before the ICJ reflect very clearly concerns about inequalities of power, the legacy of colonialism and the continuing dependencies of former colonial states on former colonial powers. At the same time, and as emerges from the arguments presented to the ICJ, there are matters which go beyond the remit of individuals or individual coun-
tries and concern the international community as a whole. As with the development of the *ius cogens* on decolonization, those with less power – in the case of decolonisation those countries which had been colonised – may have little say in how the rules emerge. This argument might be applied to the current debate about the global commons, the control of seas beyond national jurisdictions, the protection of 10% (perhaps by the end of this year 30%) of the world’s oceans and other current debates which appear to undermine the idea of autonomous sovereign states. Indeed whereas ‘the winds of change’ was the mantra of the latter part of the twentieth century, ‘protecting the planet’ might be described as that of the current century. It might also be suggested that the declaration of large marine parks around overseas territories, and even around island states which are now independent, is a continuing manifestation of colonisation and the legacy of inequality of resources and bargaining power that flowed from decolonisation. This is rather ironic given that the UNGA declared 2010-2020 to be the Third International Decade for the Eradication of Colonialism.\(^{61}\) As Walter Lini (first President of Vanuatu) said:

‘The remnants of the past must be lifted from our ocean, for … until all of us are free, none of us are.’\(^{62}\)

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\(^{61}\) UNGA 65/119 Referred to by Serbia – Written Statement of Serbia (27 February 2018) para 5.

\(^{62}\) Opening words of the address of Mr McCorquodale on behalf of the Republic of Vanuatu to the ICJ on 6 September 2018, CR 2018/26 para 4.