

**Two points for the International Court of Justice in *Chagos*:
Take the case, all of it – It is a human rights case**

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The International Court of Justice is currently deliberating in the case of Chagos. Two cardinal points are humbly put forward, with a view to support the Court in its deliberation.

1. *First point: Take the case. All of it*

The International Court of Justice (ICJ or the Court) has developed a multitude of techniques over the years to avoid taking on a case. None of them should be applied in the case of the Chagos archipelago. The Court should take the case – and it should take all of it.

The Court has routinely weaselled its way out of cases in multifarious ways.¹ In *South West Africa (second phase)*,² the Court, after having volte-faced, found that Ethiopia and Liberia lacked a proper interest in the

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¹ As A Cassesse, 'The International Court of Justice: It is High Time to Restyle the Respected Old Lady' in A Cassesse (ed), *Realizing Utopia – The Future of International Law* (OUP 2012) 240 put it: 'often the Court's output fails to meet the expectations of the world community'.

² *South West Africa, Second Phase (Ethiopia and Liberia v South Africa)* [1966] ICJ Rep 6.



case. It thereby effectively turned a blind eye to South Africa's practice of apartheid in South West Africa.³ Less than three years before that, the Court had found it incompatible with its judicial integrity to speak on the plebiscite in the Northern Cameroons.⁴ Indeed before that, in the heyday of the League of Nations, when international adjudication was en vogue and States fully trusted the Permanent Court of International Justice, it reduced international law by a stroke of the pen to a set of prohibitions in *Lotus*.⁵ More than 80 years later, *Lotus* was again the Court's method of choice in the *Kosovo* advisory opinion,⁶ this time to the purpose of eluding comment on the ethnic cleansing that had taken place in Kosovo. Previously, in the *Nuclear Weapons* advisory opinion, the Court had resisted the application of *Lotus*⁷ – instead resorting to a *non liquet*,⁸ another way for the Court to say nothing. Most recently, the Court dodged the case which the Marshall Islands brought against the UK, India, and Pakistan for violation of disarmament obligations, on the procedural ground – never before avowed⁹ – that the Marshall Islands had failed to establish a dispute with the respondents.

There are, without doubt, valid grounds for not taking a case. Usually, these depend on circumstances. In *Phosphates in Morocco*, the Permanent Court of International Justice, for instance, was right to read the declarations accepting its jurisdiction restrictively, even if this meant that the Court had no jurisdiction in the case.¹⁰ The same is true of the Court's

³ In the recent past, the Court also weaseled out with a spectacular volte-face in *Application of CERD (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70 (see paras 127 and 129), after the Court had previously found that it had provisional jurisdiction in *Application of CERD (Georgia v Russian Federation)* (Provisional Measures) [2008] ICJ Rep 353.

⁴ *The Northern Cameroons (Cameroon v United Kingdom)* (Preliminary Objections) [1963] ICJ Rep 15, in particular 29, 34, and 38.

⁵ *The S.S. "Lotus" (France v Turkey)* PCIJ Series A10 No 9.

⁶ *ibid* see paras 51, 56, 82 and 83.

⁷ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 paras 21 and 22.

⁸ *ibid* para 105 lit E of the dispositive.

⁹ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) [2016] ICJ Rep 833 Judge Crawford dissenting 1093 para 1.

¹⁰ *Phosphates in Morocco (Italy v France)* (Preliminary Objections) PCIJ Series A/B No 74.



narrow reading of Iran's declaration in *Anglo-Iranian Oil Co.*¹¹ In recent past, the Court, in *Oil Platforms*, rightly confined the dispute before it to one article of the Treaty of Amity between Iran and the USA.¹²

Worryingly however, the Court has exhibited a tendency over time to duck, in particular, cases involving serious human rights violations. This tendency should concern not only those who care about Chagos, but more so, all who care about the Court. This was most notably evident in the second *South West Africa* and the *Northern Cameroons* decisions.¹³ These decisions were undoubtedly disastrous for the human rights on the ground, but they also dried up the Court's dock. The trickle of cases only resumed after the Court had come back, hat in hand, with the *erga omnes* ruling in *Barcelona Traction*¹⁴ and the *Namibia opinion*.¹⁵ Admittedly, the *Wall opinion*¹⁶ is a beacon of human rights and its effect of (further¹⁷) alienating Israel shows that addressing human rights violations also carries a price tag for the Court. But the price would have been comparatively low in the *Kosovo opinion*, where the Court should have spoken out against the massive human rights violations in Kosovo and tackled remedial secession rather than narrow down the question until it disappeared. It would have likewise been low in the recent case of the Marshall Islands where the Court's acknowledgment of the 'suffering which its people endured as a result of it being used as a site for extensive nuclear testing programs'¹⁸ rang hollow given the weakness of the United Kingdom's objection disputing the existence of a dispute. Can the contrast be any starker than with the PCIJ, which – almost a century ago! – had shown how a firm understanding of human rights can protect minorities?

¹¹ *Anglo-Iranian Oil Co. case (United Kingdom v Iran) (Jurisdiction)* [1952] ICJ Rep 93.

¹² *Oil Platforms (Islamic Republic of Iran v United States of America) (Preliminary Objection)* [1996] ICJ Rep 803.

¹³ *South West Africa, Second Phase* (n 2) and *The Northern Cameroons* (n 4).

¹⁴ *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain) Second Phase* [1970] ICJ Rep 3 paras 33 and 34.

¹⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16.

¹⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

¹⁷ Cf the unfortunate *Aerial Incident of July 27th, 1955 (Israel v Bulgaria) (Preliminary Objections)* [1959] ICJ Rep 127.

¹⁸ *Marshall Islands v United Kingdom* (n 9) 851.



See only the *Danzig* cases,¹⁹ the *Upper Silesia* cases,²⁰ and *Minority Schools in Albania*,²¹ all of which, in hindsight, make *Lotus* appear a one-off aberration (one in which, withal, the human rights issue had been largely insignificant).

Hence, in the Chagos case the Court would certainly commit a mistake if it did not take the case. Importantly, the case is unlike *Jurisdictional Immunities of the State*²² where the human rights violations that had occurred during World War II had previously been x-rayed and the subject of deep settlements, while some municipal courts in Italy refused to accept Germany's immunity as a state. In that case, the Court was right procedurally to confine any *jus cogens* violation to the merits which remained out of reach due to immunity – even if that meant steering clear of human rights. In *Chagos*, by contrast, state immunity is not at issue.²³ The Court is therefore free to ensure that the plight of the Chagossians does not remain unaddressed any longer.

Yet what about the Court's discretion in advisory proceedings? As is well known, the Court only once used its discretion to reject a request for an advisory opinion, in 1923 in *Status of Eastern Carelia*.²⁴ It should not reactivate this case law now. The danger, though, that the Court will have recourse to *Eastern Carelia* is more real than the statements made in the Chagos proceedings may suggest. For one, the Court seems to have grown fond of the PCIJ's methods of shrinking a case – see *Kosovo* – a fondness that may extend to *Eastern Carelia*. The Court, in a similar vein as in *Eastern Carelia*, rejected a case, for the first time, for lack of a dispute in the Marshall Islands' *Nuclear Disarmament* case.²⁵

¹⁹ *Jurisdiction of the Courts of Danzig* PCIJ Series B15 Advisory Opinion No 15; *Treatment of Polish Nationals in Danzig* PCIJ Series A/B Advisory Opinion No 44, and most clearly, *Consistency of Certain Danzig Legislative Decrees With the Constitution of the Free City*, PCIJ Series A/B Advisory Opinion No 65.

²⁰ *Certain German Interests in Polish Upper Silesia (The Merits) (Germany v Poland)* PCIJ Series A No 7 (the second affair, not the Chorzow factory), *Rights of Minorities in Upper Silesia (Minority Schools) (Germany v Poland)* PCIJ Series A No 15 and *Access to German Minority Schools in Upper Silesia*, PCIJ Series A/B Advisory Opinion No 40.

²¹ *Minority Schools in Albania* PCIJ Series A/B Advisory Opinion No 64.

²² *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Merits) [2012] ICJ Rep 98.

²³ On the so-called *Vencatassen*-settlement of 1982 in the Chagos case, see below under Second Point.

²⁴ *Status of Eastern Carelia* PCIJ Series B Advisory Opinion No 5.

²⁵ *Marshall Islands v United Kingdom* (n 9) Judge Crawford's dissent 1093 para 1.



What is more, *Eastern Carelia* is not, as Mauritius wants to make believe, an old case that is no longer applicable, and can be dealt with in a footnote.²⁶ Indeed, the Permanent Court seems to have rejected the case, primarily because Russia, at the time, was not a member of the League of Nations, and thus had subscribed neither to the Covenant nor to the Court's Statute, while the UK as a member of the United Nations has now accepted both Charter and Statute. *E contrario*, *Eastern Carelia* seems irrelevant for *Chagos*. However, this conclusion risks ignoring the background and the deeper meaning of *Eastern Carelia*. The role of dispute settlement was different in the League of Nations.²⁷ Under articles 12 and 13(1) of the Covenant, members consented to strong obligations to settle disputes by arbitration or judicial settlement²⁸ – obligations to which non-members such as Russia were not subject. The Charter, by contrast, in articles 2(3) and Chapter VI, commits the members of the United Nations merely to peaceful, not however to judicial or arbitral settlement. Therefore, under the Charter, being a non-member of the United Nations means less for judicial dispute settlement than under the Covenant of the League of Nations – the implication here being that membership becomes irrelevant for the question of acceptance of a case based on propriety. The Court, in other words, is precluded from discarding *Eastern Carelia* as irrelevant for *Chagos* merely on the ground that the United Kingdom is a member of the United Nations.

Given this, another reason why *Eastern Carelia* is not pertinent becomes relevant, namely that, at its core, the *Eastern Carelia* affair had been a bilateral dispute between Russia and Finland. The acceptance to give an advisory opinion would in that case have subverted the principle of consent to adjudication in inter-state disputes²⁹ (though, admittedly,

²⁶ *Mauritius, written statement* (1 March 2018) 174 footnote 543.

²⁷ See R Kolb, *The International Court of Justice* (Hart 2013) in particular 1027, footnote 11.

²⁸ See also Germany's argument that the Permanent Court of International Justice under article 14 of the Covenant could also address bilateral disputes in advisory proceedings (*Germany, written statement* (January 2018) paras 42-3; see also paras 50-54 for the role of the PCIJ in advisory proceedings, referring to literature and *Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)* PCIJ Series B Advisory Opinion No 12).

²⁹ As the Court put it in *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 para 33 à propos *Status of Eastern Carelia* (n 24): 'In certain circumstances, therefore, the lack of consent of an interested party may render the giving of an advisory opinion

this dimension only came into play because Russia was not a member of the League of Nations). However, it is in this regard that *Eastern Carelia* is to be truly distinguished from *Chagos*; *Chagos*, in contrast to *Eastern Carelia*, has never been a purely bilateral dispute. It is a case about decolonization (and human rights in that context, see Second Point below) – like *Western Sahara*³⁰ where the Court also accepted to give an opinion. Rendering an advisory opinion in *Chagos* would therefore not jeopardize the principle of consent to dispute settlement by court. It is for this reason that *Eastern Carelia* cannot serve as a basis for the Court to reject the case.

The Court should not adopt the manoeuvre Germany proposed,³¹ either, and limit its opinion to the aspects of the question that are relevant to the General Assembly. This is not because adopting this approach would amount to ‘infanticide’, as Paul Reichler stated on behalf of Mauritius.³² *Chagos* is not an infant; nor is there anything infantile in the question the Court is asked. Indeed, one of the problems is that *Chagos* has been treated like an infant for too long – by the UK, Mauritius, and the United Nations. The reason why the German manoeuvre should be dismissed is that it is based on an overly textual reading of the Court’s jurisprudence, as well as an excessive reliance on the Court’s tainted South West Africa case law. Germany’s reading also ignores the context in which the Court’s previous advisory opinions have been given. As if the world and the law – human rights law – had not changed over the last 100 years.³³

Even more importantly though, Germany’s manoeuvre invites the Court to give a legal answer to what is not a legal question. Discretion on

incompatible with the Court’s judicial character’. The Court in this and the preceding passage explained its ruling in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion) [1950] ICJ Rep 65 at 71, and confirmed the continued relevance of *Eastern Carelia*. Contra, though: Germany’s argument that the jurisdiction of the PCIJ in advisory opinion proceedings had been broader, see above (n 28). On the idea that the advisory proceedings as such subvert the principle of consent, see Kolb, *The International Court of Justice* (n 27) 1029.

³⁰ *Western Sahara* (n 29).

³¹ *Germany, written statement* (n 28) para 48 up to para 141.

³² *Mauritius, oral submission (verbatim record)* (3 September 2018) 10 am, para 31.

³³ This is not to delegitimize Germany’s attempt to find middle ground – how can an attempt at conciliation amount to a ‘trap’? *ibid* para 31.



a pragmatic reading should not be about the ‘real question’³⁴ or any constraint the Court’s past interpretations of discretion exercise on it now. Indeed, it is what it is, quite literally: discretion.³⁵ As long as an answer fits broadly into the question asked, the Court must have the freedom to adopt its own understanding of it.³⁶ This is why it would likely be better for the Court not to reason at all on discretion, which, of course, it did in the past and which now comes to haunt the Court.³⁷ Thus, on a proper – though admittedly not prevalent³⁸ – understanding of discretion, interested parties can only *invite* the Court to exercise its discretion in a certain direction, but the Court cannot be legally constrained in this exercise. Hence, the only thing I can do is respectfully invite the Court not to forgo this opportunity and to address the questions asked, fully, in all their dimensions, including the Chagossians and their Archipelago and the ‘callous disregard of their interests’³⁹ they experienced at the hands of the UK, while Germany can only invite the Court to exercise political restraint. But beyond the invitation, we stand powerless before the Court and have to accept the exercise of its discretion.

³⁴ For one use of the ‘real question’, though in the context of a bilateral dispute, see *The Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 6 at 22.

³⁵ Discretion is a notion we need to understand on its own, without calling upon the ‘authority’ of drafters of dictionaries such as the Oxford English Dictionary. As Kolb (n 27) 1092 writes: ‘[...] the idea of ‘discretionary power’ presupposes a residuum of free choice, one that cannot be reduced to legal considerations’. (Note that this quote is somewhat taken out of context; Kolb does not generally subscribe to the notion of discretion this article puts forward.)

³⁶ If this holds true in bilateral disputes submitted to the Court via special agreement, it should be true *a fortiori* for advisory proceedings, see *The Free Zones of Upper Savoy and the District of Gex (France v Switzerland)* PCIJ Series A/B No 46, 138: ‘From a general point of view, it cannot lightly be admitted that the Court, whose function it is to declare the law, can be called upon to choose between two or more constructions determined beforehand by the Parties, none of which may correspond to the opinion at which it may arrive. Unless otherwise expressly provided, it must be presumed that the Court enjoys the *freedom* which normally appertains to it, and that it is able, if such is its opinion, not only to accept one or other of the two propositions, but also to reject them both’ (emphasis added).

³⁷ As is well known the Court requires a ‘compelling ground’ to reject a case on the basis of discretion, see for instance *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 para 30 (with the relevant case law).

³⁸ On the way the Court handles discretion, see Kolb (n 27) 1083-1084.

³⁹ *United Kingdom, written statement* (15 February 2018) para 4.3.

2. *Second Point: This is a human rights case*

The United Kingdom wants the world to believe that the Chagos case is about sovereignty, a bilateral dispute with Mauritius on which the Court cannot adjudicate absent its consent. The answer of most of the rest of the world, including Mauritius, is that it is a case about decolonization on which the Court can indeed render an opinion. In truth, the Chagos case is not about sovereignty of either Mauritius or the United Kingdom; neither is it about decolonization of Mauritius. In reality, it is about the human rights of the Chagossians.⁴⁰ And this is what the Court should address.⁴¹

The questions intensely debated in The Hague – whether Chagos could lawfully be separated from Mauritius right before independence, whether at that point in time a colony was entitled to territorial integrity, whether self-determination was a legal right then, or if not when – all these questions are immaterial to human rights. What is material, rather, is that the UK by the time of the year 1973 had cleansed the Chagos Archipelago of the Chagossians; and that the UK has never asked the Chagossians whether they wanted to be removed from the Archipelago.

The separation of the Chagos Archipelago from Mauritius (assuming that this is what happened in November 1965) is notably inapposite to the Chagossians' human rights. Even the most ardent supporters of the UK or Mauritius would refrain from reading the Lancaster House Undertakings⁴² – which the UNCLOS Arbitral Tribunal was right to sanction⁴³ – so as to imply the Chagossians' consent to their removal.⁴⁴

⁴⁰ On the tension between sovereignty and human rights, see C Chinkin, 'International Law and Human Rights' in T Evans (ed), *Human Rights Fifty Years On: A Reappraisal* (Manchester UP 1998) 105-129.

⁴¹ As to the Court's freedom to do that, see the quote above from *The Free Zones* (n 36).

⁴² On these undertakings, see S Allen, 'The Operation of Estoppel in International Law and the Function of the Lancaster House Undertakings in the *Chagos Arbitration Award*' in S Allen, C Monaghan (eds), *Fifty Years of the British Indian Ocean Territory* (Springer 2018) 231-262.

⁴³ *Chagos Marine Protected Area (Mauritius v UK)* (18 March 2015) para 425. On the Award, see TD Grant, 'The Once and Future King: Sovereignty Over Territory and the Annex VII Tribunal's Award in *Mauritius v. United Kingdom*' in Allen, Monaghan (n 42) 215-230.

⁴⁴ In its written answer to Judge Gaja's question about the relevance of the will of the Chagossians it becomes evident, however, that according to Mauritius its expression of



Quite apart from that, if the separation was lawful, this operation was all that it took to turn the persons living in Chagos at the time, into a people collectively entitled to the human right of self-determination, as well as individually, to human rights. If nothing else, the separation created the relevant frame of reference in that regard, namely for the purpose of determining the rights-holders. One may call this ‘othering’.⁴⁵ If, on the other hand, the excision was *unlawful*, then too are the Chagossians entitled to human rights, though in this case not *vis-à-vis* the UK, but Mauritius. While their rights would, perhaps in that case, not strictly entitle the Chagossians to full external self-determination – though a remedial point of view would support this – they certainly entitle them to return to the Archipelago and take possession of the islands. This consequence does not depend on whose fault it was that they were purged from the Archipelago. In other words, no matter how the separation is regarded, the Chagossians’ human rights were violated, and they are entitled to remedy.

At which point in time exactly the human rights provisions became applicable to the Chagossians is not decisive, either. Even if one ignores the coherent trajectory of universal human rights from the Universal Declaration⁴⁶ to the Covenants⁴⁷ and beyond, and chooses to accord decisive weight to the moment of bestowal of said rights, the sole fact that the Chagossians have been deprived of human rights until the present day

will absorb that of the Chagossians (*Mauritius, written reply to Judge Gaja’s question* (6 September 2018) in particular para 4). The UK replies: ‘Mauritius appears to have in mind to settle its nationals generally, but only its nationals. In its understanding, “resettlement” would both extend beyond Chagossians yet not cover all Chagossians (those who do not have Mauritian nationality). It is noteworthy that Mauritius says that if it exercised sovereignty over the Chagos Archipelago, it will allow return and resettlement “in accordance with the laws of Mauritius” [sic]. (*United Kingdom, comment on the written reply of Mauritius to Judge Gaja’s question* (12 September 2018) para 8, emphasis in original, quoted without references.)

⁴⁵ See ‘Essential Points on the ICJ Chagos Advisory Opinion’, Video from the workshop at the University of St. Gallen, <www.youtube.com/watch?v=gbgLthyInhU> at 7.40, Sebastian Schnitzenbaumer. On ‘others’ more generally, see A Orford (ed), *International Law and Its Others* (CUP 2006).

⁴⁶ Universal Declaration of Human Rights, UNGA Res 217 (III) (10 December 1948) notably art 9: ‘No one shall be subjected to arbitrary arrest, detention or *exile*’. (emphasis added).

⁴⁷ International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171, notably art 1 on self-determination and art 13 on expulsion (though of aliens).

suffices to establish a present-day violation of their rights.⁴⁸ Their removal and the maintenance of the ensuing situation amounts to a continuous violation which, if one is fond of technicalities, occurred for the first time at the entry into force/crystallization of human rights.⁴⁹ It is not just a delayed repercussion of a measure which was lawful at the time it was taken. This is not the same situation as in *Phosphates in Morocco*⁵⁰ where the Court was right to confine the relevant events to the past.⁵¹

What then is to be made of the inapplicability to Chagos of the United Nations Human Rights Covenants, alleged by the UK? The controversy surrounding the withholding of human rights from colonies through restricting the territorial scope of the rights is well known⁵² and

⁴⁸ In this sense also, though from the perspective of the rights of indigenous peoples: A Schwebel, 'International Law and Indigenous Peoples' Rights: What Next for the Chagossians' in Allen, Monaghan (n 42) 319-357.

⁴⁹ Alternatively, the Constitution Order of 2004 preventing resettlement on the Chagos Archipelago could be a measure to be assessed under human rights law as it stood in 2004. For the legality of that Order under British law see *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* (No. 2) [2009] 1 AC 453; for this case, see Stuart Lakin, 'Justifying *Bancoult* (No 2): Why Justice Hercules Must Sometimes Disappoint Us' in Allen, Monaghan (n 42) 9-41.

⁵⁰ *Phosphates in Morocco* (n 10).

⁵¹ See also ILC Articles on State Responsibility, art 14, referring to 'a breach having continuous character' ILC YB II(2) (2001) 59; note the elaborations in this regard in the arbitral award in *Bilcon v Canada*, 17 March 2015, PCA No. 2009-04, paras 258 et seq. (with relevant case-law).

⁵² See with regard to Chagos Peter Sand's and Antoni Pigrau's articles in this *Questions of International Law Zoom Out*, and more generally R Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (OUP 2008). See also Consideration of Reports submitted by State Parties under Article 40 of the Covenant - Concluding Observations on United Kingdom of Great Britain and Northern Ireland, UN Human Rights Committee, CCPR/C/GBR/CO/6 (30 July 2008), urging the United Kingdom to include Chagos in its next periodic report (recommendation 22, on 6); the United Kingdom left Chagos out of its seventh report and gave an evasive response: Seventh Periodic Report to the Human Rights Committee, United Kingdom, CCPR/C/GBR/7 (29 April 2013) para 206, 48. See also General Comment no 31, UN Human Rights Committee, CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 10; as to General Comments under the ICCPR, see H Keller, L Grover, 'General Comments of the Human Rights Committee and Their Legitimacy' in H Keller, G Ulfstein (eds), *UN Human Rights Treaty Bodies – Law and Legitimacy* (CUP 2012) 116-198. In a sense, the selective application of law in the case of Chagos follows a tradition practised by the empires towards their imperium; see M Craven, 'Colonialism and Domination' in B Fassbender, A Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 862-889 at 882-883, for the 'plurality of institutional forms' (882) in the British Empire.



need not be repeated here.⁵³ Irrespective of that, the possible territorial inapplicability of human rights is irrelevant in the Chagos case. This is because the persons whose human rights have been violated have been living in the United Kingdom, where they moved at some point after their eviction and where they unquestionably fall within the scope of human rights in all regards. (The same, of course, applies to Mauritius and the Seychelles where a significant number of Chagossians live) The argument that the territorial carve-out somehow haunts the persons wherever they go does not hold water⁵⁴ – or at least not under the Covenants.⁵⁵ This seems especially true when the violation at issue was *not* a one-off.

Furthermore, it is true that there was a settlement in 1982 in which Chagossians signed off on their removal in return for individual lump sums, the so-called *Vencatassen*-settlement.⁵⁶ This settlement was sufficient ground for the European Court of Human Rights in 2012, when it was seized with the case of the Chagossians, to deny them the status of victims and dismiss their case.⁵⁷ However, it is respectfully submitted that the Strasbourg Court ignored that 12 islanders *held out* from the settlement on their own free will.⁵⁸ The Strasbourg Court should not have deferred to the UK domestic courts in this regard. Moreover, the Seychelles

⁵³ On the uses and misuses of territory more generally, see D-E Kahn ‘Territory and Boundaries’ in Fassbender, Peters (eds) (n 52) 225-249.

⁵⁴ It would require a curious inverse application of the effects doctrine; on that doctrine see B Simma, ATh Müller, ‘Exercise and Limits of Jurisdiction’ in J Crawford, M Koskeniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 134-157 at 140-141; and H Charlesworth, C Chinkin, *The Boundaries of International Law - A Feminist Analysis* (Manchester UP 2000) 143.

⁵⁵ Under the European Convention of Human Rights this is precisely the case, though, as per the reasoning of the European Court of Human Rights: *Chagos Islanders v UK* (11 December 2012) 35622/04 para 63. See for this and the difference between the European Convention and the United Nations Covenants, which do not contain a clause concerning the applicability of human rights in colonies, R Wilde, ‘Anachronistic As Colonial Remnants May Be...’ Locating the Rights of the Chagos Islanders as a Case Study of the Operation of Human Rights Law in Colonial Territories’ in Allen, Monaghan (n 42) 175-214 in particular 177-178.

⁵⁶ *Chagos Islanders v UK* (n 55) para 12. On this settlement, see R Gifford, ‘How Public Law Has Not Been Able to Provide the Chagossians with a Remedy’ in Allen, Monaghan (n 42) 55-84 at 58-60.

⁵⁷ *Chagos Islanders v UK* (n 55) paras 78-80.

⁵⁸ *United Kingdom, written statement* (n 39) para 4.13, 61: ‘It is understood that only 12 persons refused to sign these renunciation forms’.

and the Seychellois Chagossians were not involved in the *Vencatassen* settlement. How then could that settlement cover the Chagossians present in the Seychelles? The incompleteness of the *Vencatassen* settlement is the crucial aspect for the International Court of Justice when it comes to the human rights of the Chagossians in the context of the advisory opinion.⁵⁹ Finally, the European Convention on Human Rights does not include the human right of self-determination, whereas the two UN Covenants in common article 1 do. The Strasbourg Court's ruling can therefore not be interpreted so as to sanction the idea that a permanent opt-out from self-determination is permissible. This, once more, steadily dictates the course which the International Court of Justice should take: It should apply the panoply of human rights, including self-determination, to the Chagossians – wherever they are.

The non-return of the Chagossians to the islands when a window opened in 2000 for four years is again immaterial.⁶⁰ It does not have the effect of extinguishing the human rights of the Chagossians, nor does it transform these rights into theoretical or 'symbolic' rights.⁶¹ The islands belong to the Chagossians regardless of whether they currently inhabit them. This is not only so because they were previously expelled from these lands, but also because the rights of the Chagossians cannot be presumed to have been lost at any point. Rather, they endure – as sovereign

⁵⁹ There are some signs of acknowledgment of these facts in the UK submissions: *United Kingdom, comment on the written reply of Mauritius to Judge Gaja's question* (n 45) para 10: 'If it were appropriate to focus on the population of the Chagos Archipelago, the voluntary renunciation by Chagossians [note of the author: not of *the* Chagossians] of all claims arising out of their removal from the Chagos Archipelago, following the payment by the United Kingdom of compensation, would be a factor of great and determinative importance [note of the author: but still just a factor], as follows not least from the decision of the European Court of Human Rights in *Chagos Islanders v United Kingdom in 2012*' (quoted without reference).

⁶⁰ *United Kingdom, written statement* (n 39) para 4.24, 64. The window opened as a result of the *Bancoult (No. 1)* case, see Gifford (n 56) 60-62; see also p 68 on why it closed in 2004: The relevance of the military base in Diego Garcia for the war in Iraq.

⁶¹ *United Kingdom, written statement* (n 39) para 4.27, 66, quoting from Lord Hoffmann for the majority in *Bancoult 2* (n 49).



entitlement endures without much exercise,⁶² especially in cases of authority in exile.

Finally, practical obstacles should not deter the Court from adjudicating firmly on the human rights of the Chagossians. It is well within the realm of the possible to organize the exercise of self-determination of the Chagossians today. The relatively few Chagossians who hold an entitlement can be reached by today's means, even though they may be spread across several states. *This* is reality, an incontrovertible fact.⁶³

3. Conclusion

The current proceedings constitute the ideal occasion for the International Court of Justice to focus on the Chagossians and their human rights, which have undeniably been violated, rather than just on the United Kingdom and Mauritius and their self-interested claims of sovereignty/decolonization. Indeed, the nature of the advisory proceedings, which necessarily goes beyond a purely bilateral dispute between states, all but prescribes a broad scope. Moreover, have not *erga omnes* obligations, curiously though they emerged as a response in *Barcelona Traction* to the Court's *South West Africa* debacle, been created as a means for the Court to do just that, address human rights?

⁶² In that sense on sovereignty famously see *Legal Status of Eastern Greenland (Denmark v Norway)* PCIJ Series A/B No 53 at 45: '[...] a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown [p. 46] to exist: the intention and will to act as sovereign, and *some* actual exercise or display of such authority [...] [T]he tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in *thinly populated* or unsettled countries.' (emphasis added)

⁶³ *United Kingdom, written statement* (n 39) para 4.41, 73: 'The United Kingdom sincerely regrets that the clock cannot be turned back to the late 1960s, but there is a reality to this incontrovertible fact' – referring, significantly, to *The Northern Cameroons* (n 4) and *Bancoult (No. 2)* (n 49).