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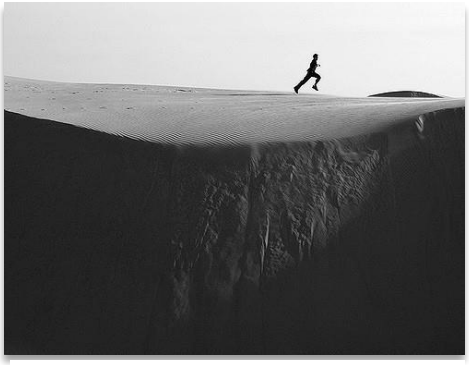
Shrinking Self-determination: The *Chagos* Opinion of the International Court of Justice



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The right to self-determination, ever since it first burst on the international legal scene, has always divided people. It has even divided those who were otherwise fairly kindred spirits. As is well-known, for instance, US President Woodrow Wilson initially was a strong advocate, while his own Secretary of State, Robert Lansing, was considerably less enthusiastic. It is also telling perhaps that Wilson's enthusiasm waned considerably when he was asked to apply it: when approached by the Irish delegation at Versailles to support their claims for self-determination and independence from Britain, he cooled off, realizing that endorsing self-determination of the Irish against his British allies might be politically awkward, and could be left to democratic processes.[1]

Still, Wilson's initial enthusiasm was understandable, and is widely shared to this day, for self-determination is one of the very few international law concepts which manages, at least at first sight, to capture both apology and utopia in one and the same idea. Self-determination manages to appeal both to romantic cosmopolitans and to equally romantic nationalists; it simultaneously taps into a sense of global community based on smaller organic communities, and into a nationalist *Blut und Boden* ideology; it appeals to the political left as well as the political right. What is more, self-

[1] Margaret MacMillan, *Paris 1919: Six Months that Changed the World* (New York: Random House, 2001), 10-13.

determination defies absolutization. It is impossible to think of any excuse for genocide, apartheid or slavery. But self-determination is different: perhaps precisely because it embodies its own antithesis, it is easy to think of compromising self-determination, putting it on hold, or denying it altogether in the name of some higher or different interest, and in the realization that my self-determination may end up undermining your self-determination, as when there is a minority within a minority. In this light, it is surprising that the right to self-determination in general is often regarded as a *jus cogens* norm; it makes considerably more sense to do so, however, if self-determination is nigh-on exclusively linked to decolonization, and that is precisely what the Court achieves in its *Chagos* opinion, rendered in February 2019: the strong condemnation of colonialism provides self-determination, in that particular context, with a sense that no derogation can be permitted.

Indeed, the one area in which the right to self-determination is often said to have been extremely successful is the decolonization process. Many former colonies gained their independence in the course of the twentieth century, and this seems to have solidified the right to self-determination. In other cases it has proven to be less successful, if not less explosive. The failure to apply self-determination in Europe after World War I,[2] and more recently with respect to Kosovo and to a lesser extent Quebec and Catalunya, suggests that it may be easier to achieve self-determination when one has been colonized. Alternatively, self-determination seems likely when the 'mother' state cooperates with attempts to exercise self-determination in the form of secession: Eritrea in the 1990s and South Sudan in 2011 could both secede from larger states (Ethiopia and Sudan, respectively) because those larger entities willingly cooperated. Such cases (decolonization, friendly secession) may look like a success for self-determination, but on a different reading self-determination does little work here.[3] Where there is political agreement to break up, the law is hardly tested; and where the law is tested, as in Kosovo, the right to self-determination turns out to be less than helpful.

Consequently, politically (and thus legally as well), there is merit in limiting the scope of the right to self-determination to those situations where it is not really needed, or then reserving it for those situations where no other option seems viable anymore. In much the same way that rich people never have problems getting a bank loan and the very poor might get support in the form of food stamps, so too the right to self-determination serves either those who do not need it, or those who have no other option left. It is this position that was recently taken by the International Court of Justice (ICJ) in its advisory opinion on the fate of the Chagos Archipelago, where the Court assimilates the right of self-determination strongly with decolonization, following the argumentative structure presented by

[2] See further Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press, 1990).
[3] Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', (1994) 43 *International and Comparative Law Quarterly*, 241-269.

Mauritius,[4] while carving out a little niche, almost in passing, for its application in situations of gross oppression. This brief reflection will focus on the way the Court handles the right to self-determination and shrinks it to fit the decolonization context but not much else; what is left of the right to self-determination in other contexts is, mostly, a right to be taken seriously: a right to be heard and taken seriously when one's fate is affected, well-honed in the ICJ's earlier case-law on self-determination.[5] Indeed, in light of its *jurisprudence constante*, it is no coincidence that the Court ends up endorsing domestic democratic processes.

II

On 25 February 2019, the ICJ rendered its long-awaited advisory opinion on the Chagos Archipelago or, to be more precise, on the question whether the decolonization of Mauritius, of which the Chagos Archipelago had once been a part, had been completed in conformity with international law: 'Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968…?'[6] The question asked by the General Assembly, it must be noted, was exceedingly clever. The Court was not asked whether the process of decolonization had *taken place* lawfully: such a question could have opened the door for all sorts of arguments about the process still being ongoing and incomplete; hence, any finding could have been found premature. The verb 'to complete', by contrast, leaves no room for debate or delaying tactics.

More importantly, neither was the Court asked whether the Chagossians had a right to self-determination and if so, whether this had been violated: this would have been the obvious way to frame the issue, but it would have invited all the regular problems associated with the right to self-determination: who are the right holders? Do the islanders qualify as a 'people' for purposes of self-determination, or do the Mauritians, and are these the same people or not?[7] And what exactly is it they are entitled to? These questions tend to defy easy answers (nay, any answers), and are thus best avoided. If anything, asking who the 'true Chagossians' are would have been likely to reveal deep political cleavages – not particularly convenient if the aim is to present a united front. Hence, the

[4] Mauritius' Memorial strongly connects self-determination to decolonization, holding self-determination to be the *modus operandi* of the decolonization process. It is available at www.icj-cij.org.

[5] And that, in turn, is not all that surprising: see Jan Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law', (2006) 28 *Human Rights Quarterly*, 186-206.

[6] An early but comprehensive analysis of the fate of the Chagossians, covering also proceedings in the English courts and the European Court of Human Rights, is Stephen Allen, *The Chagos Islanders and International Law* (Oxford: Hart, 2014).

[7] James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Leiden: Martinus Nijhoff, 2007).

General Assembly (or, more likely, Mauritius' legal advisers) must have realized that the question needed to be framed differently, focusing not on self-determination of the Chagossians (even if that is ultimately the heart of the matter) but rather on the decolonization of Mauritius. And by framing the question the way they did, they strongly suggested that the process was assumed to have been completed, and they found a way to circumvent all the usual problems associated with self-determination.

What was also ingenious was to ask the question at this moment in time, in light of discussions in various parts of the world concerning the possible self-determination of groups of people, whether in Spain (Catalunya) or in Ukraine (Crimea) or even the United Kingdom itself, where a referendum on Scottish self-determination had taken place not so long ago. And then there is Brexit, also involving the United Kingdom and yet another attempt to break away from a larger whole under a loose set of thoughts bearing an uncanny resemblance to the idea of self-determination. Counsel for Mauritius sardonically invoked former UK Foreign Minister Boris Johnson's letter of resignation in support: Johnson had resigned in light of Brexit since 'no one wants to be a colony'.[8] In short, the timing was felicitous: this was an opportune moment for the Court to operationalize self-determination and make it workable beyond its established value as a right to be taken seriously. And the Court seized the moment, limiting the scope of self-determination to processes of decolonization: shrinking self-determination to fit decolonization.

Mauritius, earlier colonized by the French, had been taken over by the British in 1814, and Britain administered the Chagos Archipelago as a dependency of Mauritius. Following the creation of the UN, Mauritius was registered as a non-self-governing territory, and therewith expected to gain independence, in its entirety, sooner rather than later. It would indeed gain independence in 1968, but not in its entirety. A few years before, in 1965, the British had divided Mauritius, and designated part of it, including the Chagos Archipelago, as British Indian Ocean Territory. This also covered the island of Diego Garcia, which was leased to the United States as a strategically convenient military base.[9] In the meantime, the initial population had been removed, and was refused a right to return. The question asked to the Court now was whether this meant that the process of decolonization of Mauritius had been lawfully completed, and the Court had little problem in answering in the negative. This was, in its own way, an 'open-and-shut' case, as the opprobrium against colonialism is so strong that it is difficult to imagine anyone in their right mind trying to argue in favour of the way the UK had handled things. Even the UK itself seemed hardly convinced: its case was largely argued by hired

[8] Philippe Sands, ICJ Doc. CR 2018/20, at 71, § 2.

[9] Margareta Brummer, 'Abandonment, Construction and Denial: The Formation of a Zone', in Tanja Aalberts and Thomas Gammeltoft-Hansen (eds.), *The Changing Practices of International Law* (Cambridge University Press, 2018), 45-69, esp. at 54-59.

hands - international law practitioners from law firms rather than Foreign Office lawyers - and the main substantive argument[10] it feebly presented in its defense was the argument that, in 1965, the local authorities in Mauritius had actually agreed with the partition by means of concluding the so-called Lancaster House agreement. And this the Court had no trouble shooting down, noting that an agreement concluded by the oppressed with their oppressor and favouring the oppressor would be hard to swallow (§ 172). Intriguingly, the Court stopped short of referring to this as coercion and invoking Article 52 of the Vienna Convention on the Law of Treaties (according to which treaties concluded under duress are invalid),[11] but the message seemed clear enough at any rate.

III

In all likelihood, the Court could have rendered its opinion without even once resorting to the notion of self-determination. Central to the dispute, after all, was article 73 of the UN Charter, which in the name of the 'sacred trust of civilization' orders the colonizing powers have to take the best interests of the colonized to heart, and to assist them in achieving self-government. This was fleshed out, in several ways, in further resolutions adopted by the General Assembly, some of them endorsing decolonization, some of them relating to the treatment of the colonized, and some of them specifically addressing the situation of Mauritius. In other words, it would no doubt have been possible, and plausible, to render an opinion on the basis of United Nations law alone. Based on this set of rules and principles, there could be little doubt that Mauritius' partition had been unlawful, and that the treatment of the Chagossians had been anything but in the interest of the local population. On this ground, it would have been possible, and plausible, for the Court to hold that the UK had been involved in a continuing wrongful act - a continuing violation of its obligations under the Charter. The Charter is a legally binding document, and the various subsequent General Assembly resolutions, while not strictly law-making by nature, can well be seen as implementing and providing detail to the obligations contained in the Charter. Anything else would be difficult to argue as long as those resolutions do little more than give hands and feet to already existing obligations such as those under Article 73 UN.
But the Court did not do so. It consistently resorted to the right of self-determination, a right which is mentioned in the Charter but in rather hortatory manner. And it felt the need to address General Assembly resolutions, in particular resolution 1514 (XV) of 1960, as 'representing a defining moment' in the consolidation of the relevant state practice, and as having a 'declaratory character with regard

[10] Much of its defense revolved around the claim that the Court should not accept the General Assembly's request.
[11] The Vienna Convention applies to treaties between states, and in 1965, it could not be said that Mauritius qualified as such. Hence, the Court may have felt that referring to the Vienna Convention was not appropriate

to the right to self-determination as a customary norm' (§ 152). Respect for self-determination is mentioned in Articles 1 and 55 of the UN Charter as underlying one of the UN's purposes (the development of friendly relations between nations), but is not phrased as an enforceable right, in contrast to the enforceable right to self-government for non-self-governing territories under Article 73 of the UN Charter. This then begs the question: why does the Court feel the need to invoke the right to self-determination if it could have done without?

There seem to be two possible explanations. The first is that the Court itself doubted that a purely UN-based reasoning would be persuasive or, more likely perhaps, that some members of the Court were reluctant to rely too heavily on the UN legal order alone, for fear of granting this legal order too much weight. After all, the UN legal order may sometimes be talked about in a colloquial sense, but not in the sense of an ontologically existing autonomous legal order, on a par with the European Union legal order. The EU is generally seen as a legal order in its own right; the UN, on the other hand, is mostly seen as part of international law, and it is altogether not impossible that some of the judges felt things had better stay that way, and thus needed to bring general international law into the Court's reasoning. This may seem like a somewhat academic argument (and it is), but it is more than just an academic conceit: as the EU experience suggests, an autonomous legal order can place itself above or beyond international law in ways not open to non-autonomous legal orders. An autonomous UN could possibly depart from international law, and that might not be desirable.[12]

IV

There is however a second, and much more immediately practical reason as to why the Court felt compelled to invoke the right to self-determination, and it can be summarized as follows. As noted above, on some readings, the right to self-determination has been most successful in the context of decolonization. It has been less successful, and downright 'explosive', in non-colonial settings, whether Kashmir, Katanga, Kosovo, or any of a multitude of other settings. In such settings, where the 'mother' state is unwilling to allow a part to secede, the right to self-determination only leads to overblown expectations leading to violence and bloodshed, sometimes on a massive scale. Put this way, there is every reason to discourage the romantic reliance on a right to self-determination that cannot be enforced in the face of determined political opposition, and put this way. there is every reason to limit the scope of the right to those entities that are generally regarded as non-self-governing

[12] For further reflection, see Jan Klabbers and Gianluigi Palombella (eds.), *The Challenge of Inter-Legality* (CUP forthcoming), and Jan Klabbers and Panos Koutrakos (eds.), *Autonomy in EU Law and International Organizations Law*, (2019) 88 *Nordic Journal of International Law*, special issue, forthcoming.

in the meaning of Article 73 of the UN Charter. It is too late to prevent bloody struggles in Kosovo, Katanga or Kashmir, but it is clear that this is not where the quest for self-determination stops. Self-determination, moreover, is not just a problem of poor states in the global south, but has also made inroads in the western world: think Quebec, think Scotland. And with populist politicians keen to tap in to romantic notions somehow related to self-determination, whether in the form of Brexit's return to 'sovereignty', or politicians in the Netherlands (some of them, ironically, of immigrant descent) discovering the purity of indigenous Dutch-ness, or the almost-drama of Catalunya not so long ago, the Court must have felt it wiser to close off this avenue as much as it could. The Court cannot, sadly perhaps, prevent lunacy of the Brexit-type from occurring, but it can limit the amount of legal arguments available to those entities that wish to break away, especially perhaps from reasonably well-functioning, reasonably liberal democracies.

The Court, following the lead of Mauritius's legal team, connected the right to self-determination to the status of non-self-governing territory, so much so that following the *Chagos* opinion, a persuasive argument can be made that self-determination and the right to decolonization come close to being one and the same thing, with the important corollary that self-determination cannot be invoked in other, non-colonial settings. Following this Advisory Opinion, the Catalans will have a hard time arguing that the right to self-determination applies to them in the same way as it applies to the Chagossians. The Court, admittedly, built in a safety valve when suggesting that self-determination, 'as a fundamental human right', has a broad scope of application (§ 144). But what this suggests is something coming close to the older idea of external self-determination (i.e. secession) as *ultimum remedium* in the face of gross oppression, useful in those circumstances where all else fails, and perhaps conditional on much blood already having been shed. On such a reading, the Rohingya stand a better chance of relying on the right to self-determination than the Catalans or the Scots.

Identifying the right to self-determination with colonization has the further advantage that all the traditional and difficult questions relating to self-determination no longer pose insurmountable obstacles. If self-determination is essentially limited to non-self-governing territories (i.e. colonies), there is no need to figure out what on earth the notion of 'peoples' means, as in the phrase 'all peoples have a right to self-determination'.[13] There is no longer a need to balance historical continuity against linguistic community, or secession against territorial integrity, or romanticism against Realpolitik.

The two perennial problems associated with the right to self-determination have therewith been clarified. Firstly, the identity of the right-holder is now clear: the right-holder is the non-self-governing territory. Secondly, the consequence of self-determination has become clear as well: the self-

[13] And the notion of 'people' is far more problematic than often assumed, as political theorists have found. See Margaret Canovan, *The People* (Cambridge: Polity, 2005).

determination of non-self-governing territories will ideally materialize in their independence, unless they themselves opt freely for association or integration with another state, in accordance with General Assembly resolution 1541 (XV).

V

Judge Tomka, while not disagreeing with the Court's opinion, had a point when he suggested there was something unpersuasive about the ICJ rendering an advisory opinion to assist the General Assembly in dealing with an issue that had not been on the Assembly's agenda for half a century. But while he had a point, he could also have realized that his point was politically unsustainable: colonialism is so strongly condemned, and the arrogance of the UK so much disliked, that it was a foregone conclusion that the Court would have to address the issue. Indeed, it is no coincidence that the always sharp Judge Xue in her declaration chides the UK for having ignored the General Assembly's discussions on the partitioning of Mauritius: 'the deep concern expressed by the General Assembly was left unaddressed' by the UK (§ 10, Xue declaration).

Indeed, if anything, the general flavour emerging from the various declarations and separate opinions is that the Court did not go far enough. Judge Sebutinde, for example, felt that the Court should have declared that in the context of decolonization, the right of self-determination is *jus cogens*, and Judge Robinson made much the same point in his lengthy individual separate opinion. Several judges also felt that the Court could have ascribed greater legal force to the relevant General Assembly resolutions, either standing on their own (as was argued by Judges Cançado Trindade and Robinson in their joint declaration) or as having been endorsed by Security Council resolutions (Judge Salam). And when Judge Gevorgian criticized the Court for having concluded that the UK has been engaged in a continuing wrongful act, he only did so because he felt that this went beyond what the Court was asked to do – not because he disagreed with the finding as such.

In the end, it is clear that according to the Court, whichever way one turns the opinion, colonialism was on trial, and colonialism can only be met by a response based on self-determination. Doing so connects self-determination to non-self-governing territories, and does so almost by exclusion. The Court leaves open (and has to leave open) the possibility for resorting to self-determination outside the decolonization context, as a 'fundamental human right' to be relied on in times of great despair. It is striking, however, how reluctant the Court is to extend self-determination to entities such as Catalunya, parts of reasonably well-functioning democracies. In such cases, the Court seems strongly to rely on the sentiment ascribed to Woodrow Wilson a century ago, once his initial enthusiasm for self-determination had cooled off a little: the Catalans, the Quebecois and the Scots live 'in a

democratic country and [can] sort it out through democratic means.'[14] In such circumstances, there is no need for international law to help out.

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[14] Macmillan, *Paris 1919*, at 11.