

Decolonisation Revisited and the Obligation not to divide a Non-Self-Governing Territory

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1. Introduction

A central question in the current ICJ advisory proceedings on Chagos is whether obligations existed to prevent Britain from separating the islands from the non-self-governing territory of Mauritius in 1965 prior to its independence in 1968. The Chagos archipelago is a group of small islands and atolls in the Indian Ocean, 2,200 km north-east of Mauritius. The islands in 1965 had an estimated population of 1,500-1,800 (the ‘Ilios’), who first settled there in the early Nineteenth Century. However, the excision of the islands to establish British Indian Ocean Territory and allow the construction of a US base led to the removal of these inhabitants, mostly to Mauritius where many would be left in a state of severe poverty.¹

The question of whether this act breached obligations in international law is underpinned by the changing perception of territory and people that defined decolonisation.² British submissions, in part, reflected the idea of a colony as group of territories and people brought together under an authority, and asserted that moving territory from one political centre to another “for reasons of administrative convenience”³ was not unusual.⁴ However, Mauritius

¹ S. Allen, *The Chagos Islands and International Law* (Hart 2014) 2.

² See R. Emerson, *From Empire to Nation: The Rise of Self-Assertion of Asian and African Peoples* (Harvard University Press 1960).

³ Oral Submissions of the United Kingdom, Verbatim Record of the Public Sitting, 3 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180903-ORA-02-00-BI.pdf>> 10, para. 20.

⁴ “It was indeed common practice, and not only by the United Kingdom, to attach one territory to another for administrative purposes only.” Ibid para. 21.

argued that this separation dismembered a ‘people’ prior to its independence.⁵ The request for an advisory opinion on the legality of this separation provides an opportunity to revisit decolonisation in international law and how its participants perceived it then and now. How this period is understood today has been informed by the written and/or oral contributions of thirty-seven states and the African Union in the proceedings. Most of these addressed the formation of obligations in this period.

This article will explore three particular aspects of an obligation not to divide a non-self-governing territory. First, it will look at the formal source for such an obligation. Second, it will consider whether this obligation is based on territorial integrity as a distinct principle or as part of the right to self-determination. Third, it will examine whether obligations are affected by the procedures under which self-determination is exercised. The United Kingdom claimed that Mauritius consented to this separation by an inter-governmental agreement in 1965,⁶ while Mauritius has argued that this agreement could not express the wishes of its people.⁷

The first of two questions posed by the General Assembly on 22 June 2017, which form the basis for the present proceedings, was the existence of obligations that might render the separation of the Chagos Islands in 1965 unlawful. These obligations, if they existed, would then define the answer to a second question on the consequences of their continued British administration.⁸ The General Assembly in its request specifically cited four of its own resolutions as reflecting these potential obligations. The first was the Declaration on the granting of Independence to Colonial Countries and Peoples, GA Res. 1514(XV) 1960. This

⁵ Written Statement of Mauritius, 1 March 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180301-WRI-05-00-EN.pdf>> vol. I, 249, para. 6.110

⁶ Oral Submissions of the United Kingdom (n 3) 11-21, paras. 22-65.

⁷ Oral Submissions of Mauritius, Verbatim Record of the Public Sitting, 3 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180903-ORA-01-00-BI.pdf>> 50-55, paras. 19-40.

⁸ GA Res. 71/292, UN Doc. A/RES/71/292, 22 June 2017.

landmark resolution defined the framework for subsequent General Assembly practice in decolonisation, in particular, by framing the process through a relationship between the principles of self-determination (Principle 2) and the territorial integrity of a country (Principle 6). Second, this declaration provided the basis for GA Res. 2066(XX) in 1965, which specifically addressed Mauritius and stated in its preamble that the separation of the islands for a military base contravened GA Res. 1514(XV) and especially Principle 6.⁹ The final two resolutions, GA Res. 2232(XXI) of 1966 and GA Res. 2357(XXII) of 1967 dealt with a number of colonial territories, but affirmed that the disruption of territorial integrity and establishment of military bases was incompatible with GA Res. 1514(XV) and the UN Charter.¹⁰

The General Assembly in Question One was careful not to overstate the legal significance of these formally non-binding resolutions, asserting that they “reflected” rather than created obligations. However, there is a notable lack of other documents to provide a basis for them. The General Assembly was asking the Court to find obligations largely-based on its own practice and consequently its law-making power. The potential significance of General Assembly resolutions in providing *opinio juris* for custom has been recognised by the ICJ.¹¹ GA Res. 1514(XV) itself was described as “important” in the *Namibia* Advisory Opinion in 1971¹² and used to identify the principles of decolonisation in the *Western Sahara* Opinion in 1975.¹³ However, both of these opinions were delivered in the 1970s, at the tail-end of decolonisation.

⁹ GA Res. 2066(XX), UN Doc. A/RES/206(XX), 16 December 1965.

¹⁰ GA Res. 2232(XXI), UN Doc. A/RES/2232(XXI), 20 December 1966; GA Res. 2357(XXII), UN Doc. A/RES/2357(XXII), 19 December 1967.

¹¹ See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), [1996] ICJ Rep. 254, para. 70.

¹² *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. 31, para. 52.

¹³ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep. 31-32, paras. 55-56.

The Chagos request by necessity turns on obligations in 1965, an earlier, more contentious period in which self-determination was positively asserted by a majority in the Assembly against a minority of states administering colonial territories. The identification of obligations in this period correspondingly depends on how the elements of custom are approached.

It is also important for the general relationship between self-determination and international law. Despite its legal trappings, self-determination remains a right that fits uncomfortably within the state-centric structure of international law. The doctrine of self-determination does not value states in themselves, but views them as potentially disposable objects that can be shaped by peoples' rights.¹⁴ International legal obligations created by states can either correspond with the wishes of peoples, in which case self-determination supports them, or deviate from them, in which case their legitimacy and more ambitiously their validity can be challenged.¹⁵

The right of colonial peoples to self-determination has been seen as the most successful example of the "domestication"¹⁶ of this right in international law. In this instance, international instruments harnessed the right of self-determination, but limited it to a select group of territories (non-self-governing and trust territories), identified on a narrow basis and with further application restricted by territorial integrity.¹⁷ However, the doctrine of self-determination also brings its own standards to law-making. The right is by nature self-determined. In the establishment of international obligations, this means that the right can

¹⁴ G. Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Friendly Relations" (1972) 137 *Recueil des Cours* III, 419, 563-564.

¹⁵ J. Summers, *Peoples and International Law* (2nd edn, Nijhoff 2014) 29-36.

¹⁶ M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 *ICLQ* 241, 242.

¹⁷ R. Emerson, *Self-Determination Revisited in the Era of Decolonization* (Harvard University Center for International Affairs 1964) 28.

attract broad support from different actors because each one is able to retain their own understanding of its content. This tends to shape international instruments towards general expressions of the right, which dissolve into incoherence when viewed as specific obligations.¹⁸ Those constructions may not advance international standards but simply provide mechanisms for competing national claims. The right is also able not only to challenge obligations but the sources they are based on. The specific argument that self-determination raises for the international lawyer is that a reading of sources that is too formal and too state-centric is as illegitimate as it frustrates peoples' rights.

2. Sources and Timing

The ICJ's first recognition of the self-determination of peoples of non-self-governing territories in *Namibia* in 1971 came late in the decolonisation process and, compared to the language of the General Assembly,¹⁹ was tentatively expressed. The principle of self-determination "was applicable to all of them [non-self-governing territories]".²⁰ This right was rooted in the principle of the sacred trust or trusteeship, under which government was a trust instituted for the benefit of the governed.²¹ This principle was expressed in the UN Charter 1945 and before that the League of Nations Covenant 1919. The UN Charter also proclaims the principle of self-determination twice, in Article 1(2), among the purposes of the organisation, and Article 55. This makes the Charter the most widely-ratified treaty on the right, though both articles were framed as a general respect for equal rights and self-determination of peoples rather than

¹⁸ R. Emerson, 'Self-Determination' (1971) 65 AJIL 459.

¹⁹ See, e.g., the "right to self-determination and freedom and independence" Principle 5(5), Declaration on Principles of Friendly Relations, GA Res. 2625(XXV), UN Doc. A/RES/2625(XXV), 24 October 1970.

²⁰ *Namibia* (n 12) 31, para. 52.

²¹ C. E. Toussaint, *The Trusteeship System of the United Nations* (Praeger 1956) 3.

any specific duties.²² More detailed obligations were developed around trusteeship in Chapter XI of the Charter for non-self-governing territories. Article 73 provided that states administering such territories recognised that “the interests of the inhabitants of these territories are paramount” and accepted the obligation to “promote to the utmost... the well-being of the inhabitants”.²³ This included a duty to develop self-government and assistance to the peoples of those territories in the progressive development of free political institutions. However, the form of this self-government and the timescale over which it was to be achieved was open-ended and explicitly conditional: “according to the particular circumstances of each territory and its peoples and their varying stage of advancement”.²⁴ How this system related to articles 1(2) and 55 was also ambiguous.²⁵ Self-determination challenged this system, but trusteeship was also envisaged as a mechanism for exercising the right,²⁶ albeit within a paternalistic framework that protected the interests of administering states.

Trusteeship was found by the Court in *Namibia* to have expanded into self-determination through the subsequent development of international law. An “important stage”²⁷ of this was the Declaration on the Granting of Independence to Colonial Countries and Peoples, a resolution adopted by the General Assembly in 1960 by 89 votes to 0, with 9 abstentions (predominantly from states with colonial possessions).

²² A. Cassese, ‘Political Self-Determination – Old Concepts and New Developments’ in A. Cassese (ed), *UN Law/Fundamental Rights: Two Topics in International Law* (Sijthoff 1979) 138.

²³ Article 73, Charter of the United Nations 1945.

²⁴ Article 73(b), *ibid.*

²⁵ R. Emerson, ‘Colonialism, Political Development, and the UN’ (1965) 19 *International Organization* 484, 485-486; U. Fastenrath, ‘Declaration Regarding Non-Self-Governing Territories’ in B. Simma (ed), *The Charter of the United Nations: A Commentary* (OUP 1994) 924.

²⁶ See J. C. Smuts, ‘The League of Nations: A Practical Suggestion’ in D. H. Miller (ed), *The Drafting of the Covenant* (G. P. Putnam’s Sons 1928) vol. 2, 29-31.

²⁷ *Namibia* (n 12) para. 52.

The Declaration was a conscious landmark in the decolonisation process, which effectively repudiated the trusteeship principle in the non-self-governing territories system, whilst using that system as the framework to advance colonial independence and self-determination. It also framed the relationship between the right of peoples to self-determination and the territorial integrity of a country in decolonisation. The Declaration, the product of a draft by African and Asian states, was a clear sign of the shifting composition of the Assembly, with an influx of new states from decolonisation and a growing anticolonial majority within the body. Nonetheless, the different objectives of states and the need to minimise opposition from administering states also resulted in vague formulations that made the Declaration's proclamation of right to self-determination less substantial than it might first appear.²⁸ Instead of a clean break from the progressive realisation of self-government under trusteeship, administering states were to take "immediate steps"²⁹ to prepare for independence, which was interpreted to allow for progressive self-determination.³⁰ Moreover, the relationship between territorial integrity and self-determination depended on the concept of 'country', which was never defined and open to different understandings, some of which conflicted.

The ICJ's *Western Sahara* Advisory Opinion in 1975 identified two further instruments in defining decolonisation: GA Res. 1541(XV) of 1960, which identified non-self-governing territories and the methods for achieving self-government, and the Declaration on Friendly Relations, GA Res. 2625(XXV) of 1970.³¹ The Friendly Relations Declaration was adopted by the Assembly by a consensus and, as an expression of the common position of states on UN

²⁸ D. A. Kay, 'The Politics of Decolonization: The New Nations and the United Nations Political Process' (1967) 21 *International Organization* 786, 790-791.

²⁹ Principle 5, GA Res. 1514(XV), UN Doc. A/RES/1514(XV), 14 December 1960.

³⁰ See, e.g., New Zealand, UN Doc. A/PV.932, 2 December 1960, para. 9; Australia, UN Doc. A/PV.933, 2 December 1960, paras. 54-68; Japan, *ibid.* paras. 92, 94, 101; Netherlands, UN Doc. A/PV.947, 14 December 1960, para. 60.

³¹ *Western Sahara* (n 13) 32-33, paras. 57-58.

Charter principles, has been utilised by the ICJ more than any other resolution.³² On self-determination, the Declaration built on GA Res. 1514(XV) and 1541(XV), reiterating the former's equation of self-determination with colonial independence, and the latter's wider possibility for self-government to include integration and free association, as well as adding "any other political status freely determined by a people".³³ The ICJ in *Western Sahara* used this provision to support its own interpretation of self-determination as "the need to pay regard to the freely expressed will of peoples".³⁴

Nonetheless, while adopted by a consensus, the Declaration revealed no agreement over the pace of self-government under self-determination or its relationship with territorial integrity in disputed colonies. These were again managed with broad formulas. The Declaration called for the "speedy end to colonialism",³⁵ though as the US delegate noted "reasonable men could differ as to the meaning of 'speedy'".³⁶ It also reaffirmed the territorial integrity of a "State or country", without defining the latter. States retained similar positions to GA Res. 1514(XV) on their understanding of 'country'.³⁷

Thus, while the Friendly Relations Declaration reflected a consolidation of the right to self-determination in decolonisation, it succeeded by finding formulas that allowed states to continue to agree to disagree on important points. States that saw the right as little more than a

³² *Western Sahara* (n 13) para. 57; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), [1986] ICJ Rep. paras. 188, 191, 202; *Wall in Occupied Palestinian Territory* (Advisory Opinion), [2004] ICJ Rep. paras. 87-88; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion), [2010] ICJ Rep. 437, para. 80.

³³ Principle 5(4), GA Res. 2625(XXV) (n 19). See R. Rosenstock, 'The Declaration of Principles of International Law concerning Friendly Relations: A Survey' (1971) 65 AJIL 713, 730-731.

³⁴ *Western Sahara* (n 13) 33, para. 59.

³⁵ Principle 5(2), GA Res. 2625(XXV) (n 19).

³⁶ US, UN Doc. A/C.6/SR.1180, 24 September 1970, para. 25.

³⁷ Spain, UN Doc. A/C.6/SR.1002, 20 November 1967, para. 49; Argentina, UN Doc. A/C.6/SR.1161, 28 November 1969, para. 18; Somalia, UN Doc. A/C.6/SR.1003, 20 November 1967, para. 47; Guatemala, *ibid* para. 35.

rebranding of their obligations for the progressive realisation of self-government under Article 73 of the UN Charter continued to do so. The US stated this explicitly: “Nor were Articles 73 and 76 of the Charter in any way altered.”³⁸ The UK in relation to self-determination in the Declaration described the text as a compromise and “[l]ike most compromises, it was less than satisfactory to all”. Like the US, it considered that it was “continuing to discharge its Charter obligations... with a view to enabling all the peoples of those Territories to exercise their right to self-determination”.³⁹

The timing of GA Res. 1514(XV) in 1960 and 2625(XXV) in 1970 provide two competing poles for the emergence of obligations towards non-self-governing territories. As both are General Assembly resolutions the question becomes whether they could express an *opinio juris* that contributed to the crystallisation of custom. The ICJ by circumstance or design (different views could be taken on this)⁴⁰ did not address self-determination until the 1970s and the question of precisely when this right become part of custom was not relevant for its decisions in *Namibia* and *Western Sahara*. The Court in the *Kosovo* Advisory Opinion in 2010 was content to situate the formation of a colonial right in “the second half of the twentieth century”.⁴¹ However, in *Chagos* the precise time of this crystallisation is pivotal. Were the relevant obligations established by 1965?

This issue of which of the two resolutions provided the necessary *opinio juris* had obvious tactical importance for states in the proceedings. The UK and the US favoured GA Res. 2625(XXV) and crystallisation in 1970, while Mauritius and other sympathetic states saw that moment arrive with GA Res. 1514(XV) in 1960 or before then. Moreover, it should not be

³⁸ US, UN Doc. A/AC.125/SR.114, 1 May 1970, 83

³⁹ UK, UN Doc. A/AC.125/SR.114, 1 May 1970, 73-74.

⁴⁰ See Oral Submissions of the United Kingdom (n 3) 47, para. 18.

⁴¹ *Kosovo* (n 32) 436, para. 79.

assumed that these positions were simply adopted out of expedience, as they point to more fundamental questions about the identity of custom and self-determination.

The crystallisation of a customary right to self-determination formally requires meeting the elements of state practice and *opinio juris*. In the context of decolonisation this shows two dynamics. First, the right of self-determination was invoked by political movements claiming to represent a people to establish an independent state. In other words, it was claimed by non-state actors who are difficult to fit within the statist framework of custom formation. Second, the state-dynamic, expressed especially in the General Assembly, was between an anticolonial majority and a minority that administered non-self-governing territories. The majority supported the right but it only entailed significant obligations for a minority. This poses the question of whether those states are ‘specially affected states’ for the formation of custom.⁴² However, in terms of obligations, this would give administering states a disproportionate ability to determine the content of a right aimed against their behaviour. An alternative possibility is that the ‘specially affected’ could relate to anticolonial states on account of their own experience of colonialism.⁴³ This argument was raised by the African Union:

“There is no doubt that those who are the most concerned States in the present proceedings are, first and foremost, the African States and then those States that have been victims of colonialism (most of whom are part of the Non-Aligned Movement).”⁴⁴

⁴² *North Sea Continental Shelf Cases*, [1969] ICJ Rep. 42, para. 73. *But see Nuclear Weapons* (n 11), where that the court did not specifically draw distinctions between states possessing nuclear weapons and those who did not. *See* K. J. Heller, ‘Specially-Affected States and the Formation of Custom’ (2018) 112 AJIL 191-243.

⁴³ *See* K. J. Heller, ‘The AU Invokes the Doctrine of Specially-Affected States in Chagos Island’ *Opinio Juris*, 18 December 2018, <<http://opiniojuris.org/2018/12/18/the-au-invokes-the-doctrine-of-specially-affected-states-in-chagos-island/>>

⁴⁴ Written Comments of the African Union, 15 May 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180515-WRI-01-00-EN.pdf>> 7, para. 23.

This could serve as a corrective to the marginalisation of liberation movements within custom formation, but there are also problems with this argument. The legal relationship for these states was always detached, as they neither envisaged exercising the right themselves nor holding direct obligations under it. Moreover, the experience of colonialism varied enormously between them. Some African, Asian or Caribbean states voted on these resolutions months after their independence, but for others, such as Latin America the experience was historical, and for some, such as Iran or Thailand more indirect.⁴⁵ The understanding of self-determination correspondingly varied between these states.

Nonetheless, it has been a consistent feature of the assessment of practice in decolonisation to emphasise that a large number of new states emerged based on a right to self-determination. The ICJ in *Namibia* referred to “the birth of many new States”⁴⁶ and again in the *Kosovo* Advisory Opinion in 2010 to the fact that: “A great many new States have come into existence as a result of the exercise of this right.”⁴⁷ This, likewise, was reflected in states’ submissions. For example, Brazil highlighted “the significant number of non-self-governing and trust territories that achieved independence in that period [up to 1960]”.⁴⁸ It can be argued that perhaps the best solution might be simply to consider state formation as part of state practice. The legal context of state formation is open to competing interpretations as to when a state actually comes into existence. Nonetheless, taking a broad view of that process in which non-state actors exercise a right to become state actors, would allow the contribution of the groups claiming peoples’ rights to count towards practice.

⁴⁵ See H. K. Jacobson, ‘The United Nations and Colonialism: A Tentative Appraisal’ (1962) 16 *International Organization* 37, 43-44.

⁴⁶ *Namibia* (n 12) 31, para. 52.

⁴⁷ *Kosovo* (n 32) 436, para. 79.

⁴⁸ Oral Submissions of Brazil, Verbatim Record of the Public Sitting, 4 September <<https://www.icj-cij.org/files/case-related/169/169-20180904-ORA-02-00-BI.pdf>> 44, para. 11. See also Judges Kateka and Wolfrüm, Joint Dissenting and Concurring Opinion, *Chagos Marine Protected Area Arbitration (Mauritius v. UK)*, 18 March 2015, 19, para. 75

States’ arguments on custom fell between two models: a ‘majoritarian’ argument centred on 1960 advanced by a majority of states (who were particularly conscious that they were a majority) and a ‘consensual’ argument favoured by the UK and US orientated towards 1970. Both have important implications for how a legal right to self-determination should be seen within post-war decolonisation. Was the process actively driven early on by a legal right or was the law of self-determination more a product of that process?⁴⁹

The majoritarian view emphasised the significance of a majority of states in promoting self-determination to change the obligations of a minority. In this view, a legal right crystallised early in decolonisation and then drove the process.⁵⁰ The Declaration on Colonial Independence in 1960 provided a crucial moment in the crystallisation of custom.⁵¹ The ICJ in *Namibia* had described it as “important”, but in this narrative it was pivotal.

In addition, Mauritius pushed the window for custom formation even further back, arguing that earlier resolutions and work on the draft Human Rights Covenants in the 1950s had already established custom.⁵² This is more of a stretch. Much of the focus on this period was on the drafting of the Human Rights Covenants and the inclusion of a right of self-determination in those instruments between 1950 and 1955. Mauritius argued that “divisions of opinion”,

⁴⁹ See Oral Submissions of Guatemala, Verbatim Record of the Public Sitting, 5 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180905-ORA-01-00-BI.pdf>> 35, para. 27.

⁵⁰ “[T]he peoples of dozens of States that achieved independence throughout the 1960s did so not pursuant to a legal right to self-determination, but at the discretionary gift of the colonial Powers.” Oral Submissions of Belize, Verbatim Record of the Public Sitting, 4 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180904-ORA-02-00-BI.pdf>> 22. “The independence of new colonies did not derive from comity or courtesy of the former colonial Powers. It was rather the due exercise of a right...” Oral Submissions of Brazil (n 48) 44, para. 12.

⁵¹ Oral Submissions of Belize (n 50) 9, para. 9, 14, para. 26; Oral Submissions of Brazil (n 48) 44, para. 11; Oral Submissions of Kenya, Verbatim Record of the Public Sitting, 5 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180905-ORA-02-00-BI.pdf>> 27, para. 19; Oral Submissions of Vanuatu, Verbatim Record of the Public Sitting, 6 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180906-ORA-01-00-BI.pdf>> 30, para. 11.

⁵² Oral Submissions of Mauritius (n 7) 46, para. 9.

between states in the drafting, “between those who saw it [self-determination] as a political principle and those who maintained that it was a legal right were resolved early in the negotiations in favour of the latter.”⁵³ However, the adoption of draft Article 1 in 1955, by 33 votes to 12, with 13 abstentions,⁵⁴ shows that states were far from agreed on the right. Some General Assembly resolutions on self-determination in this period, such as GA Res. 1188(XII) of 1957, which Mauritius highlighted, recognised a right of self-determination for peoples of non-self-governing territories and were adopted without negative votes (though a substantial minority abstained).⁵⁵ However, any commitments associated with this right were minimally expressed – GA Res. 1188(XII) called on administering states to “promote the realization” and “facilitate the exercise” of this right – which did not differ substantially from duties under Article 73.⁵⁶ This contrasts with GA Res. 637A(VII) of 1952, which contained some detail on practical steps to realise self-determination (participation in government and UN monitored plebiscites) and was more divisively adopted by 40 votes to 14, with 6 abstentions.⁵⁷

GA Res. 1514(XV) shows more substance and a lack of negative votes but there is still the question of how the minority who abstained should be characterised. These abstentions were described, for example by Kenya as ‘acquiescence’ that might not prevent custom forming:

“The vote for UNGA resolution 1514 (XV) was a clear proof of *opinio juris* by supporting countries and a sign of acquiescence to the right of self-determination in the abstaining States, and accordingly, a clear sign of emergence of a customary rule”.⁵⁸

⁵³ Written Comments of Mauritius, 1 March 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180515-WRI-04-00-EN.pdf>> vol. I, 201, para. 6.24.

⁵⁴ UN Doc. A/C.3/SR.676, 29 November 1955, para. 27.

⁵⁵ GA Res. 1188(XII) was adopted by 65-0-13 by an unrecorded vote. UN Doc. A/PV.727, 11 December 1957, 575.

⁵⁶ GA Res. 1188(XII), UN Doc. A/RES/1188(XII), 11 December 1957.

⁵⁷ GA Res. 637A(VII), UN Doc. A/RES/637(VII)A, 16 December 1952.

⁵⁸ Oral Submissions of Kenya (n 51) 28, para. 24.

Nonetheless, as non-binding instruments, General Assembly resolutions express the *opinio juris* that states bring to them. A vote for or against or an abstention does not itself automatically delimit a legal position. The value of acquiescence in custom formation is that a state is aware that legal obligations are forming, even if it does not choose to take a position on them.⁵⁹ However, with a General Assembly resolution states may choose to abstain rather than vote against because they believe that the resolution does not advance a legal situation. If their perspective is that the instrument is legally irrelevant, they may feel free to abstain out of political expediency. For example, Australia, which abstained on GA Res. 1514(XV), later characterised the resolution as important but not legally binding.⁶⁰ Likewise, even a positive vote for a resolution does not necessarily equate to *opinio juris*, as states may vote for a resolution on the specific understanding that they are not committing to obligations.⁶¹ For example, Canada voted for GA Res. 1514(XV) and subsequently characterised it as a political document, suggesting that it did not consider the resolution to establish legal duties.⁶² Moreover, as the ICJ noted in the *Marshall Islands* case, if a resolution advances a number of distinct propositions, it cannot be assumed that single vote on that resolution, in itself, defines a state's position on all of them.⁶³

⁵⁹ H. Meijers, 'How is International Law Made? – The Stages of Growth of International Law and the Use of its Customary Rules' 9 (1978) NYIL 3, 23-24.

⁶⁰ Australia: "The Australian delegation fully recognized the historic significance of the Declaration on the Granting of Independence to Colonial Countries and Peoples as a landmark in the General Assembly's efforts to expedite self-determination, but it did not consider that the Charter authorized the General Assembly, except where it was done explicitly as in article 17, to adopt legally binding resolutions." UN Doc A/AC.125/SR.70, 7 August 1967, 8

⁶¹ This was particularly evident in the adoption of the UN Declaration on the Rights of Indigenous Peoples 2007, GA Res. 61/295, UN Doc. A/RES/61/295, 13 September 2007. See, e.g., Thailand, UN Doc. A/61/PV.107, 13 September 2007, 25; Guyana, *ibid*, 26; Nepal, UN Doc. A/61/PV.108, 13 September 2007, 3. See generally, I. MacGibbon, 'Means for the Identification of International Law' in B. Cheng (ed), *International Law: Teaching and Practice* (Stevens 1982) 13.

⁶² Canada: "While his delegation would not wish to ignore the General Assembly's declaration on colonialism (resolution 1514 (XV)), which was an important political document, it did not regard that declaration as a mandatory source." UN Doc. A/AC.125/SR.69, 4 August 1967, 10.

⁶³ *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. 855, para. 56

A striking feature of arguments for a majoritarian position was their clear moral framing. “If... these vast territories were simply given away out of a sense of *noblesse oblige*, unfettered by any legal obligation,” Mauritius argued, it would be “both condescending to the peoples who gained their independence in that period and legally untenable.”⁶⁴ The African Union arguably went even further and explicitly conflated moral and legal obligations:

“When it comes to resolution 1514, of course, all the colonizers would not have supported it because it was not in their interests. Yet, they could not vote against it out of moral duty, which, in fact, is evidence of *opinio juris* and State practice at the time.”⁶⁵

The moral character of a norm can potentially have a positive influence on interpretation of the elements of custom.⁶⁶ Nonetheless, moral duty is not *opinio juris* and the fact that they were acting against their interests might equally suggest that their vote was motivated by political expediency.

By contrast a ‘consensual’ narrative advanced by the UK and US was more classically state-centric. It relied on anti-colonial states and administering states reaching a consensus on the scope of a colonial right of self-determination. The key instrument for these states was the Declaration on Friendly Relations in 1970.⁶⁷ Those states emphasised the formalities of custom

⁶⁴ Oral Submissions of Mauritius (n 7) 47, para. 11.

⁶⁵ Oral Submissions of the African Union, Verbatim Record of the Public Sitting, 6 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180906-ORA-02-00-BI.pdf>> 17, para. 8.

⁶⁶ A. E. Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 65 AJIL 764-765.

⁶⁷ “The right to self-determination crystallized in customary international law after the 1960s. The Friendly Relations Declaration, adopted in October 1970, was the first consensus resolution on the right, with the United Kingdom joining the consensus. During the six years of negotiations, the divided views of States on the meaning and status of self-determination were obvious. Consensus was only reached after extensive and in-depth deliberation” Oral Submissions of the United Kingdom (n 3) 46, para. 13; Oral Submissions of the United States,

formation and the high thresholds for this previously expressed by the ICJ. The US highlighted the ICJ's finding that deducing *opinio juris* from General Assembly resolutions must be done “with all due caution”⁶⁸. Such deference to the formalities of custom contrasts to the role of morality in the majoritarian position, but it also left the legal right as a dry artefact of decolonisation and irrelevant to the present proceedings.

Nonetheless, whether states focussed on GA Res. 1514(XV) or GA Res. 2625(XXV) the fact remained that both advanced a right of peoples to self-determination with formulas that allowed states to take contrary positions on both peoples and self-determination. While a consensual approach to obligations might support a lowest common denominator approach, it is not clear whether the content of instruments emphasised in a majoritarian approach is sufficiently precise to establish anything more. Many states promoting a right to self-determination in the proceedings, maintained a secondary line of argument centred on obligations under Article 73.⁶⁹ Ultimately, it may be UN Charter obligations under trusteeship, which were supposed to be superseded by self-determination that provide the most secure source for obligations relating to Chagos.

3. Obligations to Respect the Territorial Integrity of a Non-Self-Governing Territory

Verbatim Record of the Public Sitting, 5 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180905-ORA-01-00-BI.pdf>> 21, para. 60.

⁶⁸ Oral Submissions of the United States (n 67) 17, para. 46, citing *Nicaragua* (n 32) para. 188.

⁶⁹ Oral Submissions of South Africa, Verbatim Record of the Public Sitting, 4 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180904-ORA-01-00-BI.pdf>> 15, para. 28; Oral Submissions of Guatemala (n 49) 36, para. 33; Oral Submissions of the Marshall Islands, Verbatim Record of the Public Sitting, 5 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180905-ORA-01-00-BI.pdf>> 41, paras. 19-20; Oral Submissions of Serbia, Verbatim Record of the Public Sitting, 6 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180906-ORA-01-00-BI.pdf>> 14-15, paras. 46-47.

3.1 The Principle of Territorial Integrity in Decolonisation

The approach to sources depends on the content of instruments on the right to self-determination and territorial integrity. Territorial integrity could be expressed either as a principle associated with self-determination or as a component of the right. How the two relate, and if they are compatible in particular instances, remains an area over which states have a range of different positions.

The integrity of colonies has not always been upheld in UN practice. Indeed, the organisation has been involved in the partition of these territories. In 1947 the General Assembly endorsed a plan to partition the mandate territory of Palestine into Jewish and Arab states.⁷⁰ In 1950 a UN Commission on Eritrea gave serious consideration to separating its Western Province before agreeing to federate the trust territory as a whole with Ethiopia.⁷¹ The UN in 1956 initially also planned to divide the trust territory of British Togoland into four units for a referendum on unification with Ghana.⁷²

Neither GA Res. 637A(VII), GA Res. 1188(XII) nor Article 1 of the draft Human Rights Covenants expressly referred to territorial integrity in a colonial context. The first significant instrument to address the integrity of colonies was GA Res. 1514(XV) in 1960. The Declaration began as a proposal by the Soviet Union in September 1960, which was subsequently succeeded by a draft from forty-three Asian and African states.⁷³ Territorial integrity was raised

⁷⁰ GA Res. 181(III), UN Doc. A/RES/181(II), 29 November 1947.

⁷¹ Report of the United Nations Commission for Eritrea, UN Doc. A/1285, 8 June 1950, paras. 161 and 176.

⁷² J. S. Coleman, 'Togoland' (1956) 509 *International Conciliation* 1, 78-79.

⁷³ (1960) YBUN 44-48.

in the Soviet Draft in the context of states,⁷⁴ but in the 43-Power Draft, which became Principle 6 without any further change, it was expanded to protect a ‘country’. This was consistent with the aims of the declaration in advocating and managing the transition of colonial territories to independence. A ‘country’ could embrace both a non-self-governing or trust territory and a newly-independent state that succeeded it.⁷⁵ However, the term, which was never defined, could also empower a wider range of territorial claims by states.⁷⁶

An interpretation of Principle 6 that protected the integrity of a non-self-governing or trust territory corresponded with the Declaration in general and, in particular, Principle 4, which called for respect of the integrity of the national territory of dependent peoples. This was also supported by specific states’ comments.⁷⁷ Cyprus referred to colonial “divide and rule” policies,⁷⁸ while Arab states cited the partition of the mandate territory of Palestine.⁷⁹ Tunisia highlighted French policy in Vietnam and Algeria underlined the importance of ensuring the integrity of colonial territories.⁸⁰

The text and drafting also supported a second interpretation of Principle 6 that protected the territorial integrity of states from outside interference or from secession. Principle 7 of the

⁷⁴ Principle 3, Draft Declaration on Granting Independence to Colonial Countries and Peoples: “The Governments of all countries are urged to observe strictly and steadfastly the provisions of the United Nations Charter and of this Declaration concerning the equality and respect for the sovereign rights and territorial integrity of all States without exception, allowing no manifestations of colonialism or any special rights or advantages for some States to the detriment of other States.” UN Doc. A/4502, 23 September 1960.

⁷⁵ R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (OUP 1963) 105; H. Quane, ‘The United Nations and the Evolving Right to Self-Determination’ (1998) 47 ICLQ 537, 550.

⁷⁶ See J. Trinidad, *Self-Determination in Disputed Colonial Territories* (CUP 2018) 31-38; S. K. N. Blay, ‘Self-Determination versus Territorial Integrity in Decolonization’ (1986) 18 NYUJIL&P 441, 443; J. R. Maguire, ‘The Decolonization of Belize: Self-Determination v. Territorial Integrity’ (1982) 22 Va J. Int. Law, 859-860; T. M. Franck and P. Hoffman, ‘The Right of Self-Determination in Very Small Places’ (1976) 8 N.Y.U. J. Int’l & Pol. 369-371.

⁷⁷ Nepal, UN Doc. A/PV.935, 5 December 1960, para. 74.

⁷⁸ Cyprus, UN Doc. A/PV.945, 13 December 1960, paras. 92-93.

⁷⁹ UAR, UN Doc. A/PV.929, 30 November 1960, para. 180; Iraq, UN Doc. A/PV.937, 6 December 1960, paras. 127, 134; Morocco, UN Doc. A/PV.945, 13 December 1960, para. 51.

⁸⁰ Tunisia, UN Doc. A/PV.929, 30 November 1960, paras. 106-107.

Declaration called for non-interference in the internal affairs of states and respect for the sovereign rights and territorial integrity of peoples. The Netherlands argued that Principle 6 simply reaffirmed the prohibition of force against the territorial integrity of states in Article 2(4) of the UN Charter.⁸¹ Other states highlighted the Congo, at the time fracturing with the Katanga secession, to emphasise the importance of territorial integrity for states.⁸²

However, while these two interpretations were compatible, many states also supported a third interpretation of Principle 6 in which a ‘country’ could cross existing colonial borders, allowing states to make territorial claims over non-self-governing or trust territories. This understanding was raised by Somalia over Djibouti and ethnic Somali territory in Kenya and Ethiopia;⁸³ Morocco over Western Sahara and Mauritania;⁸⁴ Ireland over Northern Ireland;⁸⁵ and Indonesia over West Irian.⁸⁶ Guatemala, with a claim over Belize,⁸⁷ introduced an amendment that specifically emphasised the dominant role of territorial integrity over self-determination:

“The principle of self-determination of peoples may in no case impair the territorial integrity of any State or its right to the recovery of territory.”⁸⁸

It subsequently withdrew this only after Indonesia explained that this interpretation was already contained in Principle 6.⁸⁹ Iran, with a claim over Bahrain, likewise, argued that Guatemala’s

⁸¹ Netherlands, UN Doc. A/PV.947, 14 December 1960, para. 62.

⁸² Tunisia, UN Doc. A/PV.929, 30 November 1960, paras. 104 and 108; UAR, *ibid.* para. 179.

⁸³ Somalia, UN Doc. A/PV.945, 13 December 1960, paras. 6, 18-20;

⁸⁴ Morocco, UN Doc. A/PV.945, 13 December 1960, para. 46.

⁸⁵ Ireland, UN Doc. A/PV.935, 5 December 1960, paras. 112-113.

⁸⁶ Indonesia, UN Doc. A/PV.936, 5 December 1960, para. 55.

⁸⁷ Guatemala, UN Doc. A/PV.933, 2 December 1960, para. 133. *But see* Mexico, UN Doc. A/PV.934, 3 December 1960, para. 133.

⁸⁸ Guatemala, UN Doc. A/L.325, (1960) 15 GAOR Annexes, Agenda Item 87, 7. *See* comments by Jordan, UN Doc. A/PV.946, 14 December 1960, para. 39; Iran, *ibid.* para. 54; Indonesia, UN Doc. A/PV.947, 14 December 1960, paras. 8-10.

⁸⁹ Indonesia, UN Doc. A/PV.947, 14 December 1960, paras. 8-10. Guatemala, *ibid.* para. 16.

amendment was clearly expressed in the provision.⁹⁰

These varying interpretations of ‘country’ positioned Principle 6 either as a support for self-determination in Principle 2 or as a basis for precluding it. Moreover, as this relationship depended on the undefined terms ‘peoples’ and ‘countries’, and both could equate to ‘nation’, it ultimately boiled down to the prioritisation of one national claim over another. Perhaps unsurprisingly, states adopted one, two or all three interpretations as it suited them best.⁹¹

As the most significant articulation of territorial integrity in a colonial context, Principle 6 has been presented as a water-shed for the development of the principle. This is partially true. After 1960, the General Assembly citing GA Res. 1514(XV) and territorial integrity criticised the separation of a number of colonial territories: the Chagos archipelago from Mauritius in 1965;⁹² Mayotte from the Comoros Islands in 1976;⁹³ Walvis Bay from the mandate territory of Namibia in 1977;⁹⁴ and the Esparses Islands from Madagascar in 1979.⁹⁵

However, the General Assembly also divided the British Cameroons, a trust territory, into two units for separate referenda on union with Nigeria and Cameroon in 1961.⁹⁶ It accepted an agreement by the governments in the trust territory of Ruanda-Urundi to separate into Rwanda and Burundi in 1962.⁹⁷ It acquiesced in the separation and independence of Jamaica⁹⁸ from the

⁹⁰ Iran, UN Doc. A/PV.946, 14 December 1960, para. 54.

⁹¹ See Morocco, UN Doc. A/PV.947, 14 December 1960, paras. 158-161.

⁹² GA Res. 2066(XX), UN Doc. A/RES/2066(XX), 16 December 1965.

⁹³ GA Res. 31/4, UN Doc. A/RES/31/4, 21 October 1976.

⁹⁴ GA Res. 32/9D, UN Doc. 32/9D, 4 November 1977. See also SC Res. 432, UN Doc. S/RES/432, 27 July 1978.

⁹⁵ GA Res. 34/91, UN Doc. A/RES/34/91, 12 December 1979.

⁹⁶ GA Res. 1352(XIV), A/RES/1352(XIV), 16 October 1959; GA Res. 1471(XIV), UN Doc. A/RES/1471(XIV), 12 December 1959 and GA Res. 1608(XV), UN Doc. A/RES/1608(XV), 21 April 1960.

⁹⁷ GA Res. 1746(XVI), UN Doc. 1746(XVI), 27 June 1962.

⁹⁸ GA Res. 1750(XVII), UN Doc. A/RES/1750(XVII), 18 September 1962.

British West Indies following a referendum in 1962,⁹⁹ with the Cayman Islands¹⁰⁰ and Turks and Caicos remaining separate non-self-governing territories.¹⁰¹ The Assembly also endorsed the separation of the non-self-governing Gilbert and Ellice Islands in a referendum in 1974.¹⁰² The Security Council terminated the strategic trust of Micronesia with the separation of the Northern Mariana Islands, Federated States of Micronesia and Marshall Islands in 1990¹⁰³ and Palau in 1994 based on plebiscites.¹⁰⁴

Perhaps the most important test for the relationship between territorial integrity and self-determination in the colonial context was the ICJ's *Western Sahara* Advisory Opinion of 1975. This was the Court's most significant engagement with decolonisation prior to Chagos. The Court found that none of the ties invoked by Morocco and Mauritania to support claims to the territory under Principle 6 amounted to 'territorial sovereignty', which might affect the application of self-determination.¹⁰⁵ However, its approach to the unity of this non-self-governing territory was notably nuanced. Its description of self-determination as "the need to pay regard to the freely expressed will of peoples"¹⁰⁶ was loose enough to allow considerable latitude in how it might be expressed. The Court also avoided specifically identifying the population of Western Sahara as a 'people', consistent with a single self-determination unit. Instead, it referred more ambiguously to the "free and genuine expression of the will of the peoples of the Territory".¹⁰⁷ This terminological twist, which was not necessarily justified by

⁹⁹ Report of the Secretary-General, Jamaica, UN Doc. A/5080/Add.10, 25 April 1962, 2-3, 6.

¹⁰⁰ See Report of the Secretary-General, Cayman Islands, UN Doc. A/5080/Add.12, 27 April 1962, 4.

¹⁰¹ GA Res. 2069(XX), UN Doc. A/RES/2069(XX), 16 December 1965.

¹⁰² GA Res. 3288(XXIX), UN Doc. A/RES/3288(XXIX), 13 December 1974 and GA Res. 3426(XXX), UN Doc. A/RES/3426(XXX), 8 December 1975.

¹⁰³ SC Res. 683, UN Doc. S/RES/683, 22 December 1990.

¹⁰⁴ SC Res. 956, UN Doc. S/RES/956, 10 November 1994. On this inconsistency in practice see M. Pomerance, *Self-Determination in Law and Practice* (Njihoff 1982) 19-20.

¹⁰⁵ *Western Sahara* (n 13) 68, para. 162.

¹⁰⁶ *Ibid* 33, para. 59.

¹⁰⁷ *Ibid* 68, para. 162.

previous General Assembly resolutions,¹⁰⁸ left open the possibility that self-determination could have distinct outcomes in different parts of the territory. Moreover, the Court identified two groups, for whom the right could have different outcomes: the Tekna, a tribe over which the Sultan of Morocco had exercised “some authority”,¹⁰⁹ and the Regheibat, an “essentially autonomous and independent people in the region”.¹¹⁰ This is not to say that the Court actively sought the partition of this non-self-governing territory, but it did not exclude the possibility. The fact that the Court could do this does suggest that the territorial integrity of a non-self-governing territory was not firmly protected in international law.

Western Sahara remains the only recognised non-self-governing territory forcibly denied self-determination. As such, it can be seen as litmus test for the current state of a colonial right to self-determination in international law. In this regard, it is significant that the partition of Western Sahara was explicitly contemplated in a report by the UN Secretary-General in 2002 as a potential solution to the disputed territory. The Secretary-General proposed that:

“[T]he Security Council could ask my Personal Envoy to explore with the parties... whether or not they would be now willing to discuss under his auspices, directly or through proximity talks, a possible division of the Territory”

Moreover, if the parties could not reach agreement on this partition:

“[M]y Personal Envoy would also be asked to thereafter show to the parties a proposal for division of the Territory that would also be presented to the Security Council. The

¹⁰⁸ See, e.g., “the people of the Sahara under Spanish administration” GA Res. 3162(XXVIII), UN Doc. A/RES/3162(XXVIII), 14 December 1973.

¹⁰⁹ *Western Sahara* (n 13) 49, para. 106.

¹¹⁰ *Ibid* 67, para. 159.

Council would present this proposal to the parties on a non-negotiable basis.”¹¹¹

This suggests that decades after the conclusion of the bulk of decolonisation, it was possible to divide a non-self-governing territory and this could be done on the basis of an elite agreement, which, even if the people were later engaged, would define the options available to them.

3.2 Territorial Integrity in the Chagos Proceedings: A Distinct Principle or Part of Self-Determination?

The approach of states in the Chagos proceedings varied on the relationship between territorial integrity and self-determination and whether the former was a free-standing principle or an element in self-determination. While there were tactical and formal legal reasons why one of these approaches might be prioritised, it is also clear that states’ emphasis on one or the other was informed by longstanding views on the relationship between the principles. The ideas of nationhood that informed the relationship between principles 6 and 2 of the Declaration on Colonial Independence in 1960 were just as pertinent in 2018.

The problem with a free-standing principle of the territorial integrity of a ‘country’ expressed in Principle 6 of GA Res. 1514(XV) was that it needed to be established in custom. The principle could not rely on the expression of territorial integrity in Article 2(4) of the UN Charter 1945, which only related to relations between states.¹¹² Mauritius¹¹³ and other states¹¹⁴

¹¹¹ Report of the Secretary-General on the Situation concerning Western Sahara, UN Doc. S/2002/178, 15 February 2002, 8, para. 50.

¹¹² See *Kosovo* (n 32) 437, para. 80.

¹¹³ Oral Submissions of Mauritius (n 7) 48-49, para. 15.

¹¹⁴ Oral Submissions of Vanuatu (n 51) 31, para. 13; Oral Submissions of Zambia, Verbatim Record of the Public Sitting, 6 September 2018 < <https://www.icj-cij.org/files/case-related/169/169-20180906-ORA-02-00-BI.pdf>>

argued that a distinct duty to respect territorial integrity had emerged by 1965 from Principle 6 and practice in decolonisation informed by this provision. The UK and US, by contrast, citing the ICJ in *North Sea Continental Shelf*, emphasised the need for custom to be formed by “extensive and virtually uniform” practice and highlighted inconsistencies in Principle 6 and practice on the division of colonies to undermine this.¹¹⁵

Territorial integrity was also prioritised by states with territorial claims over non-self-governing territories. Guatemala argued that the “territorial integrity of States could not be jeopardized under ill-intended exercises of self-determination”.¹¹⁶ Its understanding of an “abusive use” and “weaponization” of the right was one that barred “recovery of territories unlawfully submitted to colonialism by imperialist countries under the excuse of self-determination outcomes.”¹¹⁷ This corresponded to its claim over Belize. Argentina, with a territorial claim over the Falkland (*Malvinas*) Islands, did not frame its argument in terms of abuse, but, nonetheless, prioritised territorial integrity as a distinct principle in relation to self-determination.¹¹⁸

Other states referred to another interpretation of territorial integrity to protect their interests: its application to states to prevent secession. Serbia, no doubt with Kosovo’s 2008 declaration of independence in mind, described territorial integrity as a peremptory norm of international law.¹¹⁹ Nigeria, a multi-ethnic federation that witnessed the devastating failed Biafra secession,

12, para. 15.

¹¹⁵ Oral Submissions of the United Kingdom (n 3) 45-46, para. 13, 47-51, paras. 20-30; Oral Submissions of the United States (n 67) 16, para. 43, 18-19, paras. 50-53.

¹¹⁶ Oral Submissions of Guatemala (n 49) 32, para. 9.

¹¹⁷ *Ibid.*

¹¹⁸ Oral Submissions of Argentina, Verbatim Record of the Public Sitting, 4 September <<https://www.icj-cij.org/files/case-related/169/169-20180904-ORA-01-00-BI.pdf>> 43-44, paras. 16-20; Written Comments of Argentina, 15 May 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180515-WRI-02-00-EN.pdf>> 13, para. 31.

¹¹⁹ Oral Submissions of Serbia (n 69) 12, para. 35.

was quick to qualify that any right to self-determination applicable to Chagossians was purely internal (i.e. within Mauritius) and did not imply a right to separate.¹²⁰

An alternative approach to the relationship was to position territorial integrity simply as a component of the right to self-determination.¹²¹ This effectively subordinated the principle to a support for self-determination, rather than a potential challenge to it. Belize, the subject of Guatemala's territorial claims, notably highlighted the protection of territorial integrity as central to the exercise of a right to self-determination.¹²²

Mauritius in its written submissions initially raised territorial integrity as a “corollary” or “associated right” to self-determination.¹²³ This was picked up on by the UK, which asserted that rather than corollaries, territorial integrity could conflict with self-determination¹²⁴ and highlighted that the phrase “associated right” suggested a more conditional relationship.¹²⁵ By the oral stage, Mauritius had dropped “corollary” and “associated” and positioned territorial integrity as an integral component of self-determination.¹²⁶

There were advantages to a self-determination-centred approach in terms of establishing obligations. First, there was more material in terms of instruments and practice to support a customary right to self-determination than a distinct principle of territorial integrity. Second,

¹²⁰ Oral Submissions of Nigeria, Verbatim Record of the Public Sitting, 5 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180905-ORA-02-00-BI.pdf>> 53, para. 11.

¹²¹ Oral Submissions of Kenya (n 51) 25, para. 10; Oral Submissions of South Africa (n 69) 14, para. 23.1.

¹²² “[O]nce the people of a colony enjoyed a right to self-determination, the protection of the territorial integrity of that colony formed part of that right.” Oral Submissions of Belize (n 50) 18, para. 45.

¹²³ Written Statement of Mauritius (n 5) Vol. I, 216-219, para. 6.50; Written Comments (n 53) Vol. I, 84, 133, para. 3.109,

¹²⁴ Written Comments of the United Kingdom, 14 May 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180514-WRI-01-00-EN.pdf>> 69, paras. 4.30-4.31.

¹²⁵ Oral Submissions of the United Kingdom (n 3) 47, paras. 20, 22

¹²⁶ Oral Submissions of Mauritius (n 7) 48-49, paras. 14-15.

in the grey area of custom formation, recognition of rights was semantically and conceptually more attractive than the imposition of obligations.

The weakness, though, with incorporating territorial integrity into self-determination is the latter's amorphous nature. The right complements or opposes other legal principles depending on the situation. The most common relationship between territorial integrity and self-determination after all is as a limit to the right (to preclude a right to secede), albeit outside the colonial context.¹²⁷ This does not mean that the right could not encompass territorial integrity in a colonial context but it would need to be clearly established rather than a passing alignment.

There are good reasons to make such a connection. The peoples of non-self-governing and trust territories have been territorially-defined as the inhabitants of defined political-territorial units rather than by other features, like ethnicity.¹²⁸ Moreover, the right in this context has been largely about managing the political transition of non-self-governing and trust territories into states that are also inherently territorially defined.¹²⁹ As the British Cameroons demonstrate, any decision that selects self-determination units that differ from the whole territory under consideration could potentially change the outcome of that process. This was underlined by Mauritius: "If the Chagos Archipelago was not part of the self-determination unit of Mauritius, then it would follow that it was a *separate* self-determination unit."¹³⁰ This point of integrity of process was strongly argued by several states.¹³¹ According to Botswana: "It amounts to saying: 'I recognize that you have a right to self-determination, but it is I who determine who

¹²⁷ See, e.g., "[I]nternational law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states." Supreme Court of Canada, *Reference re: Secession of Quebec*, (1998) 161 DLR, 4th Series, 436, para. 122.

¹²⁸ See Oral Submissions of Belize (n 50) 14, para. 29.

¹²⁹ See A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 72-73.

¹³⁰ Written Comments of Mauritius (n 53) 117, para. 3.75.

¹³¹ See Oral Submissions of Zambia (n 114) 8, para. 11; Oral Submissions of Belize (n 50) 9, para. 7, 14-15, para. 30; Oral Submissions of Mauritius (n 7) 47, para. 10; Oral Submissions of Brazil (n 48) 44, para. 13.

you are.’ This is an outright denial of the right to self-determination.”¹³² Similarly, in the words of Mauritius: “The colonial Power was not permitted to undermine the process of self-determination by changing the boundaries of the territorial unit before its people had had a chance to express their wishes.”¹³³

The UK countered this by distinguishing a territorial base essential for the exercise of self-determination, essentially the island of Mauritius, from peripheral areas that could be subject to modification:

“Territory is relevant to self-determination in that it defines and allows a ‘people’ meaningfully to exercise their right to self-determination. There should be a coherent and identifiable territorial base to which the exercise of self-determination can relate. This would suggest natural territorial units should be maintained. But it does not require that the boundaries of the territory remain wholly unchanged during some unspecified period prior to independence.”¹³⁴

Positioning Chagos in this peripheral category, it pointed out that they were extremely distant from Mauritius, with little social or economic interaction and no political representation. The detachment of Chagos would not undermine Mauritius’ ability to form a state.¹³⁵

¹³² Oral Submissions of Botswana, Verbatim Record of the Public Sitting, 4 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180904-ORA-02-00-BI.pdf>> 36, para. 24.

¹³³ Oral Submissions of Mauritius (n 7) 48, para. 15.

¹³⁴ Oral Submissions of the United Kingdom (n 3) 48, para. 21.

¹³⁵ “The Chagos Islands were loosely administered – as a matter of convenience – as a dependency of Mauritius. The distance of the Archipelago from Mauritius explains why its inhabitants had limited contact with Mauritius nor were they represented in Legislative Assembly.” Written Comments of the United Kingdom, 14 May 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180514-WRI-01-00-EN.pdf>> 14, para. 2.11.

There were two responses to this. First, Mauritius challenged the peripheral argument on its facts, emphasising the ties it had with Chagos:

“[T]he cultural, social and economic links between the mainland and the Archipelago, provide clear evidence of the fact that the Archipelago was – and was always treated by the administering power as – an integral part of the territory of Mauritius.”¹³⁶

However, second, a national territory, reflected in a ‘country’, was considered to have a distinct and uniform value, regardless of its distribution. The value of territory was again raised by states with a particular interest in this aspect of nationhood, such as Serbia,¹³⁷ whose attachment to Kosovo has a particular historical territorial dimension.¹³⁸ Vanuatu, an archipelago of over eighty islands stretching 1,300 km across the Pacific, likewise, rebuffed the idea that distance undermined territorial integrity.¹³⁹

Thus, there is arguably a *prima facie* case that the self-determination of non-self-governing territories is exercised in the whole territory of those colonies. What is less clear, though, is the extent to which obligations restrict detachment in all circumstances. In this regard, it is also important to consider whether any rights or obligations are affected by the procedure of separation.

4. The Procedure for Separation and the Role of Consent

¹³⁶ Written Statement of Mauritius (n 5) 229-230, paras. 6.64-6.65.

¹³⁷ See Serbia: “Mauritius and the Chagos Archipelago form a single national, social and economic unit.” Oral Submissions of Serbia (n 69) 13, para. 41.

¹³⁸ See M. Vickers, *Between Serb and Albanian: A History of Kosovo* (Hurst 1998) xiii.

¹³⁹ Oral Submissions of Vanuatu (n 51) 36, para. 28.

The ICJ's definition of self-determination in *Western Sahara* emphasised the right as a procedure rather than a particular outcome.¹⁴⁰ The definition also left latitude for states in how that procedure might be expressed. Similarly, the principle of territorial integrity has not been seen to be immutable. States, at least, have been able to consent to the adjustment of borders and the separation of territory.¹⁴¹ There is no reason, as such, why the principle should be different for non-self-governing territories, even if there might be more caveats over how consent might be expressed in a dependency. The question of whether the separation of Chagos violated international obligations depends on whether it was incompatible with any process by which territory could be divided from a non-self-governing territory. The UK argued that there had been a process by which Mauritius had given consent to separation of the Chagos archipelago. This was through an agreement between the governments of Britain and Mauritius in 1965 and the elections in Mauritius in 1967, prior to independence in 1968.¹⁴²

Practice over self-determination has shown that it can be exercised in various ways. The UN Secretary-General's Personal Envoy later dealing with Western Sahara in 2002 emphasised the multiple options for exercising the right, which could include elite agreements:

“[T]here were many ways to achieve self-determination. It could be achieved through war or revolution; it could be achieved through elections, but this required good will; or it could be achieved through agreement, as had been done by parties to other disputes.”¹⁴³

¹⁴⁰ See Written Comments of Mauritius (n 53) vol. I, 214, para. 6.45. See also J. Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law' (2006) 28 HRQ 186-206.

¹⁴¹ Summers (n 15) 502.

¹⁴² Oral Submissions of the United Kingdom (n 3) 11-21, paras. 22-65;

¹⁴³ Report of the Secretary-General on the Situation concerning Western Sahara, UN Doc. S/2002/178, 15 February 2002, 6, para. 33.

A similar flexibility was expressed in states' submissions over Chagos. Zambia summarised varying practice on the division of colonies, by concluding:

“[A]ll took place as a result of the expressed desire of the people of those territories to effect those changes. That desire was expressed either in United Nations-supervised plebiscites or by the assemblies or the governments of those territories concerned.”¹⁴⁴

States in their submissions recognised that practice in decolonisation had resulted in the division of colonies. Some states pointed out that much of this had taken place before the crystallisation of a norm of self-determination around 1960¹⁴⁵ (though why this did not undermine a territorial integrity component was less clear). Nonetheless, separation also occurred after 1960 and the division of Ruanda-Urundi into Rwanda and Burundi and Jamaica from the Turks and Caicos and Cayman Islands were highlighted, in particular.¹⁴⁶ The split between Ruanda-Urundi is particularly significant as it proceeded from an agreement between two governments, rather than a popular vote.

Mauritius in its interpretation of territorial integrity as a component of self-determination supported the use of plebiscites:

“[I]f a territory *were* to be divided, this would have to be by the agreement of the people of the *whole* territorial unit. By 1968, United Nations-supervised plebiscites had been

¹⁴⁴ Oral Submissions of Zambia (n 114) 12-13, para. 15.

¹⁴⁵ Oral Submissions of Belize (n 50) 22, para. 58; Oral Submissions of Zambia (n 114) 12-13, para. 15.

¹⁴⁶ Oral Submissions of the United Kingdom (n 3) 51, para. 29; Oral Submissions of Belize (n 50) 17, para. 41; Oral Submissions of the United States (n 67) 20, para. 58; Oral Submissions of Nicaragua, Verbatim Record of the Public Sitting, 5 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180905-ORA-02-00-BI.pdf>> 47, para. 60.

used on *many* occasions to allow the people of a colony to express their will as to the potential merger or division of the colony.”¹⁴⁷

However, it did not narrow this to a specific obligation.¹⁴⁸ Instead, it argued that consent to separation of territory required two elements: 1) participation of the whole population of the territorial unit; 2) the free expression of the wishes of the people.¹⁴⁹ Its contention was that the mechanisms used by the British did not address both Mauritius and Chagos as a unit¹⁵⁰ and that they were either coercive, in the case of government negotiations, or unable to meaningfully address a *fait accompli*, in the case of elections.¹⁵¹

There were two approaches to coercion in submissions. The first was linked to standards on the invalidity of agreements secured through coercion in Article 52 of the Vienna Convention on the Law of Treaties (VCLT) 1969. This was raised by Thailand. However, Article 52 reflected a narrow interpretation of ‘coercion’, limited to agreements secured by the threat or use of force. Many states had reacted to this concept by insisting on a broader political and economic understanding.¹⁵² However, a wider understanding of coercion also gives states a greater scope to challenge the validity of treaties. Thailand ultimately did not substantially re-engage with this debate, but it did note the “profound inequality between the two sides”¹⁵³ in the UK-Mauritius Agreement, a position echoed by other states.¹⁵⁴

¹⁴⁷ Oral Submissions of Mauritius (n 7) 49, para. 16.

¹⁴⁸ See, e.g., “[I]n accordance with the wishes of the entirety of the population as might be established in a freely-exercised referendum or plebiscite.” Written Comments of Mauritius (n 53) Vol. I, 109, para. 3.67.

¹⁴⁹ Written Statement of Mauritius (n 5) Vol. I, 228-243, paras. 6.62-6.96.

¹⁵⁰ Oral Submissions of Mauritius (n 7) 48-49, paras. 15-16.

¹⁵¹ Written Statement of Mauritius (n 5) Vol. I, 241, para. 6.93.

¹⁵² Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, Annexed to the Final Act of the United Nations Conference on the Law of Treaties, 26 March-24 May 1968 and 9 April-22 May 1969, UN Doc. A/CONF.39/26.

¹⁵³ Oral Submissions of Thailand, Verbatim Record of the Public Sitting, 6 September 2018 <<https://www.icj-cij.org/files/case-related/169/169-20180906-ORA-01-00-BI.pdf>> 22, para. 16.

¹⁵⁴ Oral Submissions of Serbia (n 69) 15-16, paras. 48-49; Oral Submissions of Zambia (n 114) 13, para. 17.

Mauritius, by contrast, avoided the limited concept of coercion in Article 52, as well as direct physical coercion in Article 51 (“nobody actually held a gun to the heads of the Mauritian representatives”¹⁵⁵). It argued that the VCLT 1969, with its limited inter-state scope, was inapplicable to agreements between the governments of a state and non-self-governing territory. Instead, it used ‘coercion’ specifically to inform the concept of self-determination and argued for an everyday understanding of the term as a negation of the free and fair component of the right.¹⁵⁶

Kenya in its submissions also extended the scope of this to the post-independence period. Addressing arguments that Mauritius acquiesced in the separation after independence, it considered that newly-independent states could also not express consent due to the economic dependence of the new state and vulnerability of emerging political institutions.¹⁵⁷ Nonetheless, the UK argued that “if an agreement could be set aside because one party was powerful and one was not, then very few treaties would be left standing.”¹⁵⁸ Extending self-determination arguments into an inter-state context could allow the right to become a general challenge to the integrity of treaties. Article 52 follows a restrictive formula precisely because of this potential challenge.

Nonetheless, there is a significant difference between non-self-governing territories and states. Sovereign equality entails that states should respect each other’s sovereignty, but they have no duty to act in the best interest of another population. States administering non-self-governing

¹⁵⁵ Oral Submissions of Mauritius (n 7) 52, para. 29.

¹⁵⁶ Ibid 52, para. 30.

¹⁵⁷ Oral Submissions of Kenya (n 51) 32, para. 44.

¹⁵⁸ Oral Submissions of the United Kingdom (n 3) 45, para. 10.

territories have this obligation and this could set limits on their relations with a non-self-governing territory.

A degree of pressure on another party is inherent in a negotiating process. Otherwise there would be no incentive to compromise, which the ICJ has considered integral to meaningful negotiation.¹⁵⁹ It is also important to recognise that in negotiations between a state and dependency, as the UK noted, “an imbalance between negotiating parties is unavoidable.”¹⁶⁰ Nonetheless, as Stephen Allen has pointed out, where there is a demonstrable benefit to the administering state at the expense of a population in a non-self-governing territory it may be questioned whether a state is meeting its obligations.¹⁶¹ This point was also made by Judges Kateka and Wolfrum in their Joint Dissenting and Concurring Opinion to the *Chagos Marine Protected Area Arbitration* (2015): “the United Kingdom... was under an obligation not to use pressure that could be acceptable in the relationship between two sovereign States, but not between a metropolitan State and a colony.”¹⁶² It is this pressure that arguably represents the most tangible potential breach of an obligation from the separation of the Chagos islands.

5. Conclusion

The current Chagos proceedings have the potential not only to reopen the role of international obligations in decolonisation but require their emergence and content to be defined to a greater precision than the Court has done before. The existence of obligations in 1965 may involve distinguishing and clarifying the roles of the declarations on Colonial Independence and Friendly Relations and their specific contribution to decolonisation. The Court must also

¹⁵⁹ *North Sea Continental Shelf* (n 42) 47, para. 85.

¹⁶⁰ Oral Submission of the United Kingdom (n 3) 45, para. 10.

¹⁶¹ Allen (n 1) 127.

¹⁶² Judges Kateka and Wolfrum, Joint Dissenting and Concurring Opinion (n 48) 19, para. 75.

consider how *opinio juris* is evaluated in relation to a majority and a consensus, whether states are specially affected and perhaps how the formation of new states qualifies as practice.

The proceedings also allow the clarification of the principle of territorial integrity and how it relates to self-determination. This article has outlined how this principle has been subject to different interpretations and varying practice and questioned whether it currently serves as a strong barrier to the division of a non-self-governing territory. However, it is also clear that the territorial integrity of a non-self-governing territory as a ‘country’ was also an important goal in decolonisation. It may also be significant that judges Kateka and Wolfrum in their dissenting opinion distinguished the separation of colonies where it advanced decolonisation from where it perpetuated a colonial situation.¹⁶³ This context may allow Chagos to be distinguished from some of this mixed practice.

Lastly, the proceedings might allow some parameters to be established in the process of exercising self-determination. This article has found that despite self-determination often being thought of as a direct expression of the wishes of a people, decolonisation can be pursued and shaped through inter-governmental agreements. Perhaps the most significant limit on these agreements in the case of Chagos, though, may be obligations under Article 73 of the UN Charter. It would be a certain irony if Article 73 was ultimately found to be the main source of an obligation not to separate the Chagos islands. If this were the case, it would show that despite its stirring rhetoric, the right of self-determination never really supplanted the obligations in Article 73 and the principle of trusteeship that it was supposed to render obsolete.

¹⁶³ Ibid 18, para. 72.