NILQ 71(2): 305–315

Asymmetrical international law and its role in constituting empires: the ICJ *Chagos* Advisory Opinion

GAIL LYTHGOE

University of Glasgow *

Abstract

The ongoing relationship between the UK and the Chagos Archipelago raises a number of important questions about international law's relationship with imperialism, more specifically, the ability of the international legal order to influence the fact and the manner of decolonisation. In this contribution, I explore some aspects of this problem. I begin by providing a brief overview of the proceedings of the International Court of Justice, summarising the basic legal consequences of the court's Advisory Opinion, before discussing its implications from the standpoint of what it reveals about international law's relationship with the residual British Empire. My argument is that, for all its apparent attempts to promote decolonisation and self-determination, the international legal order has been and continues to remain complicit in the maintenance of exactly the kind of asymmetrical legal relations that constitute empires. Thus, although the Chagos *Advisory Opinion may well have long-term significance for the development of the international legal doctrine and the teachings of international law, given the UK's current position, it will not have any immediate impact on the plight of the Chagossian people.*

Keywords: international law; international adjudication; imperialism; British Empire; postcolonial critique; legal subalternity; self-determination; International Court of Justice.

Introduction

On 22 May 2019, the UN General Assembly (UNGA), one of the six main organs of the UN, acting on a recently issued Opinion of the International Court of Justice (ICJ), passed a resolution calling for the UK to cease delaying the unlawfully discontinued decolonisation of Mauritius and to 'withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months … thereby enabling Mauritius to complete the decolonisation of its territory as rapidly as possible'.[1] The deadline set by the UNGA expired with no action taken by the UK government to comply with it. Indeed, the passing of the deadline was met with open defiance, even as it also triggered a wave of condemnation from other UN member states. As of June 2020, the UK continued not to recognise Mauritius's claim to sovereignty with regard to the Chagos Archipelago, despite the ICJ concluding that 'the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination' and

1 UN General Assembly Resolution 73/295 on the Advisory Opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, UN Doc A/Res/73/295 (22 May 2019) paragraph 3.

that 'the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State'.[2] This turn of events has led many commentators and legal experts to determine that the UK is now acting the part of a 'rogue'[3] or 'pariah'[4] state.

In addition to prompting a series of broader reflections about the UK's dubiously unique place in the contemporary international architecture, the Chagos saga also raises a number of important, if not immediately answerable, questions about the deeper relationship between international law and imperialism.

At least since the early 1960s, colonialism as an international regime and a form of political practice has been unequivocally condemned as one of the most fundamental breaches of international law. The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples pronounced colonialism as 'a denial of fundamental human rights' and 'an impediment to the promotion of world peace and cooperation'.[5] The 1970 Declaration on the Principles of International Law noted the duty of every state 'to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned'.[6] By 1989, the Draft Code of Crimes against Peace and Security of Mankind prepared by the International Law Commission listed 'colonial … or any other form of alien domination' as one of the principal crimes against peace on a par with aggression and international terrorism.[7] By 1995, the right of peoples to self-determination, the logical corollary of the prohibition of colonialism, was declared by the ICJ to be 'one of the essential principles of contemporary international law'.[8]

How legitimate is it then, against this background, that in 2020 not only should a state like the UK still find it possible to continue its 'colonial administration' over its overseas territories, despite the express wishes of the peoples concerned, but that this 'isolated, lawless, colonial'[9] state should continue to retain a privileged position in international relations and an authoritative voice on international law matters? As even its own diplomats have acknowledged, the UK's conduct raises serious questions about the propriety of its permanent membership of the UN Security Council (UNSC).[10] Yet, when all is said and done, the UK's position – both in relation to Chagos and to its

2 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion (25 February 2019), ICJ (hereafter '*Chagos* Opinion/Advisory Opinion') paragraph 177.

3 Rachael Kennedy, 'UK a "rogue state" after missing deadline to handover Chagos Islands' (*Euronews*, 22 November 2019) <www.euronews.com/2019/11/22/uk-labelled-rogue-state-after-missing-un-deadline-to-hand-chagos-islands-back-to-mauritius>.

4 Andrew Harding, 'UK Chagos islands control "crime against humanity"' (*BBC News,* 27 December 2019) <www.bbc.com/news/world-50924704>.

5 UNGA Resolution 1514 (XV): Declaration on the Granting of Independence to Colonial Countries and Peoples (14 December 1960) paragraph 1.

6 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UN Doc A/RES/2625(XXV) Annex (24 October 1970)

7 Draft articles on the draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission 1989, vol II(2), UN Doc A/44/10, 70.

8 *Case Concerning East Timor (Portugal v Australia)*, Judgment of 30 June 1995, ICJ Reports, paragraph 29.

9 Philippe Sands, 'General Assembly orders UK to leave #Chagos within 6 months, 115 votes in favour, 6 against. An isolated, lawless, colonial United Kingdom, still refusing to allow expelled Chagossians to return to their homes, unwilling to respect the rule of law or the #ICJ' (*Twitter*, 23 May 2019) <https://twitter.com/philippesands/status/1131460195337551874>.

10 Jamie Doward, 'UK could forfeit Security Council seat over Chagos Islands dispute' *The Observer* (London, 5 January 2020) <www.theguardian.com/world/2020/jan/05/uk-forfeit-security-council-chagos-islands-dispute>.

membership of the UNSC – remains more than just sustainable: like its special place in the broader UN architecture, it seems, in a way, guaranteed by the very structure of the international legal system.

Or, at least, that is what seems to be the case for the time being. The international legal process has certainly not yet run its full course. Despite the ICJ Opinion and UNGA initiatives, the situation is far from resolved, nor is it an isolated problem. Quite the opposite. First, there is the potential for further legal proceedings related to Chagos. At the close of 2019, the Prime Minister of Mauritius confirmed plans to explore the possibility of bringing an action against UK officials at the International Criminal Court for crimes against humanity, especially with respect to the forcible expulsion of Chagossians between 1968 and 1973.[11] In relation to these claims, respected QC Philippe Sands said refusing a deported population the right of return is 'arguably' a crime against humanity.[12] Taking a broader view, it can be noted that it is not only the UK and Mauritius whose legal position continues to be affected by the UK's assertion of sovereign control over the Chagos Archipelago. Diego Garcia, the largest of the Chagos islands, also featured in the January 2020 hostility between Iran and the USA, an incident that involved the killing of Iranian General Qasem Soleimani. Under the 1966 UK–US agreement, the US maintains a military base on Diego Garcia. It was to this strategically placed military base that six US B-52 bombers were reportedly deployed during the confrontation, not least because the island, it seems, is out of range of Iranian missiles.[13]

The significance of the Chagos question, in short, is beyond doubt. It will remain on the international law agenda in the coming years. How much these discussions will be able to reach the real root of the problem, however, is a completely different matter.

The ICJ's decision, the UNGA follow-up resolution, and the UK's reaction to them raise a number of far-reaching and difficult questions, not only about the state of international law's relationship with imperialism today, but also, more broadly, the general ability of the international legal system to shape and influence the conduct and policies of states, and the fact and manner of decolonisation. In the remainder of this article, I explore some aspects of these problems. I begin by providing a brief overview of the ICJ's proceedings, summarising the basic legal consequences of the court's Advisory Opinion, before discussing its implications from the standpoint of what it reveals about international law's relationship with the residual British Empire. My argument is that, for all its apparent attempts to promote decolonisation and self-determination, the international legal order has been and continues to remain complicit in the maintenance of exactly the kind of asymmetrical legal relations that constitute empires. Thus, although the *Chagos* Opinion may well have long-term significance for the development of the international legal doctrine and the teaching of international law, given the UK's current position within the UN architecture and the sustainability of this position under the existing international legal order, it will not have any immediate impact on the plight of the Chagossian people.

11 Harding (n 4).

12 Ibid.

13 Wyatt Olson, 'Six B-52 bombers heading to Indian Ocean island amid Iran tensions, report says' (*Stars and Stripes*, 6 January 2020) <www.stripes.com/news/pacific/six-b-52-bombers-heading-to-indian-ocean-island-amid-iran-tensions-report-says-1.613744#.XhQ9ywAccac.twitter>.

1 Background to the ICJ Advisory Opinion

1.1 The facts

The history of Britain's involvement in Chagos began in 1814 when it took over the colonial administration of Mauritius after France ceded the colony to Britain under the Treaty of Paris. The Chagos Archipelago, which lies 500 kilometres south of the Maldives and is made up of 60 individual islands, was included at the time as a dependency of Mauritius and for the next 150 years was administered by Britain on those grounds. After the forming of the UN, Mauritius became what is known in the UN vocabulary as a non-self-governing territory, one of the consequences of which was that, as the administering power, the UK undertook under Article 73 of the UN Charter to 'develop self-government' and 'to promote constructive measures of development' of all its constituent territories and peoples.

In 1964, four years before the declaration of Mauritian independence, the UK began a process of intensive negotiations about the future of the Chagos Archipelago. In February 1964, the USA approached the UK with a proposal to establish an American military base on Diego Garcia. The realisation of this project would require, among other things, the removal of the population with the understanding that they would not subsequently be allowed to return. Having been receptive to the American proposal, in June 1964 the UK began negotiations with Mauritian representatives concerning the 'detachment' of the Chagos Archipelago from Mauritius. The detachment 'as a condition of independence'[14] was finally executed in the Lancaster House Agreement of September 1965. Almost immediately, the UNGA expressed its deep concerns about the matter, indicating that the detachment violated the territorial integrity of Mauritius.[15] Still, the process went ahead: in November 1965, the UK established a new colony, the British Indian Ocean Territory, which included the Chagos Archipelago.

For the next half-century, the matter, in terms of the UN process, remained an open agenda item, until, finally, in 2017 the UNGA, acting under Article 96 of the UN Charter, resolved to submit a formal request to the ICJ for an Advisory Opinion, a non-binding judicial statement designed to provide guidance on whatever legal question the UNGA may feel is required. The resolution posed the following questions:

> (a) 'Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius …';
>
> (b) 'What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago …'[16]

14 Diane Marie Amann, 'Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965' (2019) 113 American Journal of International Law 784, 784.

15 UNGA Resolution 2066 (XX) Question of Mauritius, UN Doc A/RES/2066 (XX) (16 December 1965) paragraph 4.

16 UNGA Resolution 71/292 Request for an Advisory Opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, UN Doc A/RES/71/292 (22 June 2017).

1.2 The law

The modern law of decolonisation, as commonly understood, finds its origins in a series of UNGA resolutions adopted in the 1960s. As legal instruments, it should be noted, UNGA resolutions are not, technically, legally binding. In the literature they are often described as a species of 'soft law',[17] and the common assumption remains that though they may ultimately provide evidence or contribute to the formation of customary international law, they cannot in themselves give rise to legally binding obligations.[18] In the *Chagos* Opinion, the ICJ confirmed this long-standing view, repeating its observation from an earlier judgment: 'General Assembly resolutions … can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.'[19]

Substantively, the starting point of the modern law of decolonisation is found in UNGA Resolution 1514 (XV) of 14 December 1960. As the ICJ observes in *Chagos*, the adoption of Resolution 1514 became a 'defining moment'[20] in the evolution of contemporary international law not only because it had an important 'normative character, in so far as it affirm[ed] that "[a]ll peoples have the right to self-determination"',[21] but also because it had a 'declaratory character with regard to the right to self-determination as a customary norm'.[22] In particular, operative paragraph 5 of the resolution calls on colonial powers to 'transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire'.[23] Also of significance to the present case is paragraph 6 of the resolution which provided that '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.[24]

Although not considered evidence of custom, UNGA Resolution 2066 (XX) is another instrument deserving of mention at this point since it specifically addressed the 'Question of Mauritius'. Under paragraph 3 of this resolution, the UK was invited to 'take no action which would dismember the Territory of Mauritius and violate its territorial integrity'.[25] The underlying assumption here is clearly that the UK's obligation to decolonise *all* of Mauritius had already been established and the UNGA was discharging *its* obligations with regard to overseeing the UK's implementation of the latter.

Alongside custom, the second main source of international law is treaties. After the UN Charter, the treaty that at first glance would seem to be relevant in the present case was the aforementioned 1965 Lancaster House Agreement. In the *Chagos* Opinion, however, the ICJ took a markedly different view. Showing its awareness of the inherent asymmetrical balance of power between coloniser and colonised, the court effectively rejected its status as a valid international instrument, noting:

17 Mauro Barelli, 'The role of soft law in the international legal system: the case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 International and Comparative Law Quarterly 957, 959.

18 A Boyle, 'Soft law in international law-making' in Malcolm Evans (ed), *International Law* (5th edn, Oxford University Press 2018) 119.

19 *Chagos* Advisory Opinion (n 2) para 151.

20 Ibid paragraph 150.

21 Ibid paragraph 153.

22 Ibid paragraph 152.

23 UNGA Resolution 1514 (n 5) paragraph 5.

24 Ibid paragraph 6.

25 UNGA Resolution 71/292 (n 16) paragraph 3.

> … heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony. Having reviewed the circumstances in which the Council of Ministers of the colony of Mauritius agreed in principle to the detachment of the Chagos Archipelago on the basis of the Lancaster House agreement, the Court considers that this detachment was not based on the free and genuine expression of the will of the people concerned.[26]

The substantive rules of international law regarding decolonisation and self-determination are clear. Colonial powers are obliged to decolonise without any conditions or reservations. Detachment is incompatible with the purposes of the UN Charter. Every colonial administration must transfer all relevant powers back to the colonised peoples where that is shown to be their will and desire.

2 The ICJ Advisory Opinion

2.1 A surprisingly defiant court?

After the approach adopted in the *Marshall Islands* case[27] and the *Kosovo* Advisory Opinion, where it skirted around the issue of self-determination,[28] there was a general expectation among international lawyers that the ICJ would somehow fudge the *Chagos* Opinion. The 'blockbuster of an advisory opinion'[29] that came out, thus, was as notable as it was surprising.[30]

The main findings were unequivocal. Firstly, the court declared, 'the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago'.[31] Secondly, the ICJ observed that the UK remained 'under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible'.[32] Thirdly, the rest of the UN membership also remained 'under an obligation to co-operate with the United Nations in order to complete the decolonization of Mauritius'.[33]

2.2 Implications of the opinion: a window into the asymmetry of international law

The court's argument is rich with implications – not least because of the suggestion that at least one aspect of the legal situation created by the decolonisation of Mauritius by the UK gives rise to rights and obligations incumbent upon all other states (obligations *erga*

26 *Chagos* Advisory Opinion (n 2) paragraph 172.

27 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom), (Marshall Islands v India), (Marshall Islands v Pakistan)*, Preliminary Objections, Judgment, ICJ Rep 2016, page 833.

28 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Rep 2010, page 403.

29 Kevin Jon Heller, 'Shaping up to be a blockbuster of an Advisory Opinion! #Chagos #ICJ' (*Twitter*, 25 February 2019) <https://twitter.com/kevinjonheller/status/1100048585704566784>.

30 Marko Milanovic, 'ICJ delivers *Chagos* Advisory Opinion, UK loses badly' (*EJIL: Talk!*, 25 February 2019) <www.ejiltalk.org/icj-delivers-chagos-advisory-opinion-uk-loses-badly/>.

31 *Chagos* Advisory Opinion (n 2) paragraph 174.

32 Ibid paragraphs 183(3) and (4).

33 Ibid paragraph 183(5).

omnes)[34] – but in the present discussion I focus primarily on two points. The first relates to the conditionality of self-determination, specifically the contexts in which the right of self-determination exists and the strong link to decolonisation. The second concerns the legacy of empire on international law today; specifically, recognising the various historical asymmetries created by imperialism, including the imbalances of power arising in questions of representation and recognition.

Self-determination has always been a fraught concept in international law. In the first 30 years following the end of the Second World War, it was most actively invoked by the anticolonial movements struggling for independence and liberation from 'alien subjugation, domination, and exploitation'.[35] Its formulation as a right of 'all peoples' in the two UN human rights covenants,[36] however, gave rise to its potential application outside colonial contexts, and, as President Wilson found out, this produced ambiguities. It is clear the right to self-determination does not belong to *all* ethnic, religious, national or cultural groups. But just what exactly is a 'people'? International law has never clarified what a 'people' consists of and how its limits are to be determined.[37] Furthermore, what precisely does the right to self-determination entitle its subjects to? In the *Chagos* Opinion, it has been claimed, the ICJ effectively restricted the scope of self-determination only to decolonisation contexts. As Jan Klabbers puts it, the ICJ adopted an approach where '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'.[38] This has the advantage of narrowing down the range of potential rights-holders: it is only those people placed under a colonial rule. On the other hand, it goes against much of the contemporary consensus that the scope is wider; something the court itself explicitly acknowledged. The court said it was 'conscious that the right to self-determination … has a broad scope of application' and therefore it was going to 'confine itself, in this Advisory Opinion, to analysing the right to self-determination in the context of decolonisation'.[39] The court traces the *emergence* of the right of self-determination to contexts of decolonisation. But the Opinion did not address how self-determination may apply in other contexts. Does this mean that for all practical purposes of application, the right of self-determination is limited to contexts of decolonisation? It is not clear how the court envisages the right applying to contexts of secession, nor whether the court would be so defiant in applying the right in these contexts.

The second point the *Chagos* Opinion brings into relief is the legacy of empire and imperialism in international law. Much has been written about the relationship between

34 For more on this, see: Craig Eggett and Sarah Thin, 'Clarification and conflation: obligations erga omnes in the *Chagos* Opinion' (21 May 2019) <www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/>.

35 UNGA Resolution 1514 (n 5) paragraph 1.

36 International Covenant on Civil and Political Rights 1966, Article 1 'All peoples have the right of self-determination' (99 UNTS 171); International Covenant on Economic, Social and Cultural Rights 1966, Article 1 'All peoples have the right of self-determination' (993 UNTS 3).

37 James Crawford (ed), *The Rights of Peoples* (Oxford University Press 1992); Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995); Paul Weismann, 'Peoples' right to self-determination' (2019) 21 International Community Law Review 463.

38 Jan Klabbers, 'Shrinking self-determination: the *Chagos* Opinion of the International Court of Justice' (2019) 8(2) European Society of International Law: Reflections.

39 *Chagos* Advisory Opinion (n 2) para 144.

empire and international law.[40] It is a common thesis today that the formation and development of international law – its form and substance – have been heavily influenced by the experience and practices of imperialism, and at the same time, or indeed precisely because of that, international law has also played an important role in constituting and reproducing imperial regimes. The 'colonial encounter … played a crucial role in the formation of core international legal concepts, categories and doctrines, and especially sovereignty'.[41] As a result of this, international law has also been key to creating and sustaining empires: 'international law is not incidental to or external to the imperial enterprise ... it plays an important constitutive role in the creation and maintenance of the very structures and institutions that enable and make it possible in the first place'.[42] International law is a product of empires and colonial projects. and at the same time empires and colonial projects have been constituted and enabled by international law.

It is not difficult to see how the legacy of colonialism plays out in the *Chagos* case. There are three instances where this legacy reveals itself most notably. The first is in the negotiation of treaties between politically unequal parties. International law not only tolerates and legitimates this practice on the pretence it is the formal legal equality between the parties that really matters, but by remaining blind to the asymmetries of power it reinforces and perpetuates the inequality. One of the more understated but decisive factors in the *Chagos* Opinion was the asymmetry in the bargaining power between Mauritius and the UK that led to the detachment of Chagos. The court recounts some of the forceful discussions that took place between the UK and Mauritian representatives in this connection. For example, it notes that it was the stated and long-held preference of the Premier of Mauritius, Sir Seewoosagur Ramgoolam, that the parties agree on a 'long-term lease rather than detachment'.[43] This should be understood as the freely expressed will and desire of Mauritius. The UK Foreign Office and the Ministry of Defence in response recommended a 'forcible detachment'.[44] Forcible here does not mean the use of force, but any tactics that might force the Mauritian representatives to change their position. These intentions came out clearly in a Note prepared by the Private Secretary to the UK Prime Minister, Sir Harold Wilson: 'Sir Seewoosagur Ramgoolam is coming to see you at 10:00 tomorrow morning. The object is to frighten him with hope: hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago.'[45] The very 'granting' of independence by the benevolent colonial master was placed under threat if the colony did not accept what was demanded.

Another way in which the legacy of colonialism plays out in this episode can be seen in the function performed by international law's unstructured and decentred process of enforcement. Neither the ICJ nor the UNGA can 'order' a state to comply with their views and opinions, no matter how widespread the support for them may be otherwise. A decentred operationalisation of the legal process typically favours more powerful

40 Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2004); Antony Anghie, 'The evolution of international law: colonial and postcolonial realities' (2006) 27 Third World Quarterly 739; Susan Marks, 'Empire's law' (2003) 10 Indiana Journal of Global Legal Studies 449; Akbar Rasulov 'Imperialism' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019).

41 Marks (n 40) 457.

42 Rasulov (n 40) 433.

43 *Chagos* Advisory Opinion (n 2) paragraph 100.

44 Ibid paragraph 103.

45 Ibid paragraph 105.

parties. The principle of non-intervention and the right of every state to determine the extent of its obligations under international law provide states with just enough formal protection to be able to ignore, as a matter of law, the court's findings and the decisions of the UNGA. In these circumstances, only power can force compliance. But not every state has the same ability to withstand political pressure. Poorer and weaker states are more likely to comply even with the 'softest' of legal regimes, out of concern about crippling sanctions, unfavourable treatment in future negotiations, or simply being frozen out. Powerful states, such as the UK, can afford to ignore much of this, even when found in breach of their hard law obligations.

Thirdly and relatedly, the structure and processes of international law are not equipped to deal with peoples, who are the beneficiaries of the right of self-determination. Only states and other recognised legal entities – which does not include peoples – can, in most practical instances, access and use the formal machinery of international law.

In the case of ICJ Advisory Opinions, for example, it is only the UNGA, the UNSC and those 'other organs of the United Nations and specialized agencies which [have been] so authorized by the General Assembly' that may submit requests to the court.[46] The only way a 'people' can meaningfully pursue its legal interests through this channel is by getting one of these international bodies to take up its cause before the ICJ.

In the case of contentious disputes, only states may initiate legal proceedings before the ICJ, any assertion of jurisdiction by the court is grounded in the respective parties' consent, which typically will be limited not only *ratione materiae* but also *ratione personae* due to the requirement of reciprocity. This means that, if a 'people' intends at any point to benefit from the court's contentious jurisdiction, it firstly has to find a suitable third state able to bring a case that would fall within the material and personal jurisdiction of the court and then to convince it to take such action, but only in exercise of *its* sovereign rights, since the court's case law expressly rules out the possibility of third-party actions brought on behalf of the general public (*actio popularis*). Though, technically, this conjunction of events is not entirely impossible – the recent case brought by The Gambia against Myanmar provides a good illustration of how an interested third state can bring action in defence of the rights and interests of a persecuted people where the applicable legal frameworks so enables it[47] – the likelihood of this scenario becoming more regular is extremely low.

None of this, of course, will be news to those acquainted with the literature on international law and subalternity.[48] As scholars like Dianne Otto have argued, it is the very structure of international law's formal processes that often limits the participation and representation of peoples, noting the tension between the 'emancipatory ideas' of international law and the 'current state-based structure of the international community'.[49]

46 UN Charter 1945, 1 UNTS XVI, Article 96.

47 Application Instituting Proceedings and Request for Provisional Measures, Republic of The Gambia v Republic of the Union of Myanmar, 11 November 2019. See in particular section II founding the court's jurisdiction.

48 Dianne Otto, 'Subalternity and international law: the problems of the global community and the incommensurability of difference' (1996) 5 Social and Legal Studies 337; Rahul Rao, 'Subalternity and international law' (2017) 18 Melbourne Journal of International Law 1; Kiran Grewal, 'Can the subaltern speak within international law? Women's rights activism, international legal institutions and the power of "strategic misunderstanding"' in Nikita Dhawan, Elisabeth Fink, Johanna Leinius and Rirhandu Mageza-Barthel (eds), *Negotiating Normativity* (Springer 2016).

49 Otto (n 48) 338–339.

The Chagossian people waited nearly half-a-century for the right conjunction of goodwill and strategic interests among external actors before their cause was finally taken up and their voice could be heard in an authoritative legal forum. Even then, it was not the Chagossians themselves that directly raised their case and had their rights asserted, but Mauritius and the UNGA.

The story of the Chagossians' legal silence – the subaltern that cannot speak even when its destiny is being decided in court – may seem poignant. Yet, there is a long history of this. In the 1995 *East Timor* case – where the court dismissed Portugal's complaint against Australia on the grounds that the dispute between them could not be properly decided without also pronouncing on the legality of conduct by Indonesia, which had refused to accept the court's jurisdiction – one of the judges noted exactly this kind of moment of silenced subalternity. In a candid passage at the start of his Separate Opinion, Judge Vereshchetin writes:

> Besides Indonesia, in the absence of whose consent the Court is prevented from exercising its jurisdiction over the Application, there is another 'third party' in this case, whose consent was sought neither by Portugal before filing the Application with the Court, nor by Australia before concluding the Timor Gap Treaty. Nevertheless, the Applicant State has acted in this Court in the name of this 'third party' and the Treaty has allegedly jeopardized its natural resources. The 'third party' at issue is the people of East Timor.[50]

Vereshchetin goes on to note that given the judgment did not address these people 'one might wrongly conclude that the people, whose right to self-determination lies at the core of the whole case, have no role to play in the proceedings' even though 'the right of a people to self-determination … requires that the wishes of the people concerned at least be ascertained and taken into account'.[51] He did not mean that 'the Court could have placed the States Parties to the case and the people of East Timor on the same level procedurally',[52] only that there is a need 'for the Court … to ascertain the views of the East Timorese representatives of various trends of opinion on the subject-matter of the Portuguese Application'.[53] As things stand, however, he concludes, the lack of any evidence that such views were ever sought should, in principle, have been considered another factor 'leading to the inability of the Court to decide the [present] dispute'.[54]

The tensions raised in *Chagos* and in *East Timor* continue into the present day. Most recently in relation to the oral submissions in *The Gambia v Myanmar Genocide* case,[55] as a tactic to give voice to those who could not speak in the court, a group of civil society institutions representing the Rohingya people set up a series of unofficial events on the periphery of the ICJ proceedings in the hope of giving the Rohingya people a 'right of reply'[56] to Myanmar and Gambia's oral submissions. This reply cannot be 'legally heard' by the court. There is growing pressure to hear and accommodate the voices of the peoples most affected and who cannot bring cases for themselves. In this case, the Rohingya were reliant on The Gambia to instigate a case. Although without legal effect,

50 *Case Concerning East Timor* (n 8) Separate Opinion of Judge Vereshchetin, 135.

51 Ibid.

52 Ibid.

53 Ibid 138.

54 Ibid.

55 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Oral Proceedings 18–21 December 2019.

56 Video of the meeting held on 11 December 2019, 15:00, the Nutshuis, The Hague <www.facebook.com/watch/live/?v=1205861036269715&ref=watch_permalink>.

periphery events may certainly impact the awareness of international lawyers and seem to be, at least, a step in the right direction.

Conclusions

Empire and colonialism are not just a part of Britain's history but also of its present. Chagos remains a colony of the UK. The desire of Mauritius is that the islands are returned to it, and the desire of the Chagossian people is to return to their land. The ICJ Advisory Opinion confirmed all of this and left no ambiguity about the legitimacy of these demands. But it did so without giving a voice to the Chagossians or securing compliance from the UK. The incorporation of the Chagos Archipelago into the British Indian Ocean Territory in 1965, the court concluded, meant that the decolonisation of Mauritius by the UK had not been lawfully completed. The UK's continuing assertion of sovereign control over the islands means that colonialism still very much remains a part of the UK's role and place in contemporary international relations and international law.[57]

There is no doubt that colonialism is unlawful under international law, and yet the very design and operationalisation of the international legal system mean this fact in itself will often have little discernible impact on the practical realities of decolonisation, and virtually no influence over the laws and politics of the respective colonial powers. There are no enforcement mechanisms that can force the UK to hand Chagos back to Mauritius and to allow the return of Chagossians. The very framework of international law and the political architecture that supports it are set up in such a way that nothing can meaningfully be done to compel the UK to change its position on these matters. Because of its veto power with regard to the UNSC, the UK remains legally invulnerable to any pressure coming from the UN. Despite being effectively found in violation of its obligations under the UN Charter, it cannot lose its UNSC seat – just like Russia and the US did not lose their seats on the UNSC for their breaches of the UN Charter. In a decentralised legal system wedded to the principles of sovereign consent and legal non-interference, more often than not it is power that forces compliance. Weak states comply because they must. Powerful states find ways to act as they wish.

None of this means, of course, that the *Chagos* Advisory Opinion is meaningless. From the international law perspective, it is, I think, very likely that the Opinion will have a long-lasting effect – but more so perhaps for pedagogical and academic purposes. There are some clear and uncompromising statements from the court. The law was clarified and the substance of UNGA Resolution 1514 (XV) as customary international law was put beyond a doubt. All of this seems very useful from the standpoint of international legal education. Outside this context, however, it is not at all clear what the broader real-world impact of the Opinion might be. It seems almost certain, however, that it is not going to have any immediate effect on the lives of the most tragic *dramatis personae* in this act: the displaced, silenced and still un-self-determined Chagossian people.

57 As of February 2020, the UN 'returned' the Chagos Archipelago to Mauritius in its map of the world. While this designation, of course, is not legally binding, it is highly symbolic and shows the UN is willing to take interesting steps to secure decolonisation. See <https://www.un.org/Depts/Cartographic/map/profile/world.pdf>.