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CASE AND COMMENT

RECKONING WITH BRITISH COLONIALISM: THE CHAGOS ADVISORY OPINION

MAURITIUS was a non-self-governing territory under UK administration until 1968. In 1965, as the constitutional process leading to the territory's independence progressed, the UK decided that the Chagos Archipelago was to be detached from Mauritius so that, remaining under British sovereignty, it could host a US military base. British officials sought and ultimately secured the consent of Mauritius's representatives in exchange for a number of commitments, including that of returning the islands if the need to maintain military presence there ever subsided. The change to Mauritius's territory was heavily criticised at the United Nations.

A few years after achieving independence, Mauritius started voicing the view that the excision of Chagos had violated international law. Its claim that the UK was obliged to return the islands intensified as the tragedy of the Chagossians, who were expelled and prevented from returning to their homeland, unfolded. Mauritius's efforts to bring the issue to an international forum culminated with the UN General Assembly (UNGA) requesting, in 2017, an advisory opinion from the International Court of Justice on whether the decolonisation of Mauritius had been lawfully completed and the legal consequences of the continuing UK presence in Chagos. In the opinion entitled *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court decided, by 13 votes to one, that the decolonisation of Mauritius was not lawfully completed; that the UK is under an obligation to bring to an end its administration of Chagos; and that all UN Member States are legally required to cooperate with the UN in dealing with this state of affairs. Eleven of the 14 sitting judges appended to the advisory opinion individual opinions that elaborate upon or criticise the Court's reasoning.

Before dealing with the merits of the request, the Court unanimously decided that it had jurisdiction to give an opinion on the legal question

asked by the UNGA. A trickier preliminary issue was whether the court ought to exercise its discretion to decline giving an opinion because of "compelling reasons" of judicial propriety. The strongest argument advanced in this connection was that the UNGA's request concerned a bilateral dispute between Mauritius and the UK, to the judicial settlement of which the UK had not consented. In previous cases, the Court had accepted that entertaining requests that circumvent the principle of consent, on which its jurisdiction to settle disputes between states is based, could be incompatible with its judicial character in certain circumstances (e.g. *Western Sahara* (1975) I.C.J. Rep. 12, at 25). Yet, by 12 votes to two, the Court decided that it was appropriate to give the opinion because the "issues raised by the request [were] located in the broader frame of reference of decolonization", a matter "which [was] of particular concern to the United Nations" (at [88]). The Court's analysis is in keeping with previous cases where the Court gave opinions on issues that overlapped with disputes between states but had been on the UN agenda (*Western Sahara*, at 26–27; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* (2004) I.C.J. Rep. 136, at 158–59). It confirms the Court's tendency to give precedence to the multilateral aspects of requests for an advisory opinion over their bilateral aspects, which reflects its understanding of its duty to contribute to the activities of the UN as the organisation's "principal judicial organ". Judges Tomka and Donoghue dissented on this point, expressing concern that the advisory jurisdiction of the Court is now increasingly used as a last-resort forum for disputes between states in which the UNGA has only been involved marginally or in the distant past (the UNGA had not discussed the question of the detachment of Chagos since the late 1960s).

In giving its advice to the UNGA, the Court had to deal with three issues: the obligations that international law – in particular, the right of self-determination – imposed on the UK between 1965 and 1968; whether the UK had breached those obligations; and, if so, the legal consequences arising therefrom.

Tackling the first issue, the Court dismissed the argument that the right to self-determination was not applicable as customary international law in the relevant period, having only later crystallised in the practice and *opinio juris* of states. The Court found that state practice on decolonisation had already consolidated by the time UNGA Resolution 1514(XV) (the so-called "Colonial Declaration") was adopted in 1960, and pointed to that resolution's "declaratory character" (at [152]). It then recalled that self-determination requires the "expression of the free and genuine will of the people concerned", and clarified that the right applies to the entirety of each non-self-governing territory, thus having the effect of preventing colonial powers from dismembering colonies without the consent of the local populations (at [157]–[160]).

The Court's reasoning should be commended for doing two things. The first is avoiding an excessively static approach to the formation of international custom, which would have led to the conclusion that self-determination only emerged as a legal right when the process of decolonisation was almost complete, that is, when the principle was no longer needed. In the hearings of a previous arbitration involving Mauritius and the UK, James Crawford, acting as counsel for Mauritius, argued that to say that self-determination only became law at the finishing line "was as if the non-self-governing territories gate-crashed a diplomatic reception, to which, it was afterwards conceded, they should have been invited" (*The Chagos Marine Protected Area Arbitration*, Hearing of 5 May 2014, 957). That is a point that the advisory opinion seems to heed, and which invites reflection upon the role of hindsight in the analysis of the raw data of state practice and *opinio juris* when claims about custom are made in a historical context. While an international lawyer looking at the question the day after the Colonial Declaration was adopted might have been unsure as to whether self-determination was already a rule of customary international law, the way in which the principle was invoked and applied in the subsequent years sheds light on its evolution and emergence as a normative practice adhered to by states. The second thing that the Court's reasoning should be commended for is clarifying that the emergence of the right to self-determination deprived colonial powers of the prerogative to dispose of colonial territory. International law only deals with the long-lasting effects of colonialism in a superficial manner, offering limited opportunity to criticise the way in which colonial powers carved out and further dismembered colonies with little, if any, consideration to the interests of the local populations. That said, the Court's reasoning on the integrity of non-self-governing territories makes it clear that there came a point where colonial powers became bound to respect the boundaries that they had drawn themselves.

As regards the second main issue, then, the court decided that the UK breached its international obligations by detaching Chagos from Mauritius. However, although correct in its conclusion, the Court's reasoning is laconic. The Court observed that Mauritius was a colony "under the authority of the United Kingdom"; that as a result the agreement warranted "heighted scrutiny"; and that the circumstances of the detachment showed that the agreement was "not based on the genuine expression of the will of the people concerned" (at [172]). But it did not explain what those circumstances were. It failed to state, for example, that the record shows that the UK would have proceeded with the excision with or without the consent of the Mauritian representatives, which means that a free and genuine choice was never offered. Nor did the Court pronounce on the more contentious issue of whether, and to what extent, the UK had used the prospect of achieving independence as leverage to coerce the Mauritian representatives

into agreeing to the deal. At the same time, the advisory opinion does contain a lengthy and detailed description of the events of 1965–68, as if inviting the reader to join the dots, and identify for herself the relevant circumstances that substantiate the Court's conclusion. In contrast with the Court's approach are the separate opinions of Judges Sebutinde and Robinson, who take the time to apply the law to the facts in a way that the advisory opinion falls short of doing.

Finally, dealing with the issue of the legal consequences arising from its findings of law and fact, the Court decided that the UK committed a continuing internationally wrongful act which it has the obligation to cease by bringing its administration of Chagos to an end. Describing "respect for the right to self-determination as an obligation *erga omnes*", the Court also concluded that all UN Member States must cooperate with the UN in completing the decolonisation of Mauritius. The Court's reluctance to characterise self-determination as a peremptory norm of international law (*jus cogens*), referring to it instead as an *erga omnes* right, is noteworthy. It runs counter to the tendency in the more recent case law to apply the concept of *jus cogens* to substantive issues (e.g. *Jurisdictional Immunities of the State (Germany v Italy)*, (2012) I.C.J. Rep. 99), reserving the concept of *erga omnes* for discussions of *locus standi* (e.g. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, (2012) I.C.J. Rep. 422) – which more or less reflects the structure found in the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARS). Those familiar with the work of the Court can safely predict that the use of the *erga omnes* terminology resulted from careful deliberation at the time of drafting. One might wonder whether the Court was hesitant to refer to self-determination as *jus cogens* because the right has been a contentious issue outside the context of decolonisation, but the conceptual slippage is far from inconsequential. Refraining from labelling self-determination as *jus cogens* has made it easier for the court to omit the finding that all states are obliged, in addition, to deny recognition to the UK's current exercise of sovereignty over Chagos (per the rule articulated in Article 41(2) ARS). In that, the present opinion contrasts with the Court's previous opinions in *Legal Consequences of the Continued Presence of South Africa in Namibia*, (1971) I.C.J. Rep. 16, 56 – where it affirmed a general duty for states not to recognise South Africa's presence; and *Construction of a Wall*, p. 200 – where, finding that Israel had breached obligations *erga omnes*, it affirmed that all states had a duty not to recognise as a lawful the situation created by the construction of the wall. While neither of these opinions used the language of *jus cogens*, which only became part of the Court's lexicon in 2005, they provide clear authority for the proposition that an obligation of non-recognition arises out of the breach of certain fundamental rules of international law. That the Court has now reverted back to the language of *erga omnes*, but

done so in a way that downplays the legal consequences of the UK's breach of the principle of self-determination, makes the Court's case law look incoherent. Those discrepancies, alongside the conceptual confusion that the reasoning creates, are discussed in the separate opinions of Judges Cançado Trindade, Sebutinde and Robinson.

Being an advisory opinion, the Court's judgment is not binding on the UK – formally, it ranks as legal advice given to the UNGA to help it perform its functions. Yet, opinions given by the principal judicial organ of the United Nations are highly authoritative. The UK now faces an uphill battle to justify its presence in the Chagos Archipelago legally.

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FORMALISM AND REALISM IN CAMPAIGN FINANCE LAW

R. v MACKINLAY [2018] UKSC 42, [2018] 3 W.L.R. 556 addressed a narrow question of statutory construction, with implications for two weighty influences upon elections: party support of local candidates, and campaign funding. The case considered an interlocutory pure question of law for an ongoing criminal prosecution. The Supreme Court imposed statutory reporting restrictions and answered the legal question without applying its conclusions to the specific facts of the case. Nevertheless, the facts are important for the general substantive context. In issue was whether a candidate must explicitly authorise campaign resources that are provided to the candidate *gratis* ("notional expenditures") for the resources to qualify as candidate "election expenses" under the Representation of the People Act 1983 (RPA). While *Mackinlay* rightly concluded that such notional expenditures do not require authorisation to be treated as candidate election expenses, the Supreme Court undertook a tortured reading of statutory language to avoid engagement with substantive political realities. Its unwillingness to face these underlying issues may in time undermine the regulatory regime.

Campaign financing by individual candidates (under the RPA) and political parties (under the Political Parties, Elections and Referendums Act 2000 (PPERA)) is extensively regulated. Under PPERA, section 72(7), if a party expenditure would also qualify as a candidate expenditure, it is attributed to the candidate rather than the party for regulatory purposes. Parties frequently provide extensive campaign support to candidates in competitive local elections, so this distinction has great significance for compliance with spending and reporting requirements. Attributing functionally local spending to a national party may allow funders to use the