NITPICKING JUSTICE

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When legal niceties get in the way of justice, which should give? The answer might seem obvious: How could it be appropriate to insist on upholding legal technicalities when justice is at stake? But legal "technicalities" such as jurisdiction and standing are at least part of what makes law a distinctive enterprise, separate from morality. So if we think the legal enterprise has value, then to what extent are legalisms worth upholding, even when they lead to injustice in an individual case?

These questions occurred to me as I read Philippe Sands' beautifully written new book, *The Last Colony*. The book movingly describes the grave injustice done to the people of the Chagos Archipelago by Great Britain, which forcibly removed then from their homes in the late 1960s and early 1970s and – shamefully – continues to deny them the right to return. In Philippe's inimitable, highly personal style, he tells the story of the quest to use international law to remedy this injustice – a story in which he played a key role.

The story Philippe tells is of the arc of the law bending towards justice. It begins with what many regard as the low point in the ICJ's history, its 1966 decision in the *South West Africa* case, holding that Liberia and Ethiopia lacked standing to challenge South Africa's racist rule of South West Africa (now Namibia) – a case that Philippe describes as "plung[ing] the court into an abyss of disrepute" (p. 39) and "forever" damaging both its reputation and that of Percy Spender, its Chief Judge at the time (p. 32). The rest of the book charts the efforts of the ICJ to rehabilitate itself, at least in the eyes of the Global South, first in its 1971 *Namibia* advisory opinion, which found that South Africa' s rule over South West Africa was illegal and must be ended immediately (p. 61);

then in the *Nicaragua* case, which held that US support for the *contras* violated international law (pp. 66-67); and finally in its *Chagos Advisory Opinion*, which concluded that the separation of the Chagos Archipelago from Mauritius was illegal, that Britain's decolonization of Mauritius had therefore not been lawfully completed, and that the United Kingdom must end its administration of Chagos "as rapidly as possible" (p. 133).

There were bumps along the way. Mauritius wanted to bring a contentious case against Britain under the Convention on the Elimination of Racial Discrimination (CERD) but was discouraged from doing so by the ICJ's decision that it lacked jurisdiction in a similar case under CERD brought by Georgia against Russia (p. 91). Mauritius brought a claim against the United Kingdom under the UN Convention on the Law of the Sea (UNCLOS), challenging Britain's establishment of a marine protected area around the Chagos Archipelago, but the arbitral panel said that it lacked jurisdiction to resolve issues concerning sovereignty over land territory. And the biggest bump of all, Britain rejected the advice of the ICJ in its *Chagos Advisory Opinion* and continues to rule the Chagos Archipelago to this day, a stance that Philippe characterizes as "rais[ing] serious questions about the country's purported commitment to the rule of law." (p. 146).

In this story of the slow progress of law in overcoming injustice, Philippe does not consider whether there is a potential tension between the two. Instead, he assesses opinions purely in terms of their results – their contribution to justice. On the one hand, the ICJ's decision in *South West Africa* was the nadir of the Court's history because it struck "a blow for colonial rule, leaving apartheid and discrimination in place" (p. 39). Conversely, the *Nicaragua* case "helped the Court to emerge from a wilderness" and "cleans[ed] many of the stains left by South West Africa" (p. 67) because it sided with David over Goliath, Nicaragua over the United States (p. 64). The two dissenting arbitrators who rejected the UK's jurisdictional challenge in the *Chagos Marine Protected Area* arbitration opened the door "to the intelligence of a future day" (p. 97, quoting Jessup).

In contrast, procedural objections that stand in the way of the Court doing justice are dismissed as "nit-picking lawyer's arguments" (p. 58), while decisions that accept these arguments, like the ICJ decision that it lacked jurisdiction to consider the complaint brought by Georgia against Russia under CERD, are obliquely criticized as "legalistic" and "technical" (p. 91).

The Last Colony is a book written for the general public, so Philippe does not delve into the legal issues in these rulings and never says in so many words whether he thinks they were rightly or wrongly decided as a matter of law. But he seems to take the perspective of legal realists that judges use procedure merely as a cover for substance and that procedurally-based decisions can therefore be disparaged. The ICJ decision in the *South West Africa* case was ostensibly based on the technical legal issue of standing, but it really was about colonialism and made the ICJ "an instrument" of that discredited practice (p. 39). Sir Christopher Greenwood was "less open to human rights arguments than his predecessor" on the ICJ; hence he was more likely to agree with a procedural argument that the Court lacked jurisdiction (p. 91). The ruling by the UNCLOS arbitral tribunal in the *Chagos Marine Protected Areas* case that it lacked jurisdiction over the land territorial dispute between Mauritius and the UK was an "all-male affair," involving an arbitrator (again, Sir Christopher Greenwood) with a potential conflict of interest who should have recused himself (pp. 92-93).

I am sympathetic to Philippe's perspective that we should evaluate decisions by their results rather than their legal reasoning. *Roe v Wade* was a landmark decision because it held that women have a fundamental right to choose whether or not to have an abortion, while *Dobbs* was a terrible one, because it allows states to deny that right. To quibble about which decision better reflects the "law" seems perverse, like Herbert Wechsler's hand-wringing about whether *Brown v Board of Education* rested on some "neutral principle."[1] If judges not legal rules determine outcomes – if cases can come out either way – then judges should not

[1] Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1 (1959).

hide behind legal rules and pretend that they are simply doing what the law requires; they should take responsibility for their decisions and seek to do justice.

And yet … is there another side to the story? Rules about standing and jurisdiction are part and parcel of the law. So, if one believes in the principle of legality, then perhaps judges should apply these rules, even if they result in injustice in an individual case. Perhaps that is an important aspect of their judicial function. Would we want judges to act like Judge Handy – the exemplar of legal realism in Lon Fuller's apocryphal *Case of the Speluncian Explorers* – who completely ignores the law in order to reach what he considers to be the right result?[2] If not, how do we reconcile the demands of legality and justice?

Philippe was an advocate in most of the cases he describes, so it is understandable that he does not admit the possibility that the cases he lost might have been correctly decided, or the cases he won wrongly decided. But that question certainly seems relevant in assessing the role of law in addressing the injustice done to the Chagossians.

Consider, for example, the 3-2 decision of the arbitral tribunal in the *Chagos Marine Protected Area* case, finding that the tribunal lacked jurisdiction to consider Mauritius's claim of sovereignty over the Chagos Archipelago. Philippe portrays the majority decision as retrograde, which in some sense it was – as "pass[ing] over in silence on the future Madame Elsyé and other Chagossians, and on the legacy of colonialism" (p. 97). But although the decision failed to remedy the injustice inflicted on the Chagossians by Britain, it rested on strong legal grounds. UNCLOS gives its dispute settlement bodies – including the arbitral tribunal in the *Chagos Marine Protected Area* case – jurisdiction only to consider disputes concerning "the interpretation or application" of UNCLOS (UNCLOS art. 288(1)). Since nothing in UNCLOS addresses the issue of territorial sovereignty, Mauritius's claim of sovereignty over the Chagos Archipelago manifestly did not involve the interpretation or application of UNCLOS. Hence the majority's conclusion that the tribunal lacked

[2] Lon Fuller, *The Case of the Speluncean Explorers*," 62 HARV. L. REV. 1731 (1949).

jurisdiction to consider Mauritius's claim.[3] This result may seem legalistic, but aren't courts supposed to decide cases according to the law? If so, then shouldn't we favor the majority opinion in the *Chagos Marine Protected Area* case if it had the stronger legal basis, even though it failed to do justice for the Chagossians or to open the door to "the intelligence of a future day," as the dissent did?

The treatment of the legal effect of the *Chagos Advisory Opinion* raises similar questions. That advisory opinions are not legally binding is unexceptionable[4] – at least, that is what I had always thought. But if so, then Britain's refusal to accept the *Chagos Advisory Opinion* was not an additional violation of international law, as it would have been in a contentious case. Instead, the ICJ's opinion merely provided advice about international law – advice that the United Kingdom was well within its rights to reject, if it found the advice unpersuasive.

Nevertheless, a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) found otherwise in a recent maritime delimitation case between Mauritius and the Maldives, which Philippe briefly describes (p. 150). Maldives raised a preliminary objection that ITLOS lacked jurisdiction to delimit the maritime boundary because an indispensable third party – the United Kingdom, which also claims sovereignty over the Chagos Archipelago – was absent. The Special Chamber rejected the preliminary objection by a vote of 8-1, on the ground that the ICJ advisory opinion, although admittedly not binding, had nevertheless definitely resolved the dispute between Mauritius and the United Kingdom about Chagossian sovereignty. Philippe clearly agrees, describing Maldive's concerns as "unfathomable" (p. 138) and the British position as "pure Alice in Wonderland" (p. 150).

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[3] Mauritius tried to argue that the provision in UNCLOS about "applicable law" (i.e. art. 293) expanded the tribunal's jurisdiction and the two dissenting arbitrators agreed.

[4] See, for example, the ICJ's advisory opinion in the *Interpretation of Peace Treaties*, 1950 ICJ Rep. 65, 71 ("The Court's reply is only of an advisory character: as such, it has no binding force."); MANLEY HUDSON, THE PCIJ, 1920-1942 at 511-12 ("An advisory opinion of the Court is what it purports to be. It is advisory…. Though the authority of the Court is not to be lightly disregarded, it gives to the Court's opinions only a moral value.").

The ITLOS Special Chamber decision may be a victory for justice. But is it a victory for the rule of law? Should we welcome the alchemy by which ITLOS transmuted an advisory opinion into a decision that definitively decided a bilateral dispute? The ITLOS Special Chamber attempted to justify its decision by saying that ICJ advisory opinions, although not "binding," are "authoritative" and have "legal effect." But this is a distinction without a difference. By concluding that the ICJ's *Chagos Advisory Opinion* effectively settled the issue of who has sovereignty over the Chagos Archipelago, the ITLOS Special Chamber --with only a lone dissent – effectively obliterated the distinction between advisory and contentious opinions.

This is seemingly not the first time ITLOS has bent the rules in its quest to reach what it considers to be the right result. First, it adopted rules in 1997 that dramatically expanded, "essentially … out of the blue,"[5] the very modest advisory jurisdiction that States gave it in UNCLOS.[6] Then, in a line of decisions that one commentator characterizes as "appalling," it used the "applicable law" provision of UNCLOS to say that it has jurisdiction to resolve non-UNCLOS disputes, despite the "wide modern acceptance of the principle that applicable law provisions do not expand the jurisdiction of international courts and tribunals."[7]

As someone with a legal realist perspective about judicial decisionmaking, I agree with Philippe that judges are, in fact, often result-oriented and that the composition of the ICJ can determine the outcome of cases, a description of judicial decisionmaking amply supported by studies of the US Supreme Court. As Philippe relates, when the ICJ's composition changes, its rulings follow suit. First, the ICJ decides that it

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[5] T Ruys and A Soete, *"Creeping" Advisory Jurisdiction of International Courts and Tribunals? The Case of the International Tribunal for the Law of the Sea*, 29 LEIDEN J. INT'L L. 155, 173 (2016).

[6] For criticism of the effort by ITLOS to expand its own advisory jurisdiction, see; Y Tanaka, *The Role of an Advisory Opinion of ITLOS in Addressing Climate Change: Some Preliminary Considerations on Jurisdiction and Admissibility* 32 REV. EUR., COMPARATIVE & INT'L ENVTL. L. (2023).

[7] Peter Tzeng, *Jurisdiction and Applicable Law under UNCLOS*, 126 YALE L.J. 242, 243, 158 (2016).

can hear the complaint by Ethiopia and Liberia concerning South Africa's racist governance of South West Africa, and the complaint by Georgia against Russia under CERD. Then a few judges depart, new ones take their place, and the ICJ reverses itself. An ITLOS panel includes a judge partial to Britain and the panel decides in Britain's favor; what else should one expect?

But it is one thing to say, as a descriptive matter, this is the way things really work, and a very different thing to say, as a normative matter, this is how judges should decide cases. Of course, it is great when result-oriented judges reach the results we like – results that move us closer to justice. But what is sauce for the goose is sauce for the gander. Result-oriented judges may also reach results we don't like. And when they do, then legal nit-picks that prevent unfavorable decisions – like rules that limit a court's jurisdiction – may look a whole lot better.