placing Sovereignty: Justice Donoghue’s dissent in the *Chagos* Advisory Opinion

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*It is for the people to determine the destiny of the territory and not the territory the destiny of the people*.[[1]](#footnote-1)

 In the 1975 *Western Sahara* case, Spain argued that the International Court of Justice should not exercise its discretion to give an advisory opinion as doing so would be incompatible with the Court’s judicial character. Spain’s primary objections were based on the consequences said to follow from the absence of its consent to the adjudication of the questions presented by the General Assembly to the Court. In particular, Spain asserted that

In the present case the advisory jurisdiction is being used to circumvent the principle that jurisdiction to settle disputes requires the consent of the parties.[[2]](#footnote-2)

In response to a direct communication on 23 September 1974 from Morocco proposing joint submission to the ICJ, Spain had made clear that it did not consent to the submission of this issue to the jurisdiction of the Court. Furthermore, Spain considered the subject of the dispute to be “substantially identical” to the subject of the questions on which the advisory opinion was requested. On this basis, the advisory procedure was being used as an “alternative after the failure of an attempt to make use of the contentious jurisdiction with regard to the same question” and was therefore a “means of bypassing the consent of a State, which constitutes the basis of the Court’s jurisdiction.”[[3]](#footnote-3) This would arguably result in “compulsory jurisdiction being achieved by a majority vote in a political organ.”[[4]](#footnote-4)

 Despite fully accepting that Spain had not consented to the adjudication of the questions formulated in UN G.A. Resolution 3292 on the “Question of Spanish Sahara,” the Court had no difficulty in dismissing Spain’s objections. Where responding to such a request would “have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without it consent,” rendering an advisory opinion would be incompatible with the Court’s judicial character.

But the dispute here arose from the “decolonization proceedings of the United Nations” and involved legal questions “located in a broader frame of reference than the settlement of a particular dispute and embrace other elements.”[[5]](#footnote-5) The object of the General Assembly’s request was not to bring before the Court a dispute or legal controversy in order that it may later, “on the basis of the Court’s opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy.” Rather, the object of the request was to obtain from the Court an opinion which is of assistance to it “for the proper exercise of its functions concerning *decolonization of the territory*.”[[6]](#footnote-6)

In the exercise of the Court’s advisory opinion discretion, it was especially necessary to appreciate the “origin and scope of the dispute” to understand the “real significance” of Spain’s lack of consent in the case, as follows:

The real issue between Morocco and Spain regarding Western Sahara is not one as to the legal status of the territory today, but one as to the rights of Morocco over it at the time of colonization. The settlement of this issue will *not affect the rights of Spain today as the administering power*, but will assist the General Assembly in deciding on the policy to be followed in order to accelerate the decolonization process in the territory.[[7]](#footnote-7)

 In her lone dissent in the *Chagos Archipelago* Advisory Opinion, Justice Donoghue cites to this passage noting that the Court in *Western Sahara* further “found that ‘the request for an opinion does not call for the adjudication upon *existing territorial rights or sovereignty over territory*.’”[[8]](#footnote-8) On this basis, she distinguishes the request in the *Chagos* case which centrally involves a “bilateral dispute between the United Kingdom and Mauritius regarding sovereignty over the Chagos Archipelago” and in relation to which the U.K. has persistently refused consent to adjudicate, whether in the ICJ or arbitration proceedings under Annex VII of UNCLOS.

 As I read Philippe Sand’s masterful and emotionally powerful account of the case in *The Last Colony*, it was this question that kept recurring in my mind. Was this a case centrally about “sovereignty over territory,” and, if so, was Justice Donoghue not at least partly correct that the *Western Sahara* and *Chagos* cases are distinguishable? Indeed in *East Timor* (*Portugal v. Australia*) a quarter century earlier, didn’t the Court decline to exercise its contentious jurisdiction altogether, despite the parties’ acceptance of compulsory jurisdiction under the optional clause, in the absence of Indonesia’s consent as a “necessary party”?[[9]](#footnote-9) Or was the case more centrally about the right of the Chagossians to self-determination, akin to the right of the Saharawi to self-determination in the territory of Western Sahara? If so, wasn’t the Court’s advisory opinion just another instance of assisting the General Assembly in “the proper exercise of its functions concerning decolonization of the territory”?

 These two views express the essential ambiguity and double-bind between sovereignty and self-determination that lies at the heart of the modern structure of international law. The Court’s opinion is expressed in the language and authority of decolonization and self-determination, and yet it ineluctably falls back onto a statist framework underpinned by the very colonial doctrines it claims to overcome. Conversely, Justice Donoghue’s dissent speaks in the statist language of sovereign consent and yet is underpinned by a background norm of the right of self-determination of peoples.[[10]](#footnote-10) How should we understand such apparent paradoxes and dualities?

 In her critical analysis of the *Western Sahara* advisory opinion, Vasuki Nesiah observes that the state is the “supreme icon of postcolonial modernity” and that a “range of protagonists in the decolonization drama, from the departing colonial powers to Third World nationalists to international jurists, all clung to the modern nation-state as the means through which self-determination was to be realized.”[[11]](#footnote-11) As a result, the “received categories of the territorially-bounded state reach into the postcolonial imagination both to produce and to discipline ‘independence.’”[[12]](#footnote-12) This has the paradoxical effect of stifling the pursuit of self-determination and prematurely foreclosing options available to particular communities. This is precisely what we see in the majority opinion in the *Chagos Archipelago* case.

 In applying the principle of self-determination as a customary law norm as declared by the General Assembly in Resolution 1514 (XV) of 14 December 1960, the Court observes that paragraph 6 provides:

Any 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.

The territorial integrity of a non-self-governing territory is thus said to be a “corollary” of the right to self-determination. It follows that “any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination.”[[13]](#footnote-13)

 Who, however, is the *subject* of the right to self-determination, i.e. the “people concerned”: the Mauritians or Chagossians? The Court does not address this issue squarely. Rather, it simply states that “no free and genuine will of the people concerned” was expressed at the time of the detachment of the Chagos Islands. In so doing, the Court appears to apply a qualified form of the *uti possidetis* principle such that, from 1960 onwards, any changes of (internal) borders undertaken by the colonial power are presumed to circumvent the self-determination obligation and are therefore invalid under international law.[[14]](#footnote-14)

 What are the consequences of this finding? In this narrative, territorial integrity emerges as a “statist spatial representation intelligible to international law, and posited as indispensable to the self-determination of the post-colony.”[[15]](#footnote-15) Despite of its colonial lineage, the principle of *uti possidetis* can be seen here to be operating in the post-colonial context achieving its two goals of defining the relationship to territory as well as relationships between alternative contenders to territory, effectively “freeze-framing the map operative at the moment of decolonization.”[[16]](#footnote-16) On this reading, it is the *territory* of the Chagos Islands that has been unlawfully detached from Mauritian sovereignty, either without obtaining the free and genuine will of the Mauritian people or under conditions of duress. This would be the case regardless of whether the Chagos archipelago was entirely uninhabited or, alternatively, whether the human rights of the Chagossians living on the islands were robustly protected by the United Kingdom.[[17]](#footnote-17)

At the same time, it is this conception of territorial sovereignty that animates Justice Donoghue’s lone dissent. As she observes, while there is no reference to “sovereignty” in the request to the General Assembly, Mauritius’ own statements make clear that the request for an advisory opinion was related to “the completion of the process of decolonization of Mauritius, thereby enabling Mauritius to *exercise its full sovereignty over the Chagos Archipelago*.”[[18]](#footnote-18) Unlike in the case of Spain as administering power of Western Sahara in 1975, this directly affects the sovereign rights of the United Kingdom and the “legal status of the territory today.” The logic of the Court’s opinion inseparably binds self-determination and territory together.

This construction of legal reasoning paradoxically makes the question of the human rights of the Chagossians, including their right to self-determination and any reparations for its long denial, now subject to the sovereign will of Mauritius. Will the Mauritian government, for example, give effect to or extend the joint U.K./U.S. agreement allowing the United States to operate a military base on the island of Diego Garcia? Will former inhabitants of the islands be permitted to return and, if so, under what terms and conditions exactly? In relation to these issues, the Court merely states as follows:

As regards the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, this is an issue relating to the protection of the human rights of those concerned, which should be addressed by the General Assembly during the completion of the decolonization of Mauritius.[[19]](#footnote-19)

The Court thus does not address the specific human rights dimensions of the case, confining itself “to analyzing the right to self-determination in the context of decolonization.”[[20]](#footnote-20) As argued by Hilpold, it is “difficult to reconcile the statement [on resettlement] with the lofty finding in para. 144 …  according to which the right to self-determination is a fundamental human right.”[[21]](#footnote-21) What would it have meant to take the right to self-determination as a human right seriously? Again, the analysis of Hilpold is illuminating:

If taken seriously this finding would have implied a full examination of the human rights implications of Great Britain’s continuing disrespect of her obligations as a colonial power. Of course, this would have meant to attribute, at least partially, a new understanding to the concept of self-determination, namely to put the individual at the center of interest and not the territory, to apply the rules on self-determination according to the needs of the people concerned and not on the basis of uti possidetis considerations, in clinical isolation from the needs of the persons immediately affected by the related measures.[[22]](#footnote-22)

Paradoxically, it is precisely in relation to these questions – whether and when there arose a customary international law right of self-determination of peoples; the content of any such right and the obligation of colonial States that were a consequence of the right to self-determination – that Justice Donoghue suggests would have been appropriate for the Court to have chosen to exercise its discretion to give an advisory opinion.

 One of the great achievements of Philippe Sands’ *The Last Colony* is to tell the story, through the eyes and from the unique personal perspective of Liseby Elysé, of the dispossession and forced removal of the Chagossians from the Chagos Islands. This is the perspective of modern human rights law with the individual as the central subject of international law. This is not, however, the narrative or legal logic underpinning the Court’s advisory opinion. The right to self-determination of the Saharawi people lay at the center of the Court’s 1975 advisory opinion in *Western Sahara*, as paraphrased in Judge Dillard’s famous statement that “it is for the people to determine the destiny of the territory and not the territory the destiny of the people.”

In *Chagos Archipelago*, however, it is the reattribution of territorial sovereignty over the Chagos Islands to Mauritius and the strong condemnation of colonialism that lies at the center of the Court’s advisory opinion. Indeed, for the International Tribunal for the Law of the Sea following the Court’s advisory opinion, sovereignty has already passed to Mauritius.[[23]](#footnote-23) As Hilpold concludes, while this will “surely give redress to past injustice … it is not so certain that thereby the destiny of the Chagossians will be improved by any degree.”[[24]](#footnote-24)

In many respects, however, this framing of the question was ingenious. It avoided all the usual pitfalls and intractable questions associated with claims of the right to self-determination of the Chagossians and focused instead on the decolonization of Mauritius.[[25]](#footnote-25) The direct linkage of the right to self-determination with the non-self-governing territory as right-holder ensured that self-determination and the right to decolonization come close to being one and the same thing in the Court’s reasoning.

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 Western Sahara, 16 October 1975, Advisory Opinion, ICJ, Separate opinion by Judge Dillard, p. 122. [↑](#footnote-ref-1)
2. ¶ 25. [↑](#footnote-ref-2)
3. ¶ 27. [↑](#footnote-ref-3)
4. *Id.* [↑](#footnote-ref-4)
5. ¶ 38. [↑](#footnote-ref-5)
6. ¶ 39. (My emphasis.) UN G.A. Res. 3292, para. 3 asked the Court for an opinion so as to be in a position to decide “on the policy to be followed in order to accelerate the decolonization process in the territory … in the best possible conditions, in the light of the advisory opinion.” The legitimate interest of the General Assembly was thus in relation to obtaining an opinion regarding its own “future action.” [↑](#footnote-ref-6)
7. ¶ 42. It follows that “the legal position of the State which has refused its consent … is not “in any way compromised by the answers the Court may give to the questions put to it.” [↑](#footnote-ref-7)
8. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, 22 June 2019, ICJ, Advisory Opinion, Justice Donoghue (dissenting), ¶ 17. (My emphasis.) [↑](#footnote-ref-8)
9. Case Concerning East Timor (Portugal v. Australia), 30 June 1995, ICJ, Advisory Opinion. [↑](#footnote-ref-9)
10. [T]he lack of United Kingdom consent to adjudication of the bilateral dispute would not stand in the way of an opinion limited to the questions of law presented by Question *(a)*, i.e. whether there was, as of 1965-1968, a customary international law right of self-determination of peoples; the content of any such right and the obligations of colonial States that were a consequence of the right of the right to self-determination. Such a response would have provided legal guidance to the General Assembly without undermining the integrity of the Court’s judicial function.

Justice Donoghue (dissent), ¶ 22. [↑](#footnote-ref-10)
11. Vasuki Nesiah, “Placing International Law: White Spaces on a Map,” 16 *Leiden Journal of international Law* 1, 2 (2003). [↑](#footnote-ref-11)
12. *Ibid.* [↑](#footnote-ref-12)
13. *Chagos Archipelago* Majority opinion, ¶ 160. [↑](#footnote-ref-13)
14. *See* Peter Hilpold, “‘Humanizing’ the Law of Self-Determination – the *Chagos* Island Case,” 91 *Nordic Journal of International Law* 189, 202 (2022). [↑](#footnote-ref-14)
15. Nesiah, *supra* note 11, at 20. [↑](#footnote-ref-15)
16. *Ibid.* 24. [↑](#footnote-ref-16)
17. In this move, “[c]ritics of *uti possidetis* emerge as also having invested in the project of territorial inscription that we had earlier allied with the colonial legacy.” *Id.* 29. [↑](#footnote-ref-17)
18. *Chagos Archipelago* Advisory Opinion, Justice Donoghue, ¶ 11. Mauritius concludes in its written statement that “international law requires that … [t]he process of decolonization of Mauritius be concluded immediately, including by the termination of the [U.K.] administration of the Chagos Archipelago… so that Mauritius is able to exercise sovereignty over the totality of its territory.” *Id.* ¶ 12. [↑](#footnote-ref-18)
19. *Chagos Archipelago* Advisory Opinion, ¶ 181. [↑](#footnote-ref-19)
20. *Ibid*. ¶ 144. [↑](#footnote-ref-20)
21. Hilpold, *supra* note 14, at 207. [↑](#footnote-ref-21)
22. *Ibid.* 207-8. [↑](#footnote-ref-22)
23. In its recent judgment of 28 January 2021 (Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives on the Indian Ocean, Case No. 28) on preliminary objections, the International Tribunal for the Law of the Sea stated as follows:

The United Kingdom’s continued claim to sovereignty over the Chagos Archipelago is contrary to those determinations. While the process of decolonization has yet to be completed, Mauritius’ sovereignty over the Chagos Archipelago can be inferred from the ICJ’s determinations.”

Ibid. para. 246. [↑](#footnote-ref-23)
24. Hilpold, *supra* note 14, at 212. *See also* Jan Klabbers, ‘Shrinking Self-determination: The *Chagos* Opinion of the International Court of Justice’, 8 ESIL Reflections (2/2019). [↑](#footnote-ref-24)
25. As noted by Jan Klabbers, the Court was never asked “whether the Chagossians had a right to self-determination and if so, whether this had been violated: this would have been the obvious way to frame the issue, but it would have invited all the regular problems associated with the right to self-determination: who are the right holders? Do the islanders qualify as a ‘people’ for purposes of self-determination, or do the Mauritians, and are these the same people or not?” Klabbers, *supra* note 24, at note 7. [↑](#footnote-ref-25)