PEOPLEHOOD OBSCURED? THE NORMATIVE STATUS OF SELF-DETERMINATION AFTER THE *CHAGOS ADVISORY OPINION*

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*In international law the right of every people to self-determination is well established. Yet in terms of substance and process this right incident to 'peoplehood', on its face the paradigmatically collectively held right, is inadequately articulated. This paper interrogates the normative status of self-determination in the context of colonial domination, after the Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 ('*Chagos Advisory Opinion*') issued by the International Court of Justice ('ICJ') in 2019. Self-determination is investigated both as a putative norm of customary international law ('CIL') and a putative norm jus cogens. The CIL status of self-determination in the post-colonial setting is well established by the ICJ and a higher, peremptory status is strongly implied. In either case territorial integrity is of the essence of the rights conveyed by the norm. Here it is argued that while the formal status of a norm of self-determination is thus to some extent clarified by the* Chagos Advisory Opinion*, the substance of such a norm remains insufficiently articulated. If anything, the emphasis on territorial integrity compromises the status of peoplehood and conveys that the incidents of statehood take precedence over the collective rights of distinct populations.*

I INTRODUCTION

The right to self-determination has long been accepted as one of the pre-

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eminent principles of the international law of the modern era.[1] The origins of a political right to self-determination in a population can be traced back to the era of the French, American and Haitian Revolutions of the late 18th century.[2] At the conclusion of World War II, under the auspices of the United Nations, many colonial states began or accelerated the decolonisation process in response to administered peoples claiming their right to self-determination.[3] The right to self-determination is enshrined in several international human rights instruments, including the *Charter of the United Nations*,[4] and the two 1966 Human Rights Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights. Common art 1 of those Covenants states that '[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.[5]

The operational consequences of a right to self-determination have been considered on several occasions by the International Court of Justice ('ICJ').[6] Both the ICJ and states have thus had the opportunity to clarify and consolidate the status of the right to self-determination and its place in the international law system. Despite the attention devoted to the right to self-determination, it still remains one of the most 'indeterminate, incoherent, and unprincipled' areas of international law.[7] Indeed it has been observed that self-determination as an international legal process 'thrives in ambiguity'.[8] On 25 February 2019, the ICJ released its Advisory Opinion on the *Legal Consequences of the Separation of the*

1 Sean D Murphy, 'Peremptory Norms of General International Law (*Jus Cogens*) and Other Topics: The Seventy-First Session of the International Law Commission' (2020) 114(1) *American Journal of International Law* 68, 71, quoting International Law Commission, *Report of the International Law Commission: Seventy-First Session*, UN Doc A/74/10 (2019) 146–7 ('*Report of the International Law Commission*'); Malcolm N Shaw, 'Peoples, Territorialism and Boundaries' in Malcolm N Shaw (ed), *Title to Territory* (Ashgate, 2005) 492, 494 ('Peoples, Territorialism and Boundaries'); Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press, 2008) 154.

2 David S Berry, 'The Caribbean' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 578, 600; Elizabeth Rodríguez-Santiago, 'The Evolution of Self-Determination of Peoples in International Law' in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press, 2016) 201, 205–6.

3 Jamie Trinidad, *Self-Determination in Disputed Colonial Territories* (Cambridge University Press, 2018) 8; Nathan Yaffe, 'Indigenous Consent: A Self-Determination Perspective' (2018) 19(2) *Melbourne Journal of International Law* 703, 715.

4 *Charter of the United Nations* arts 1(2), 55.

5 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1 ('*ICCPR*'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1.

6 See *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 31–2 [55] ('*Western Sahara Advisory Opinion*'); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 ('*Construction of a Wall Advisory Opinion*'). See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403 ('*Kosovo Advisory Opinion*').

7 Fernando R Tesón, 'Introduction: The Conundrum of Self-Determination' in Fernando R Tesón (ed), *The Theory of Self-Determination* (Cambridge University Press, 2016) 1, 1.

8 James Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape a Contemporary Law of Nations* (Martinus Nijhoff, 2nd rev ed, 2014) 571. One alternative to this ambiguity is the harsh majoritarian realism of Higgins discussed by Trinidad, *Self-Determination in Disputed Colonial Territories* (n 3) 60.

Chagos Archipelago from Mauritius in 1965 ('*Chagos Advisory Opinion*').[9] The *Chagos Advisory Opinion* explored the international legal ramifications flowing from the administrative separation, by the British colonial power, of the Chagos Archipelago from the rest of Mauritius. The Court debated whether the process of decolonisation had or had not been lawfully completed when Mauritius, sans Chagos, gained its independence. Further, the ICJ examined the consequences arising under international law as a result of the continuing administration by the United Kingdom ('UK') of the Chagos Archipelago.[10]

The first focus of this paper will be on the right to self-determination as a rule of customary international law ('CIL'). A point of inquiry for the ICJ in the *Chagos Advisory Opinion* was when the right to self-determination 'crystallised' as CIL. Advocates for the position held by the government of Mauritius argued that such a norm of CIL had crystallised before the critical date of 1965. This claim concerning the crystallisation of a CIL of self-determination will be examined in the context of opposing arguments from representatives of the UK and the United States of America ('USA'). While the process of 'crystallisation' remains problematic in some respects, this paper will concur with the Court that the right to self-determination had emerged as CIL by 1960, that is to say following United Nations General Assembly ('UNGA') Resolution 1514 (XV) of 14 December 1960, the *Declaration on the Granting of Independence to Colonial Countries and Peoples* ('*Resolution 1514*').[11] It has been suggested that *Resolution 1514* in particular leads to the inescapable conclusion that self-determination has a normative status.[12]

The paper will then move on to explore the applicability and operation of peremptory norms (norms *jus cogens*) and how a rule of international law achieves the status of a peremptory norm.[13] The normative status of self-determination in

9 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95 ('*Chagos Advisory Opinion*').

10 Stephen Allen, 'The Chagos Advisory Opinion and the Decolonization of Mauritius', *American Society of International Law: Insights* (Web Page, 15 April 2019) <https://www.asil.org/insights/volume/23/issue/2/chagos-advisory-opinion-and-decolonization-mauritius> ('Decolonization of Mauritius'); Stephen Allen, 'Self-Determination, the *Chagos Advisory Opinion* and the Chagossians' (2020) 69(1) *International and Comparative Law Quarterly* 203 ('Self-Determination'); Fernando Lusa Bordin, 'Reckoning with British Colonialism: The Chagos Advisory Opinion' (2019) 78(2) *Cambridge Law Journal* 253; Jan Klabbers, 'Shrinking Self-Determination: The *Chagos* Opinion of the International Court of Justice', *European Society of International Law: Reflections* (Web Page, 27 March 2019) <https://esil-sedi.eu/esil-reflection-shrinking-self-determination-the-chagos-opinion-of-the-international-court-of-justice/>; Marko Milanovic, 'ICJ Delivers Chagos Advisory Opinion, UK Loses Badly', *EJIL: Talk!* (Blog Post, 25 February 2019) <https://www.ejiltalk.org/icj-delivers-chagos-advisory-opinion-uk-loses-badly/>.

11 *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN Doc A/RES/1514(XV) (14 December 1960) ('*Resolution 1514*'); *Chagos Advisory Opinion* (n 9) 132–3 [150]–[153].

12 Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, 1963) 100.

13 Asif Hameed, 'Unravelling the Mystery of *Jus Cogens* in International Law' (2014) 84(1) *British Yearbook of International Law* 52, 62; Matthew Saul, 'Identifying *Jus Cogens* Norms: The Interaction of Scholars and International Judges' (2015) 5(1) *Asian Journal of International Law* 26, 31 ('Identifying *Jus Cogens* Norms').

the wake of the *Chagos Advisory Opinion* will be analysed in this context. It will be argued that post-*Chagos Advisory Opinion*, there is sufficient evidence that the right to self-determination displays all elements necessary to confirm its status as a peremptory norm or to elevate it to that status.[14] This is despite the fact that the *Chagos Advisory Opinion* Bench declines except in individual opinions, to expressly endorse that status. Characteristic elements of *jus cogens* norms will be compared with both the situation arising out of the *Chagos Advisory Opinion* as well as historical examples, such as previous Advisory Opinions, to arrive at this conclusion. However self-determination in international law is not (or not merely) an abstract principle but concerns specific, indeed unique, populations and communities. It is a right held by 'a people' and in this context it has been authoritatively stated that the right to self-determination encompasses a 'free and genuine expression of the will of the peoples concerned'.[15] It has been long contested as to what the meaning of a 'people' is in this context.[16] In the wake of the *Chagos Advisory Opinion*, the 'people' to which self-determination applies clearly refers to the entirety of a non-self-governing territory, in this case the whole population of pre-independence Mauritius including the Chagossians.[17] To the extent the Chagossians constituted or constitute a 'people', and despite the recognition of the distinctiveness of their experience in the factual matrix, their self-determination rights are subsumed under those of Mauritius as a whole. Indeed it is above all the violation of the territorial integrity of the greater Mauritius entity, by the 1965 British colonial excision of the Chagos Archipelago, that generates the conclusion that decolonisation was never completed. In something of a catch-22, the protean self-determination rights of the Chagossians are traded in for a right to territorial integrity of a larger, non-self-governing entity, itself defined by a succession of colonial European rulers; a kind of *uti possidetis* by stealth. Indeed, colonial self-determination can involve '[t]he suppression of the ambitions of ethnic and tribal groups as a result of the upholding of arbitrarily drawn colonial boundaries'.[18]

To the extent this analysis is correct, it has consequences for subgroups of any state's population, such as indigenous peoples within settler societies.[19] It would

14 *Chagos Advisory Opinion* (n 9).

15 *Western Sahara Advisory Opinion* (n 6) 32 [55].

16 Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47(3) *International and Comparative Law Quarterly* 537; Trinidad, *Self-Determination in Disputed Colonial Territories* (n 3) 71, 242.

17 *Chagos Advisory Opinion* (n 9) 134 [160].

18 Trinidad, *Self-Determination in Disputed Colonial Territories* (n 3) 15. See also James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019) 224. On the relevance of *uti possidetis*, see Stephen Allen, *The Chagos Islanders and International Law* (Hart Publishing, 2014) 202 ('*The Chagos Islanders*').

19 Yaffe (n 3). When settler societies take the extreme form of 'transplanted' communities, as may arguably be said concerning the population of the Malvinas/Falkland Islands, problematic matters of self-determination and the definition of 'peoples' once more emerge: Trinidad, *Self-Determination in Disputed Colonial Territories* (n 3) 148, quoting HE Chehabi, 'Self-Determination, Territorial Integrity, and the Falkland Islands' (1985) 100(2) *Political Science Quarterly* 215, 217–18.

be confirmed that under current international law, indigenous peoples would not have claims to self-determination on a par with those of the entirety of the population of a territory. More generally, the opportunity will have been passed by to investigate and to clarify the complex relationships between peoplehood and self-determination in international law.

II THE *CHAGOS ADVISORY OPINION*

Mauritius, understood as geographically including the Chagos Archipelago, has a long history as a colonial entity. It was first colonised by the Dutch.[20] France became the administering power in 1721.[21] The French maintained their rule until 1814, at which time following the penultimate defeat of Napoleon, sovereignty was ceded to the UK.[22] In 1965, the UK terminated its colonial possession of Mauritius in favour of the locally elected leadership of Mauritius, through the Lancaster House Agreement.[23] Whilst the mainland of Mauritius was decolonised in this fashion, the Chagos Archipelago was excised from the territory of Mauritius.[24] The Chagos Archipelago was renamed as part of the British Indian Ocean Territory ('BIOT'), where the UK's colonial administration continued.[25] The UK subsequently entered into an agreement with the USA which established a military base on the Chagos Archipelago's largest island, Diego Garcia.[26] This bilateral agreement included a clause which stated that the inhabitants of Diego Garcia could be resettled to ensure that states parties' defence needs were met.[27] Between 1967 and 1973, approximately 1500 Chagossians were either prevented from returning or forcibly removed by the UK and the USA.[28] Extreme tactics were employed to remove the Chagossians, reportedly even including death threats to opposition groups and embargos aimed at starving the population.[29] In 1967 the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (the Committee of 24), a special UN committee for decolonisation, stated

20 Geoffrey Robertson, 'Who Owns Diego Garcia? Decolonisation and Indigenous Rights in the Indian Ocean' (2012) 36(1) *University of Western Australia Law Review* 1, 3.

21 Ibid.

22 *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (Permanent Court of Arbitration, 18 March 2015) [1] ('*Chagos Marine Protected Area Arbitration*'); *Chagos Advisory Opinion* (n 9) 107 [28].

23 *Chagos Advisory Opinion* (n 9) 108 [32]–[33].

24 Allen, *The Chagos Islanders* (n 18) 11.

25 *Chagos Advisory Opinion* (n 9) 108 [33].

26 Allen, *The Chagos Islanders* (n 18) 11.

27 *Chagos Advisory Opinion* (n 9) 109 [37].

28 Garth Abraham, 'Paradise Claimed: Disputed Sovereignty over the Chagos Archipelago' (2011) 128(1) *South African Law Journal* 63, 67.

29 Claire Grandison, Seema Niki Kadaba and Andy Woo, 'Stealing the Islands of Chagos: Another Forgotten Story of Colonial Injustice' (2013) 20(3) *Human Rights Brief* 37, 38, citing Elena Landriscina, 'Accepting Responsibility for the Displacement of the Chagos Islanders', *JURIST: Legal News & Commentary* (Web Page, 26 April 2012) <https://www.jurist.org/commentary/2012/04/elena-landriscina-chagos-islanders/>.

that the 'dismemberment' of Mauritius violated the territorial integrity principle and called upon the UK to return the Chagos Archipelago to Mauritius.[30] A series of General Assembly Resolutions have consistently condemned the continuing administration of the Chagos Archipelago by the UK.[31] The Chagossians still suffer the effects of their forced removal. Many live in poverty in Mauritius or the Seychelles. There are no mechanisms for the Chagossians to return to their homeland and they have received minimum compensation for the harm suffered.[32]

The Chagossians have consistently attempted to regain control of the Archipelago. These attempts have had little success. Instead as a consequence of legal proceedings in London in 1975, the exiled Chagossians received £2,976 each in compensation for their removal.[33] The Chagossians' plight has also been brought before the European Court of Human Rights, however meeting with no success.[34] The Court found that the Chagossians had waived any right to return after accepting compensation from the UK.[35]

In 2010, the UK sought to create a Marine Protected Area around the Chagos Archipelago.[36] Mauritius subsequently initiated proceedings against the UK under the dispute mechanism provided by annex VII of the *United Nations Convention on the Law of the Sea* ('*UNCLOS*').[37] Mauritius argued that the UK was not able to declare a Marine Protected Area as the relevant geographical entity is not a 'coastal state' within the meaning of *UNCLOS*.[38] Whilst the Arbitral Tribunal found that it did not have jurisdiction on this, and two further submissions, it did have jurisdiction on its fourth submission. Here, Mauritius argued that the Marine Protected Area is an environmental measure.[39] Thus, the jurisdiction of the Tribunal was established under *UNCLOS* as this concerns the protection of the environment.[40] The Arbitral Tribunal found that the UK had breached its obligations under *UNCLOS* in establishing the Marine Protected Area.[41] Further, the UK's agreement to 'return' the Chagos Archipelago to Mauritius if

30 *Chagos Advisory Opinion* (n 9) 109 [39], quoting Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Resolution on Mauritius, Seychelles and St. Helena*, 539th mtg, UN Doc A/AC.109/249 (19 June 1967). The text of the Resolution is reproduced in Mohsen S Esfandiary, Rapporteur, *Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN Doc A.6700/Add.8 (11 October 1967) 52–3 [194].

31 See, eg, *Question of Mauritius*, GA Res 2066 (XX), UN Doc A/RES/2066(XX) (16 December 1965).

32 Grandison, Kadaba and Woo (n 29) 38.

33 Ibid, citing *Chagos Islanders v United Kingdom* (European Court of Human Rights, Chamber, Application No 35622/04, 11 December 2012) [12] ('*Chagos Islanders*').

34 *Chagos Islanders* (n 33).

35 Ibid [87].

36 *Chagos Marine Protected Area Arbitration* (n 22) [5].

37 The Arbitral Tribunal was hosted by the Permanent Court of Arbitration: ibid [6]–[7].

38 Ibid [7].

39 Ibid [232].

40 Ibid.

41 Ibid [536].

and when it was no longer needed for defence purposes, was binding. As noted in the subsequent *Chagos Advisory Opinion*, that undertaking was made in the Lancaster House Agreement in 1965 between Mauritian and British officials, prior to independence.[42] Despite its conditionality, the implications of the British government's term 'return [to Mauritius]' might also be said to raise issues in the nature of estoppel, supporting the view that in British eyes the Chagos Archipelago 'belongs' to Mauritius in a substantive sense.[43]

In 2017 the UNGA voted on whether the dispute over the Chagos Archipelago should be referred to the ICJ. The UNGA delivered overwhelming support in their request for an Advisory Opinion, with 94:15 in favour (65 states abstained).[44] The ICJ subsequently delivered their Advisory Opinion on 25 February 2019. The Court responded to the following questions:

> Question *(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 and having regard to international law … ?'
>
> Question *(b)*: 'What are the consequences under international law … arising from the continued administration by the United Kingdom … of the Chagos Archipelago … ?'[45]

The opinion of the Court broadly concurred with the views of the government of Mauritius on both counts.[46] With regard to Question *(a)*, the Court determined that CIL on the right to self-determination had crystallised by 1965.[47] As a result, when understood to include territorial integrity, the subsequent detachment of the Chagos Archipelago from greater Mauritius was unlawful. The decolonisation process had not been completed. Flowing on from this, in relation to Question *(b)*, the Court found that the continued administration of the Chagos Islands by the UK was a wrongful act under international law.[48] Therefore, while the decision was an Advisory Opinion and not the resolution of a dispute between state parties as such, it was made clear by the Court that the UK was and remains obliged to

42 *Chagos Advisory Opinion* (n 9) 122 [108].

43 See also Stephen Allen, 'The Operation of Estoppel in International Law and the Function of the Lancaster House Undertakings in the *Chagos Arbitration Award*' in Stephen Allen and Chris Monaghan (eds), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (Springer, 2018) 231, 232.

44 *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*, GA Res 71/292, UN Doc A/71/PV.88 (22 June 2017).

45 *Chagos Advisory Opinion* (n 9) 128 [132].

46 Ibid 137 [174], 139–40 [182].

47 Ibid 132–3 [150]–[153].

48 Ibid 138 [177].

cease administration of the Chagos Archipelago as soon as possible.[49] At the time of writing the British government under Prime Minister Johnson shows no signs of complying with this requirement.[50]

III SELF-DETERMINATION AS CIL

The ICJ in the *Chagos Advisory Opinion* determined that the right to self-determination crystallised as CIL in the 1960s.[51] This occurred after the adoption of *Resolution 1514* of 14 December 1960.[52] The Court found that the wording of this Resolution has a 'declaratory' and a 'normative character'.[53]

As is well known the criteria for recognition of CIL were clarified by the Court in the *North Sea Continental Shelf Cases*[54] and thereafter as consisting of a combination of sufficient state practice and the so-called *opinio juris sive necessitatis* ('*opinio juris*'). The concept of *opinio juris* refers to the requirement that sovereigns believe themselves to be legally obligated in relation to the corresponding conduct.[55] The very nature of CIL is built on 'a pattern of actual behavior on the part of states that reflects conformity with the rule'.[56] In its decision concerning CIL status for the norm of self-determination, in the *Chagos Advisory Opinion*, the Court relied heavily on General Assembly Resolutions. Thus the adoption of *Resolution 1514* by the UNGA is found to provide evidence that by that date, states displayed sufficient state practice and *opinio juris* going to the honouring of a right to self-determination.[57] Indeed, there was a marked acceleration of the decolonisation process following the adoption of *Resolution 1514* in December 1960: 28 countries became independent between 1961 and 1969.[58] Beyond this, the ICJ did not seek evidence of state practice.[59] Whilst General Assembly Resolutions can contribute to recognition of state practice,

49 Ibid 138–9 [177]–[178].

50 In a news article from 18 June 2020, the UK Foreign Office is reported as stating that the UK continues to insist on its sovereignty over the Chagos Archipelago, indicating that it will 'cede sovereignty of the territory to Mauritius when it is no longer required for defence purposes': Richard Vaughan, 'Foreign Office Quietly Rejects International Court Ruling to Hand Back Chagos Islands', *The i* (online, 18 June 2020) <https://inews.co.uk/news/politics/foreign-office-quietly-rejects-international-court-ruling-to-hand-back-chagos-islands-450078>. See also David Snoxell, 'How This New Year Could See a Resolution of the Chagos Tragedy', *ConservativeHome* (Blog Post, 2 January 2020) <https://www.conservativehome.com/platform/2020/01/david-snoxell-will-this-new-year-see-a-resolution-of-the-chagos-tragedy.html>.

51 *Chagos Advisory Opinion* (n 9) 132 [152].

52 Ibid.

53 Ibid 132–3 [150]–[155].

54 *(Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3 ('*North Sea Continental Shelf Cases*').

55 Ibid 44 [77]; *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Judgment)* [1985] ICJ Rep 13, 29 [27].

56 S James Anaya, 'Customary International Law' (1998) 92 *American Society of International Law Proceedings* 41, 41.

57 *Chagos Advisory Opinion* (n 9) 132 [150]–[152].

58 Ibid 132 [150].

59 Milanovic (n 10).

this is just one facet of the whole picture.[60] For example, state practice provides evidence of CIL where states assent to treaties, or pass domestic legislation, or via domestic court decisions.[61] The ICJ's findings are thus based on somewhat narrow evidence of state practice and of corresponding *opinio juris*. It can fairly be observed that the current (as of 2018) validity of a CIL of self-determination is taken for granted by the Court, with its enquiries being directed at the chronological age rather than the existence of the customary norm.[62]

The Court briefly considered counterarguments raised by the UK and the USA. Both nations argued that self-determination did not crystallise as CIL as a result of *Resolution 1514*.[63] Instead, they claimed that this occurred, at the earliest, following the adoption of UNGA Resolution 2625 (XXV) of 1970 ('*Resolution 2625*'), that is to say after Mauritius had gained its independence.[64] It may be said to be favourable to the position of the UK and the USA that *Resolution 2625* was adopted by consensus, whilst *Resolution 1514* was adopted with 89 votes in favour but nine abstentions.[65] However, consensus of states is not as such required for formation of a rule of CIL.[66] For the purposes of examining the normative status of self-determination in the *Chagos Advisory Opinion*, the remaining analysis in this paper will assume that a CIL right to self-determination did indeed crystallise at or by the time of *Resolution 1514*. But the content of that right, and the specification of the communities and territories to which it applies, remained somewhat opaque at least up to the *Chagos Advisory Opinion* itself.

With respect to territory, a right to territorial integrity is provided in the *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations* ('*Declaration concerning Friendly Relations*') as an integral component of the right to self-determination.[67] It has been suggested that in the context of decolonisation, territorial integrity means that 'partial or total disruption of the national unity' is condemned.[68] That is to say, the territorial integrity principle

60 Malcolm N Shaw, *International Law* (Cambridge University Press, 8th ed, 2017) 61.

61 Gleider Hernández, *International Law* (Oxford University Press, 2019) 37.

62 Continuing theoretical puzzles arising from CIL are addressed by the contributors to Curtis A Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press, 2016) and by Kevin Jon Heller, 'Specially-Affected States and the Formation of Custom' (2018) 112(2) *American Journal of International Law* 191.

63 Allen, 'Decolonization of Mauritius' (n 10).

64 Ibid.

65 Ibid.

66 Shaw, *International Law* (n 60) 57; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 97–8 [184].

67 *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN Doc A/RES/2625(XXV) (24 October 1970) ('*Declaration concerning Friendly Relations*').

68 SKN Blay, 'Self-Determination versus Territorial Integrity in Decolonization' (1986) 18(2) *New York University Journal of International Law and Politics* 441, 443, quoting *Resolution 1514*, UN Doc A/RES/1514(XV) (n 11) 67.

must be applied to preserve the unity of a non-self-governing territory, to 'enable it to exercise self-determination as a single unit'.[69] The *Chagos Advisory Opinion* confirms territorial integrity as a component of the right to self-determination as entrenched in CIL.[70] The UK, in its written submissions in *Chagos Advisory Opinion*, did not accept the view that the right to self-determination encompasses the right to territorial integrity.[71] The UK instead declared that even if, in the alternative, self-determination was recognised as CIL in 1965, the detachment of the Chagos Archipelago was not prohibited.[72] This is because, according the UK, there was no 'right that the boundaries of a non-self-governing territory had to remain entirely unchanged'.[73]

The ICJ in affirming the right to self-determination as encompassing territorial integrity, understood that principle as having customary force and as such applicable to the prior conduct of the UK. The UK thus violated the territorial integrity of Mauritius by excising the Chagos Archipelago from its territory. As seen by the Court, such customary obligations suffice to demonstrate that self-determination with respect to Mauritius has never been completed. But even more weighty arguments lie just below the surface.

IV SELF-DETERMINATION AS *JUS COGENS*

Many states in their written submissions to the *Chagos Advisory Opinion* commented on the peremptory nature of a norm of self-determination in the context of colonial domination.[74] A peremptory norm (a norm *jus cogens*) of international law is understood as a norm of international law which is non-derogable and which may not be displaced by any treaty. The status of the peremptory norm is provided in arts 53 and 64 of the *Vienna Convention on the Law of Treaties* ('*VCLT*'). Norms which have a *jus cogens* character are norms 'accepted and recognized by the international community of States as a whole'.[75] A norm *jus cogens* is regarded as 'so important to the international

69 Blay (n 68) 447.

70 *Chagos Advisory Opinion* (n 9) 133 [155].

71 'Written Statement: The United Kingdom of Great Britain and Northern Ireland', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 15 February 2018) 119 [8.3] ('Written Statement of the UK').

72 Ibid.

73 Ibid.

74 These include the submissions of the African Union, Argentina, Belize, Brazil, Chile, Cuba, Cyprus, Djibouti, Mauritius, Namibia, the Netherlands, Nicaragua, Serbia, Seychelles and South Africa: see generally 'Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965: Written Proceedings', *International Court of Justice* (Web Page, 25 February 2019) <https://www.icj-cij.org/en/case/169/written-proceedings>.

75 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53 ('*VCLT*').

society of States … that they can conceive of no exceptions to them'.[76] Whilst there has been much discussion on the application of peremptory norms, there is little authoritative jurisprudence concerning the ways in which a norm may achieve peremptory status, nor on the criteria by which such status should be determined.[77] Thus, *jus cogens* norms continue to deserve a reputation as being 'among the most ambiguous and theoretically problematic of the doctrines of international law'.[78]

At the time of the drafting of the *VCLT*, the International Law Commission ('ILC') drafting process attempted to clarify the required criteria for recognition of peremptory norms.[79] As ILC rapporteur, Hersch Lauterpacht argued that peremptory norms obtain their status by a combination of both international morality and general principles of state practice.[80] Lauterpacht ceased his involvement when elected to the ICJ in 1954.[81] At the conclusion of the drafting process, no concrete resolution could be reached on the 'theoretical basis for peremptory norms'.[82] No criterion was established for identifying existing peremptory norms.[83] As states could not reach a consensus, it was determined that the development of *jus cogens* norms should be left to '[s]tate practice and in the jurisprudence of international tribunals'.[84] In the more than half a century that has passed since the *VCLT* drafting sessions, the formula for gaining acceptance of a rule as *jus cogens* is still opaque.[85] This has arguably undermined the application of *jus cogens* norms, as without a determined criterion, national and international courts have been reluctant to appeal to peremptory norms without overwhelming evidence in particular circumstances.[86] The ILC has pointed to '[s]tate practice and … the jurisprudence of international tribunals' to determine whether a principle of international law is recognised as *jus cogens*.[87] At the UN, Sixth Committee Delegates called in 2017 for further clarity on exactly how a norm

76 Michael Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66(2–3) *Nordic Journal of International Law* 211, 221.

77 Sir Humphrey Waldock, *Second Report on the Law of Treaties*, *by Sir Humphrey Waldock*, *Special Rapporteur*, UN Docs A/CN.4/156 and Add.1–3 (20 March 1963) 52 ('*Second Report on the Law of Treaties*'); Hernández, *International Law* (n 61) 59; Murphy (n 1); Kennedy Gastorn, 'Defining the Imprecise Contours of *Jus Cogens* in International Law' (2017) 16(4) *Chinese Journal of International Law* 643, 658.

78 Christopher A Ford, 'Adjudicating *Jus Cogens*' (1994) 13(1) *Wisconsin International Law Journal* 145, 145.

79 Evan J Criddle and Evan Fox-Decent, 'A Fiduciary Theory of Jus Cogens' (2009) 34(2) *Yale Journal of International Law* 331, 338.

80 H Lauterpacht, Special Rapporteur, *Law of Treaties*, UN Doc A/CN.4/63 (24 March 1953) 155, discussed in ibid 336.

81 Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge University Press, 2010) 358, 360.

82 Criddle and Fox-Decent (n 79) 337.

83 Ibid.

84 *Second Report on the Law of Treaties*, UN Docs A/CN.4/156 and Add.1–3 (n 77) 53.

85 Hameed (n 13) 52.

86 Ibid 95.

87 *Second Report on the Law of Treaties*, UN Docs A/CN.4/156 and Add.1–3 (n 77) 53, quoted in Criddle and Fox-Decent (n 79) 338.

attains *jus cogens* status.[88] Suggestions in the literature include the view that *jus cogens* norms derive their status from state consent, that peremptory norms are special kinds of CIL, and that recognition involves the direct application of natural law or of fiduciary obligations of states.[89] The majority of submissions to the ILC on the topic of peremptory norms were in favour of a formula based on the practice of states and judicial bodies.[90]

States might demonstrate consent by codifying *jus cogens* norms in treaties or by accepting them as a special form of CIL.[91] To the extent such consent is thought of in terms of customary law, states would presumably need to demonstrate some version of *opinio juris* in respecting such a rule.[92] In this context, reference is made in a separate opinion in the *Chagos Advisory Opinion* to the concept of '*opinio juris communis*'.[93] The term is employed by Judge Cançado Trindade in posing an inquisitorial question to all delegations of participants. The concept appears to derive from the writings of Bin Cheng but its substance is unclear and its authority dubious.[94] In the *Questions Relating to the Obligation to Prosecute or Extradite* ('*Belgium v Senegal*') case, the Court found that state consent constituting peremptory status was evident in state practice.[95] This was seen through the implementation of anti-torture clauses in domestic legislation of almost all states. This might be said to demonstrate *opinio juris* such that states believe they are acting under a legal obligation to adhere to a peremptory norm as to the prohibition of torture.[96] However state practice in the sense of CIL has not thus far been found either necessary or sufficient to ground a peremptory norm.[97] Indeed it has been suggested, somewhat in the Lauterpacht tradition, that a peremptory norm may achieve recognition in a direct sense, by virtue of its subject matter, where it aligns with moral philosophy or natural law values. Such values can be said to underpin the international law system and to

88 United Nations, 'Sixth Committee Delegates Call for More Clarity on Peremptory Norms, Protecting Environment in Armed Conflict, as International Law Commission Review Ends' (Meetings Coverage GA/L/3560, 1 November 2017) <https://www.un.org/press/en/2017/gal3560.doc.htm>.

89 Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press, 2004) 17; Ford (n 78) 149; Criddle and Fox-Decent (n 79) 332–3, 339; Hameed (n 13); Hernández, *International Law* (n 61) 64; Saul, 'Identifying *Jus Cogens* Norms' (n 13) 31.

90 Dire Tladi, *Second Report on Jus Cogens by Dire Tladi, Special Rapporteur*, UN Doc A/CN.4/706 (16 March 2017) 9 [19] ('*Second Report on Jus Cogens*').

91 Criddle and Fox-Decent (n 79) 339.

92 Gastorn (n 77) 657.

93 *Chagos Advisory Opinion* (n 9) 185 [87] (Judge Cançado Trindade).

94 HCM Charlesworth, 'Customary International Law and the Nicaragua Case' (1984) 11 *Australian Year Book of International Law* 1, 11, discussing Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 *Indian Journal of International Law* 23.

95 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [2012] ICJ Rep 422, 457 [99] ('*Belgium v Senegal*').

96 However the diversity and even inconsistency of state enactments of norms understood to be peremptory must not be overlooked: for the case of genocide, see Tamás Hoffmann, 'The Crime of Genocide in Its (Nearly) Infinite Domestic Variety' in Marco Odello and Piotr Łubiński (eds), *The Concept of Genocide in International Criminal Law: Developments after Lemkin* (Routledge, 2020) 67.

97 *Second Report on Jus Cogens*, UN Doc A/CN.4/706 (n 90) 46 [91].

be recognised as fundamental to the international community.[98] The ICJ has it appears recognised this as a legitimate method for attaining *jus cogens* status. In the *South West Africa Advisory Opinion*,[99] the ICJ was asked to determine the legal consequences of the continued presence of South Africa in Namibia.[100] The Court found that South Africa's continuing administration of Namibia was illegal.[101] The *South West Africa Advisory Opinion* confirmed that moral principles of international law might attain peremptory status where they are further entrenched in jurisprudence.[102] This could include *Charter of the United Nations* provisions and conventions.[103] The prohibition against genocide may be one such *jus cogens* norm that has achieved its status due to the direct effect of its subject matter.[104] States would be bound to respect the prohibition against genocide, irrespective of consent as traditionally understood.[105]

Thus if universal application is present, state consent may be irrelevant except as a kind of legal fiction. The Inter-American Commission on Human Rights has opined in *Michael Domingues v United States* that the universal application of *jus cogens* norms means that the international community as a whole is bound, 'irrespective of protest, recognition or acquiescence'.[106] If this is correct, it may not matter whether states accept or reject a rule of *jus cogens*. All states should be bound regardless. It may be that the concept of *opinio juris communis* noted above, represents a version of such an appeal to shared values, without illuminating such a position. In this context the notion of the 'persistent objector' should also be noted. In the UK's written submissions to *Chagos Advisory Opinion*, it is contended that the right to self-determination did not crystallise as CIL until 1970.[107] In the alternative, the UK argues that it was a persistent objector to any

98 Hameed (n 13); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 110–11 [161] (citations omitted); Saul, 'Identifying *Jus Cogens* Norms' (n 13) 31; ibid 10 [20]. In this connection the phenomenon of the 'fetishization of self-determination as *jus cogens*' needs to be recognised: Trinidad, *Self-Determination in Disputed Colonial Territories* (n 3) 236.

99 *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 16 ('*South West Africa Advisory Opinion*').

100 'Request for Advisory Opinion', *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1970] ICJ Pleadings 3, 3.

101 *South West Africa Advisory Opinion* (n 99) 65.

102 Ford (n 78) 150.

103 Ibid.

104 Hameed (n 13) 61.

105 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23.

106 Organization of American States, Inter-American Commission on Human Rights, *Michael Domingues v United States*, Doc No OEA/Ser.L/V/II.117, 116th regular session, 7–25 October 2002, [49].

107 'Verbatim Record', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 3 September 2018) 46 (Alison Macdonald QC). See generally *Declaration concerning Friendly Relations*, UN Doc A/RES/2625(XXV) (n 67).

emerging CIL rule on self-determination.[108] Indeed, the UK did vote against, or abstained from voting, on, Resolutions relating to self-determination, on several occasions.[109] However, the ICJ in its findings, did not address the UK's persistent objector argument.[110] Here, the Court's disregard of the UK's persistent objector argument suggests that self-determination may have an elevated status, such that CIL style objection is not recognised.[111]

The above considerations generally refer to norms that take the form of peremptory prohibitions. How does a norm concerning self-determination fit into such a scheme? Of the eight norms indicated by the ILC in its most recent statement as to candidates for the status of *jus cogens*, six are expressly prohibitive and a seventh, which refers to '[t]he basic rules of international humanitarian law' might also be said to be essentially prohibitive or preventive in nature.[112] The 'right of self-determination' stands out as a facilitative rather than a prohibitive norm; that which is peremptory with respect to states, is in particular the honouring of positive rights rather than the prohibition of the violation of rights. That said, a core meaning of the right to self-determination may be said to be freedom from domination.[113] This is exemplified in *Resolution 1514*, where it is proclaimed that '[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights'.[114] *Resolution 1514* interlinks this with the right to self-determination, thus making it clear that peoples subject to colonial domination should have the freedom to define their political constitution.[115]

The contrast between self-determination claims in a colonial context and those in cases of secession can be illustrated by reference to the *Kosovo Advisory Opinion*.[116] Here, the ICJ declared that Kosovo's unilateral declaration of independence made against the State of Serbia, did not violate international law rules.[117] The Court declined to expressly examine self-determination either for the population of Kosovo, as distinct from the whole population of the State of Serbia, or indeed in general terms.[118] The Court confirmed in the *Kosovo Advisory*

108 'Written Statement of the UK' (n 71) 130 [8.31].

109 Ibid 139 [8.61].

110 *Chagos Advisory Opinion* (n 9).

111 Ibid. See also Gastorn (n 77) 660. In relation to the *North Sea Continental Shelf Cases* (n 54), see Heller (n 62) 241.

112 Murphy (n 1) 71, quoting *Report of the International Law Commission*, UN Doc A/74/10 (n 1) 146–7.

113 Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11(4) *Human Rights Law Review* 609, 613 ('The Normative Status of Self-Determination').

114 *Resolution 1514*, UN Doc A/RES/1514(XV) (n 11) 67.

115 Ibid; Saul, 'The Normative Status of Self-Determination' (n 113) 613.

116 *Kosovo Advisory Opinion* (n 6).

117 Ibid 452 [122].

118 Jure Vidmar, 'The *Kosovo* Advisory Opinion Scrutinized' (2011) 24(2) *Leiden Journal of International Law* 355, 355.

Opinion that only 'egregious violations of norms of general international law, in particular those of a peremptory character',[119] would 'render a declaration of independence illegal'.[120] Whilst the right to self-determination is certainly not inapplicable outside of colonial domination, it cannot be said that international law currently recognises non-colonial situations of self-determination to have the status of a *jus cogens* norm.[121]

The universal application of a norm of post-colonial self-determination is in some respects manifested in its associated obligations *erga omnes*.[122] The *Barcelona Traction, Light and Power Company, Limited* ('*Barcelona Traction*') case defines an obligation *erga omnes* as an obligation of a state to 'the international community as a whole'.[123] If an obligation *erga omnes* is violated, standing may thus arise for any state as complainant.[124] Whilst obligations *erga omnes* and *jus cogens* norms are cognate concepts, they do have distinct features.[125] However it is noteworthy that the four examples of obligations *erga omnes* cited in *Barcelona Traction* were used as examples of peremptory norms during the Vienna Conference.[126] Self-determination has long been accepted as generating obligations *erga omnes*. In the *South West Africa Advisory Opinion*, the Court had addressed the obligation of all states to non-recognition of a purported independent state where the right to self-determination of a non-self-governing territory was breached.[127] This position was developed in *East Timor*.[128] Here, the Court upheld Portugal's argument that the right to self-determination of all peoples was 'irreproachable'.[129] The Court confirmed the obligations *erga omnes* of self-determination in the *Construction of a Wall Advisory Opinion*,[130] a position endorsed by various states as well as the ILC.[131] The *Chagos Advisory Opinion* once again held that the right to self-determination gives rise to obligations *erga omnes*. The Court declared that all states are obliged or have a legal interest in protecting the right to self-determination, which is owed to all.[132] The obligation *erga omnes* despite its high-sounding name is in effect procedural whereas

119 *Kosovo Advisory Opinion* (n 6) 437 [81].

120 Vidmar (n 118) 373.

121 See *Construction of a Wall Advisory Opinion* (n 6).

122 *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 102 [29] ('*East Timor*').

123 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 32 [33] ('*Barcelona Traction*').

124 Byers (n 76) 211.

125 Ibid 230; Gleider I Hernández, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"' (2013) 83(1) *British Yearbook of International Law* 13, 41.

126 Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, 2005) 140; *Barcelona Traction* (n 123) 32 [34].

127 *South West Africa Advisory Opinion* (n 99) 54–5 [119]–[121].

128 *East Timor* (n 122).

129 Ibid 102 [29].

130 *Construction of a Wall Advisory Opinion* (n 6) 199 [155].

131 See Byers (n 76) 230.

132 *Chagos Advisory Opinion* (n 9) 139 [180].

the norm *jus cogens* is undoubtedly substantive.[133] Demonstrating the overlap of the peremptory nature of the norm with its *erga omnes* nature, while not expressing the former, the ICJ found that all states must cooperate to ensure that the decolonisation of Mauritius is lawfully completed.[134]

As well as its facilitative rather than prohibitive character, it has been commented that self-determination differs from other recognised peremptory norms is that it 'defies absolutization' and is in some respects not universally applicable in all cases.[135] This is in stark contrast to other *jus cogens* norms such as the prohibition against genocide. Instead, the international community's 'strong condemnation of colonialism' assists self-determination in achieving a non-derogable character in such circumstances.[136] In applying this to the *Chagos Advisory Opinion*, the international community's condemnation of colonialism is clear. In this context a number of UNGA Resolutions have been adopted since 1965 which have consistently condemned the separation of the Chagos Archipelago from Mauritius.[137] The Court in the *Chagos Advisory Opinion* found that these UNGA Resolutions provide more than sufficient evidence that colonialism is universally condemned.[138]

It should be emphasised that as discussed above in the context of CIL, such Resolutions have specifically denounced the dismembering of the territorial integrity of a newly independent state as contrary to the *Charter of the United Nations*.[139] Indeed the Court found no evidence of any administering power considering it lawful to detach part of a non-self-governing territory for the purposes of continuing its rule.[140] The Court further noted that states see respect for territorial integrity as an essential component of the right to self-determination.[141] *East Timor* had held that the territorial integrity of self-determination in the colonial context is 'one of the essential principles of contemporary international law'.[142] Territorial integrity is essential to the norm of post-colonial self-determination, as understood by the ICJ, whether that norm has customary or peremptory status (or indeed both).

133 Hernández, *International Law* (n 61) 65.

134 *Chagos Advisory Opinion* (n 9) 139–40 [182].

135 Klabbers (n 10).

136 Ibid.

137 See, eg, *Question of American Samoa, Antigua, Bahamas, Bermuda, British Virgin Islands, Cayman Islands, Cocos (Keeling) Islands, Dominica, Gilbert and Ellice Islands, Grenada, Guam, Mauritius, Montserrat, New Hebrides, Niue, Pitcairn, St Helena, St Kitts-Nevis-Anguilla, St Lucia, St Vincent, Seychelles, Solomon Islands, Tokelau Islands, Turks and Caicos Islands and the United States Virgin Islands*, GA Res 2232 (XXI), UN Doc A/RES/2232(XXI) (20 December 1966).

138 *Chagos Advisory Opinion* (n 9) 135 [163]–[166].

139 Robertson (n 20) 10.

140 *Chagos Advisory Opinion* (n 9) 134 [160].

141 Ibid.

142 *East Timor* (n 122) 102 [29], quoted in ibid 288 [38] (Judge Sebutinde).

The *Chagos Advisory Opinion* refers to self-determination as having a 'normative character'.[143] One way of reading this is as gesture toward *jus cogens* status. However, the Court does not elaborate further on what that 'normative character' entails. It is unclear whether the Court is referring to a rule of CIL, or an elevated norm comprising peremptory status. In the *Construction of a Wall Advisory Opinion*, the Court had considered the status of self-determination (of the people of Palestine) as a non-derogable norm of international law.[144] It concluded that the status of the right had a higher normative value, emphasising its 'character and … importance'.[145] Similarly the *Chagos Advisory Opinion*, in highlighting states' overwhelming support of the decolonisation process, indicates but does not expressly endorse the view that the right to self-determination is a *jus cogens* norm. Of course, the *Construction of a Wall Advisory Opinion* had also indicated a wider application of a higher norm of self-determination, that is to say outside the circumstances of colonialism as usually understood. However, issues of territorial redefinition over time, and of the domination of a people by an occupying, administrative power, bring the Palestine and the Chagos circumstances somewhat closer. In any event the Palestine situation emerged in the context of Ottoman, French and British colonial or imperial domination in the region, connecting up the contexts in terms of larger historical process. Several of the separate opinions provided by ICJ judges in the *Chagos Advisory Opinion* indicate the acceptance of self-determination as a peremptory norm at least in the context of decolonisation.[146] Judge Sebutinde contends that respect for territorial integrity as a component of self-determination is recognised as a *jus cogens* norm.[147] Judge Sebutinde argues that the Court's failure to recognise self-determination as a peremptory norm means that the ICJ has not delivered on its duty to develop international law rules to assist the General Assembly.[148] Judge Cançado Trindade delivered a lengthy, separate opinion in the *Chagos Advisory Opinion*. Here he argues that the entire concept of self-determination should be treated as a peremptory norm and that self-determination has been accepted as a peremptory norm by states for decades, as evidenced by both UNGA Resolutions and the responses of states themselves to ICJ Advisory Opinions.[149] Judge Cançado Trindade is currently in a minority on the Bench of the ICJ, which has for decades deliberately minimised its employment of the language of peremptory norms.[150] It has been suggested that one reason for this practice is that the Court is reluctant

143 *Chagos Advisory Opinion* (n 9) 132 [153], 133 [155].

144 *Construction of a Wall Advisory Opinion* (n 6).

145 Ibid 200 [159], quoted in *Chagos Advisory Opinion* (n 9) 288 [39] (Judge Sebutinde).

146 *Chagos Advisory Opinion* (n 9) 193 [119] (Judge Cançado Trindade), 292 [47] (Judge Sebutinde).

147 Ibid 285 [31].

148 Ibid 283 [25], 289 [40].

149 Ibid 206 [163].

150 Chintan Chandrachud, '*Jus Cogens* in the International Court of Justice: Lessons from the Basic Structure Doctrine in Indian Constitutional Law' (2013) 4(1) *Journal of Philosophy of International Law* 75, 76.

to chip away at state sovereignty.[151] In defence of the Court's conservative attitude however, it might be observed that the jurisprudence of the peremptory norm is still a work in progress.[152]

V PEOPLEHOOD

As noted above, the phraseology of 'peoples' is integral to articulations of a right to self-determination whether treaty-based, custom-based or peremptory in nature. While the term is thus used in many instruments of international law, not least as the third word in the *Charter of the United Nations*, the term 'peoples' and its singular form 'people' has not yet been adequately defined.[153] Some judicial indications have however been made. Thus the ICJ has interpreted the right to self-determination as 'the need to pay regard to the freely expressed will of peoples'.[154] The *Western Sahara Advisory Opinion* did not explicate the term 'people' as a general term, except to indicate that in a situation where a population does not fall within the ambit of a 'people', the General Assembly is not required to consult with the inhabitants of a given territory.[155] With respect to treaty law, self-determination is declared a universal right of 'all peoples' in the *Declaration concerning Friendly Relations*.[156] However it has been suggested that under *Resolution 1514*, the term 'people' is 'restricted … to colonized peoples'.[157]

The *Chagos Advisory Opinion* states that a people concerned about its right to self-determination is to be defined with reference to 'the entirety of a non-self-governing territory'.[158] In his separate opinion, Judge Sebutinde expresses the consistent view that any separation of the Chagos Archipelago from Mauritius must 'occur subject to the free and genuine will of the people of Mauritius, including the Chagossians'.[159] Indeed the excision of the Chagos Archipelago by the UK would have had quite different, arguably benevolent consequences, if

151 Sue S Guan, '*Jus Cogens*: To Revise a Narrative' (2017) 26(2) *Minnesota Journal of International Law* 461, 480.

152 In the spirit of having one's cake and eating it too, the ILC suggested in 2019 both that peremptory norms are 'hierarchically superior to other rules of international law and … universally applicable' and that inconsistency between the former and the latter is to be resolved by interpreting the latter 'as far as possible' in a manner consistent with the former: Murphy (n 1) 69 n 7, 70, quoting *Report of the International Law Commission*, UN Doc A/74/10 (n 1) 142, 146 respectively.

153 Crawford (n 18) 621; Trinidad, *Self-Determination in Disputed Colonial Territories* (n 3) 242. The significance of the difference between 'peoples' and 'states' as bearers of international legal rights, is perhaps more than the 'unduly technical obstacle' in the establishment of customary norms noted by Allen: Stephen Allen, 'Introductory Note to Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (I.C.J.)' (2019) 58(3) *International Legal Materials* 445, 446 ('Introductory Note').

154 *Western Sahara Advisory Opinion* (n 6) 33 [59].

155 Ibid.

156 *Declaration concerning Friendly Relations*, UN Doc A/RES/2625(XXV) (n 67).

157 Frances Raday, 'Self-Determination and Minority Rights' (2003) 26(3) *Fordham International Law Journal* 453, 455, discussing *Resolution 1514*, UN Doc A/RES/1514(XV) (n 11).

158 *Chagos Advisory Opinion* (n 9) 134 [160]. See also Allen, 'Introductory Note' (n 153) 446; Klabbers (n 10).

159 *Chagos Advisory Opinion* (n 9) 277 [14].

independence had thus been granted in parallel to the Chagossians and the people of Mauritius treated as two distinct peoples. In the eyes of the ICJ, the excision as such is an international wrong to the overall or combined population, not to either of the component populations understood as such.

In support of this position, as a general principle, some scholars theorise that the right to self-determination refers to the whole population of recognised territorial entities. Buchanan argues that a 'people' is understood such that relevant territory is the 'territory of the people as a whole'.[160] If this is the case, the concept of peoplehood may only be applied to the population of a non-self-governing territory where they seek as a whole to exercise their right to self-determination, as part of the decolonisation process.[161] In the case of the *Chagos Advisory Opinion*, the 'people' concerned would indeed be the Mauritians as a whole. The Chagossians would have no competing claim to self-determination in their own right. Here it should be noted that those who identify as Chagossians have been said to be indigenous to the Chagos Archipelago, being in the main descendants of those transported to the islands from the 16th century onwards by their colonial rulers.[162] By the 1960s, the Chagossians had made the islands their home and the UK recognised them as indigenous occupants of the land.[163]

From the perspective of the *Chagos Advisory Opinion*, to recognise the Chagossians as the 'people' to which a valid self-determination claim applies would violate the principle of territorial integrity. Unless consented to by the whole population of Mauritius, it would amount to secession. *Resolution 1514* states 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 … of the United Nations'.[164] Indeed, the *Declaration concerning Friendly Relations* also affirms this, stating that the right to self-determination does not countenance dismemberment or impairment of the territorial integrity of states.[165] It further affirms that the government must represent the whole people, 'without distinction as to race, creed or colour'.[166] Throughout the decolonisation process, administering powers would strike down attempts to gain independence by populations which did not constitute the entirety of the non-self-governing

160 Buchanan (n 89) 374.

161 Ibid.

162 Individuals were involuntarily relocated for purposes of indentured employment and related practices sometimes said to amount to slavery: Grandison, Kadaba and Woo (n 29) 38.

163 Ibid. Significantly however, the status of an indigenous people for the Chagossians has been rejected by the government of Mauritius: Allen, 'Self-Determination' (n 10) 217 n 94. See also Amy Schwebel, 'International Law and Indigenous Peoples' Rights: What Next for the Chagossians' in Stephen Allen and Chris Monaghan (eds), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (Springer, 2018) 319.

164 *Resolution 1514*, UN Doc A/RES/1514(XV) (n 11) 67.

165 *Declaration concerning Friendly Relations*, UN Doc A/RES/2625(XXV) (n 67) 124; Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 497–8.

166 *Declaration concerning Friendly Relations*, UN Doc A/RES/2625(XXV) (n 67) 124.

territory.[167] With respect to indigenous groups in particular, the *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*[168] expresses the rights of indigenous peoples as a corollary of statehood.[169]

In 2007, the *United Nations Declaration on the Rights of Indigenous Peoples* was adopted, which asserts that '[i]ndigenous peoples have the right to self-determination'.[170] However, states have on occasions employed different terminology such as 'populations' to avoid their obligations to afford self-determination to indigenous groups.[171] This provides some clarity on the way the ICJ framed their response in the *Chagos Advisory Opinion*. Whilst the Court acknowledges the inhabitants of the Chagos Archipelago as in some ways distinct, by using such terms as 'Chagossians', the 'Ilois' or 'Islanders', there is no direct consideration of their putative status as an indigenous population.[172] While this can be interpreted as an endeavour to confine the scope of the question, it suggests that the ICJ is unwilling at this point to offer its opinion on whether native Chagossians constitute 'a people', giving validity to their own hypothetical claim to self-determination independently of Mauritius as a whole. Indeed, this supports the idea that the indeterminacy surrounding the definition of a 'people' by states is purposeful.[173] Thus it has been argued that states strategically decline to narrow or clarify the understanding of a 'people' as it currently stands.[174]

Minority rights exist to protect the rights of subgroups, such as indigenous populations, who do not qualify as a 'people' for the purposes of self-determination.[175] This is exemplified in art 27 of the *International Covenant on Civil and Political Rights*, where minority rights are granted, independently of the right to self-determination under art 1.[176] The general position in international law has been that full recognition of minority rights of various kinds generates a form of ('internal') self-determination, to be distinguished from the 'external'

167 Yaffe (n 3) 716.

168 *Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, opened for signature 26 June 1957, 328 UNTS 247 (entered into force 2 June 1959).

169 Ibid. See, eg, *The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1654, UN Doc A/RES/1654(XVI) (27 November 1961) 65.

170 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 3.

171 Roderic Pitty, 'Indigenous Peoples, Self-Determination and International Law' (2001) 5(4) *International Journal of Human Rights* 44, 46.

172 *Chagos Advisory Opinion* (n 9) 109 [37]. On the complex and politicised role of perceived indigeneity versus perceived artificiality of the populations of territories in question for self-determination, see Trinidad, *Self-Determination in Disputed Colonial Territories* (n 3) 207.

173 Saul, 'The Normative Status of Self-Determination' (n 113) 620.

174 Ibid; Klabbers (n 10).

175 Raday (n 157) 458, citing *ICCPR* (n 5) art 27.

176 *ICCPR* (n 5) arts 1, 27.

self-determination provided by independent statehood as in decolonisation or successful secession.[177] This was seen in the Canadian Supreme Court case of *Reference Re Secession of Quebec* ('*Quebec*').[178] Here, the Canadian Supreme Court held that a right to (external) self-determination may only arise 'where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development'.[179] This criterion, which in effect refers to anti-democratic oppression on the part of the host state, would otherwise negate any right of that minority to self-determination.[180] It has been argued that a racial or religious group could attempt secession on such grounds, however all attempts to achieve internal self-determination must have first failed.[181]

Before the arbitral outcome, Robertson had asserted that the right to self-determination is a *jus cogens* norm with binding status.[182] As a result, he contended that the Chagossians' right to self-determination had been violated.[183] But after the *Chagos Advisory Opinion*, on its face such a claim from the Chagossians would seem unlikely to succeed. On the lines of *Quebec*, it can be reasonably assumed that Mauritius would have had to have actively prevented the expression of the Chagossians' collective rights. There is no evidence of this in the *Chagos Advisory Opinion*.[184] More generally, the rights of minorities and in particular, indigenous populations, are not yet adequately recognised in the jurisprudence of international law.[185] A claim to self-determination by such minorities will be trumped by the claim of the entirety of the non-self-governing territory.[186] Thus, the 'people' which is offered protection under international law is that of the entirety of the non-self-governing territory.[187] It would appear that in order for there to be competing claims, or claims for sub-populations, the definition of self-determination would need to be expanded to include 'peoples'

177 Raday (n 157) 459.

178 *Reference Re Secession of Quebec* [1998] 2 SCR 217.

179 Ibid 287 [138].

180 Ibid.

181 Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 498.

182 Robertson (n 20) 2.

183 Ibid.

184 *Chagos Advisory Opinion* (n 9). However, the Chagossians continue to occupy an underprivileged stratum of Mauritian society: Allen, 'Self-Determination' (n 10) 215.

185 Kirsty Gover, 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38(3) *Sydney Law Review* 339.

186 *Chagos Advisory Opinion* (n 9) 286 [32] (Judge Sebutinde).

187 Yaffe (n 3) 717. As Trinidad observes, 'the integrity of colonial territory [is treated] as the cornerstone of the decolonization process. The wishes and interests of minority populations … appear to have been, at most, an issue of secondary concern': Trinidad, *Self-Determination in Disputed Colonial Territories* (n 3) 91.

rather than a 'people'.[188]

Intriguingly, the *Charter of the United Nations* both at arts 73(b) and 76(b), refers to 'each territory and its *peoples*' in the context of the administration of non-self-governing territories and trusteeship territories, respectively.[189] A plurality of peoples within a given territory is therefore envisaged. Articles 73 and 74 which together comprise ch XI 'Declaration Regarding Non-Self-Governing Territories' are concerned with colonial entities, and aim to facilitate 'self-government';[190] ch XII on the 'International Trusteeship System' aims at 'self-government or independence'.[191] While a path to self-determination seems signalled in the trusteeship situation, it is not in the colonial situation. According to Fastenrath, commenting on art 73, this was no oversight; in the drafting process France and the UK 'opposed international supervision of colonial rule, regarding it as a domestic affair'.[192] Colonialism casts a long shadow.

As Summers has observed, self-determination in the post-colonial context has turned out to be a state-centred phenomenon; thus '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'.[193]

VI CONCLUSION

The Court's view in the *Chagos Advisory Opinion* is that the process of decolonisation was not lawfully completed in the case of Mauritius because of the British retention of the Chagos Archipelago.[194] Consequently, the UK's continued administration of the Chagos Archipelago was and remains unlawful. All states have a legal interest in protecting Mauritius' right to self-determination and must cooperate with the United Nations to assist in the decolonisation of Mauritius as a whole.[195] Further, just as the *Construction of a Wall Advisory Opinion* found

188 Therefore while questionable in some respects in its Chagos Archipelago context, the point made by the UK government that self-determination and territorial integrity may be in tension is correct and important so that those two principles are indeed 'not neat corollaries' as claimed by Mauritius: see Robert McCorquodale, Jennifer Robinson and Nicola Peart, 'Territorial Integrity and Consent in the Chagos Advisory Opinion' (2020) 69(1) *International and Comparative Law Quarterly* 221, 223, quoting 'Written Comments of the United Kingdom of Great Britain and Northern Ireland', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 14 May 2018) 69 [4.31].

189 *Charter of the United Nations* arts 73(b), 76(b) (emphasis added).

190 Ibid ch XI.

191 Ibid art 76(b).

192 Ulrich Fastenrath, 'Ch.XI Declaration regarding Non-Self-Governing Territories', in Bruno Simma et al (eds), *The Charter of the United Nations: A Commentary* (Oxford University Press, 3rd ed, 2012) vol 2, 1829, 1832.

193 James Summers, 'Decolonisation Revisited and the Obligation Not to Divide a Non-Self-Governing Territory' (2018) 55 *Questions of International Law: Zoom-In* 147, 176.

194 *Chagos Advisory Opinion* (n 9) 137 [174].

195 Ibid 139 [180], 139–40 [182].

that all states are under an obligation not to recognise the construction of the 'security' wall in the Occupied Palestinian Territory, given its illegality under international law, states are obliged not to offer assistance or recognition to the ongoing British administration of Chagos.[196] Any such state would risk complicity in an internationally wrongful act.

The Court in the *Chagos Advisory Opinion* refers to the 'normative character' of the right to self-determination but does not comprehensibly elaborate on what this means.[197] In terms of norms of international law, the right to self-determination has been a CIL since at least the early 1960s. It applies to cases of colonial domination. The norm includes the requirement of territorial integrity. Klabbers concurs that the *Chagos Advisory Opinion* narrows the application of self-determination to post-colonial situations.[198] This paper has argued that the right to self-determination may well have achieved the elevated normative status required of a peremptory norm, as proposed by several members of the ICJ Bench, even if the finding is not made explicit in the agreed opinion. Even if this is correct, the process for achieving peremptory status remains as opaque as before.[199]

So long as self-determination continues to fluctuate somewhere between custom and a norm *jus cogens*, ambiguity will follow. It is clear that a right to self-determination is established, but which communities or populations can be its beneficiaries? In other words, what is 'a people'? The *Chagos Advisory Opinion* has made it clear that in international law, the 'people' having standing in a self-determination claim refers to the population of the entirety of the non-self-governing territory.[200] Whilst minorities and in particular indigenous groups do possess significant collective rights, these do not amount to self-determination, except in special circumstances.[201] As it currently stands, only where qualified minorities have already tried to assert their rights and this has been blatantly disrespected by the state, will minorities have potential grounds to assert their right to self-determination on the international stage. Territorial integrity of states, and of entities with the potential to be states without disrupting international order, is the bottom line in this 'controlled exercise in international justice'.[202] Given that such territorial specifications have so often been drawn up by the civil servants of empire, and the resident populations traded back and forth like fixtures in a real estate deal, it is ironic that what appears as a triumph for post-colonial peoples

196 *Construction of a Wall Advisory Opinion* (n 6) 200 [159], quoted in ibid 288–9 [39] (Judge Sebutinde).

197 *Chagos Advisory Opinion* (n 9) 132 [151]–[153]. See Allen, 'Self-Determination' (n 10) 214; Bordin (n 10) 256.

198 Klabbers (n 10).

199 See generally Hameed (n 13).

200 *Chagos Advisory Opinion* (n 9) 134 [160].

201 Crawford (n 18) 622.

202 Trinidad, *Self-Determination in Disputed Colonial Territories* (n 3) 22.

is just as much a reminder of their continuing subjugation to the administrative convenience of London or Paris.[203]

203 The circumstances of the French Overseas Department of Mayotte with respect to Comoros, are in some respects comparable to the Chagos situation: Mamadou Hébié, 'Was There Something Missing in the Decolonization Process in Africa? The Territorial Dimension' (2015) 28(3) *Leiden Journal of International Law* 529, 547; Trinidad, *Self-Determination in Disputed Colonial Territories* (n 3) 74; Jamie Trinidad, 'Self-Determination and Territorial Integrity in the Chagos Advisory Proceedings: Potential Broader Ramifications' (2018) 55 *Questions of International Law: Zoom-Out* 61. It was reported by the BBC on 26 August 2021 that the Universal Postal Union has prohibited the international use of postage stamps printed by the UK for use on Chagos, labelled 'British Indian Ocean Territory': 'British Stamps Banned from Chagos Islands in Indian Ocean', *British Broadcasting Corporation* (online, 26 August 2021) <https://www.bbc.com/news/world-africa-58321580>.