LAGOS MODEL UNITED NATIONS '22

BACKGROUND GUIDE

International Court of Justice (ICJ)

Background Guide: International Court of Justice (ICJ)

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LMUN 2022: The Seventh Session

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Letter from USG

Dear Delegates,

It is an honour to welcome you to the 7th session of the Lagos Model United Nations (LMUN) conference, 2022. For years, LMUN has established a platform for youths to lend their voices to contemporary global problems by inciting discussions and deliberations that seek to funnel a drive towards innovative and sustainable solutions. This conference offers you the opportunity to harness your abilities and equip yourselves with unique skills like diplomacy, teamwork, research, public speaking, networking, and leadership. The conference guarantees a phenomenal experience and the opportunity to contribute your quota towards global development and sustainability. I hope that you get to learn, have fun, participate actively, and have the most fantastic experience.

The staff for the International Court of Justice (ICJ) are - **Rahmat Suenu** (Under-Secretary-General); **Oreoluwa Adejumo** (President); **Chukwudifu Jason Okoli** (Vice-President); **Toyosi Awodiji** (Researcher); **Oluwatimilehin Oluwasemilore** (Researcher).

Rahmat is a 4th-year law student at the University of Lagos. Her interest in MUNs is driven by her passion for human rights and sustainability. She has participated in several MUN conferences both as a delegate, and in official capacities. She has also bagged several awards for her participation, including the Best Delegate Award at the Ghana International MUN in 2020, the Exemplary Journalist Award at the Youth International Summit MUN in 2020, and an Honorable mention award at LMUN 2019. **Oreoluwa** is a 4th-year law student at the University of Lagos with keen interest in advocacy, international law and the Sustainable Development Goals. She has participated in MUNs and multiple competitions simulating court sessions, including the ICJ. Oreoluwa is an Associate Member of ICMC and Director of Research II for the Mooting Society, University of Lagos. **Chukwudifu** is a 4th-year student of the Faculty of Law, UNILAG. He was a delegate at LMUN 2021 where he was awarded the Distinguished Delegate award. He was on the LMUN committee that won the 2021 UN Refugee Challenge. He was also a part of the UNILAG delegation at NMUN 2019 Germany which received an Honorable Mentions Award. Chukwudifu is fascinated by the dynamics of international relations and diplomacy. **Toyosi** is a 3rd-year law student at the University of Lagos. He was a delegate at LMUN'21, where he was awarded the Position Paper and Honourable Mention awards. He maintains a keen interest in international law, fundamental human rights, and the achievement of the SDGs. Oluwatimilehin **Oluwasemilore** is a 3rd-year student of the Faculty of Law, University of Lagos. He attended his first LMUN in 2019 as the delegate of Kuwait in the United Nations Security Council (UNSC) and his second in 2021 also in the UNSC but as the delegate of Estonia. He was presented with the Outstanding Delegate Award in the LMUN 2021.

The ICJ is one of the six main organs of the United Nations. Its main objective is to adjudicate matters brought before it in the international sphere.

The topics to be discussed by the committee are:

1. Contentious Case: Application Of The International Convention On The Elimination Of All Forms Of Discrimination(Qatar V United Arab Emirates).

2. Advisory Opinion:Legal Consequences Of The Separation Of The Chagos Archipelago From Mauritius In 1965.

The background guide is to serve as a stepping stone to begin research on the topics to be discussed and not as a replacement for individual research. As such, delegates are encouraged to conduct their research beyond the background guides and make use of the Further Research, Annotated bibliography and Bibliography to aid in extensive research. Also, the Delegate Prep Guide and the Rules of Procedure will acquaint you with the conference's required conduct and procedural rules. These documents can be accessed on the LMUN website- www.lmun.ng.

In preparation for the conference, each delegate is expected to submit a position paper on a date to be communicated after registration and country and committee assignment. The guidelines in the LMUN Position Paper Guide will direct delegates on this process.

To communicate any questions or concerns during your preparation for the conference, please contact me at usgpeacesecurityhr@lmun.ng or the committee at icj@lmun.ng.

We look forward to seeing you at the LMUN 2022 Conference!

Rahmat Suenu

USG Peace Security and Human Rights, LMUN 2022.

Abbreviations

AAT	Australian Antarctic Territory
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
BIOT	British Indian Ocean Territory
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
EEZ	Exclusive Economic Zone
GA	General Assembly
HRC	Human Rights Committee
ICCPR	International Convention on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICERSC	International Convention on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICT	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
Int'AmCHR	Inter-American Court of Human Rights
NSGTs	Non-Self-Governing territories
OHCHR	Office of the United Nations High Commissioner for Human Rights
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights

UN	United Nations
UNCLOS	United Nations Convention on the Laws of the Sea
VCLT	Vienna Convention on Law of Treaties
VCSSRT	Vienna Convention on the Succession of States in Respect of Treaties
WHO	World Health Organisation

Glossary Of Terms

Customary international law: international obligations arising from established international practices.

Doctrine uti possidetis juris: a principle of customary international law that serves to preserve the boundaries of colonies emerging as States.

Jus cogens: certain fundamental and overriding principles of international law which are peremptory norms.

Juris consult: an expert on international and public law.

Jurisdiction of a court: the practical authority given to a legal body to deal with legal matters.

Opinio juris (opinion of law or necessity): an action carried out as a legal obligation.

Principle of Inter-Temporal Law (*tempus regit actum*): the application of international law to cases that occurred before treaties, codifications or legal acts entered into force.

Public international law: body of legal rules, norms and standards that apply between sovereign states and other entities that are recognised as international actors.

State party (to a treaty): a country that has ratified or acceded to that particular treaty and is therefore legally bound by the provisions of the treaty.

Treaty: a binding formal agreement, contract or other written instrument that establishes obligations between two or more subjects of international law.

Committee Overview

Introduction

The United Nations is an international organisation founded after the Second World War in 1945.[1] Currently with 193 Member States, the organisation is committed to maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights. The Charter of the United Nations[2] is the primary treaty of the UN establishing its six essential organs including the International Court of Justice.

The International Court of Justice (ICJ) was established to serve as the principal judicial organ of the UN charged with the purpose of settling international disputes between Member States and giving advisory opinions on legal issues. The ICJ replaced the Permanent Court of International Justice (PCIJ) as the United Nations replaced the League of Nations and transferred its archives to the ICJ in October 1945 to mark its succession and ensure continuity.[3] In February 1946, the ICJ held its first election with the last President of the PCIJ, Jose Gustavo Guerrero, emerging as its first president.[4] The ICJ draws its mandate and statute from its predecessor, and the rulings of the PCIJ are still valid. The Court has its seat at The Hague, Netherlands and has heard more than 160 cases, since 1946, including more than 25 advisory proceedings.[5]

The Statute of the ICJ is the primary document of the organisation.It serves as the constitution of the court, consisting of 70 Articles, and spanning 5 Chapters. It contains laws on the organisation and the competence of the court as well as its rules of procedure and advisory opinions. According to Article 93 of the UN Charter, all Member States are automatically parties to the Statute and are bound by it.

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[1] United Nations, Peace, dignity and equality on a healthy diet: History of the United Nations.

[2] UN, *Charter of the United Nations,* 1945, 1 UNTS XVI. Hereinafter UN Charter.

[3] Handbook of the International Court of Justice, ISBN 978-92-1-1573640.

[4] International Court of Justice, '*Tribute to Jose Gustavo Guerrero, first President of the ICJ,'* Press Release No. 2018/54, 23 October 2018.

[5] Supra note 3.

Governance Structure And Membership

The International Court of Justice is made up of 15 justices who are elected by the United Nations General Assembly and Security Council for nine-year mandates.[6] Each of the electing organs vote at the same time but in different ways. In order to be elected, a candidate must earn an absolute majority of the votes in both electing organs. The electing bodies have different rounds of voting until the absolute majority vote is met.[7] Every three years, one-third of the Court is elected to guarantee continuity of the court, to prevent a case where many of the seats of the court are vacant. Judges are permitted to run for re-election when the nine-year tenure lapses. However, if a judge dies or resigns during his or her tenure of office, a special election to replace the unexpired portion of the term is held as quickly as feasible.[8]

During the late September session of the General Assembly, elections are held in New York. The term of office for justices elected in a triennial election begins on February 6 of the following year, after which the Court holds a secret ballot election to pick a President and Vice-President to serve for three years.[9] All countries party to the Statute of the ICJ have the right to nominate candidates. However, it is not the government of the state that nominates members, it is the members of the Permanent Court of Arbitration (PCA) designated by that State that makes such nominations. The PCA is made of four jurists who can be called upon to serve as members of an arbitral tribunal under the Hague Conventions of 1899 and 1907.[10]

However, for countries that are not a party to the Hague Conventions but are party to the Statute of the ICJ, nominations will be made by a group formed in the same way.[11] Each group can nominate up to four candidates, with no more than two of them being of its own nationality and the rest coming from any country. The names of nominated candidates must

[6] Statute of the International Court of Justice.

[7] The Hindu News: International, *How are judges elected to the International Court of Justice?'* Rohan Abraham November 21, 2017.

[8] *Ibid.*

[9] *Ibid.*

[10] ICJ.org, "Members of the Court."

[11] *Ibid.*

be communicated to the United Nations Secretary-General within a timeframe determined by them.[12]

Judges must be chosen from among people of high moral character who meet the prerequisites for appointment to the highest judicial offices in their respective nations, or who are juris consults with acknowledged international law expertise.[13] There may not be more than one national of the same country in the Court. Furthermore, the Court as a whole must represent the world's most influential civilizations and legal systems.

Justices of the International Court of Justice are not delegates of their government of their country or of any other State once elected. The Court, unlike most other international organisations' organs, is not made up of government representatives. Members of the Court are independent judges who must make a formal declaration in open court before beginning their duties that they would exercise their powers impartially and conscientiously. To ensure their independence, no member of the Court can be fired unless the other members unanimously agree that the member no longer meets the required conditions.[14] Members of the Court have privileges and immunities comparable to those of the head of a diplomatic mission when doing Court business. In The Hague, the President takes priority over the diplomatic corps' de facto leader, who is followed by the Vice-President, who is followed by judges and ambassadors, in that order.[15]

Furthermore, the Court may establish Chambers composed of three or more judges to discharge of its duties The Court has three types of Chamber such as the Chamber of Summary Procedure for the speedy dispatch of business comprised of the President and the Vice-President including three other judges,[16] chambers formed to deal with certain categories of cases, such as labour or communications,[17] any chamber formed to deal with a

[12] *Ibid.*

[13] Encyclopedia.com, “International Court of Justice.”

[14] *Ibid.*

[15] *Ibid.*

[16] Article 29 of the Statute of the ICJ.

[17] Article 26, paragraph 1, of the Statute of the ICJ.

particular case at the request of the parties.[18] Every judgement rendered by a Chamber is considered a judgement of the Court.[19]

The official languages of the Court are English and French. The Court may also authorize, at the request of a party, a language other than French or English to be used by that party and the judgement will have a translation in its official language attached to it.[20]

Mandate, Powers And Function

The International Court of Justice has two functions: to settle legal disputes between States in line with international law (contentious jurisdiction);[21] and to provide advisory opinions on legal problems presented to it by fully authorized UN organisations and agencies (advisory function). The dispute may include a disagreement on a question of law or fact, a conflict or a lash of legal views or interests. The Court may only preside over a dispute when the parties concerned have recognised its jurisdiction.

1. Contentious Jurisdiction

Only States may apply to the Court and appear before it in contentious matters. Individuals, non-governmental organisations, and private groups have no jurisdiction before the ICJ in its contentious jurisdictional capacity. The Statue of the Court also grants all Member States of the United Nations access to the ICJ in contentious jurisdictional capacity.[22]

In addition, the Court's jurisdiction in contentious cases is predicated on the permission of the countries to which it is accessible. However, the method in which this permission is communicated influences how a matter can be presented before the Court. Below are some of the ways the permission can be communicated to the court:

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[18] Article 26, paragraph 2, of the Statute of the ICJ. For example, in the cases of The Frontier Dispute (*Burkina Faso v. Republic of Mali*), ICJ Reports 1986; Elettronica Sicula S.p.A (ELSI) (*United States and Italy),* ICJ Reports 1989; and The Land, Island and Maritime Frontier Dispute (*El Salvador v. Honduras*), Nicaragua intervening, ICJ Reports 1993.

[19] Ibid.

[20] Article 39 of the Statute of the ICJ.

[21] Article 35 of the Statute of the ICJ.

[22] *Ibid.*

a. *Special Agreement* [23]

According to Article 36, paragraph 1 of the Statute, the Court's jurisdiction includes all cases referred to it by the parties. In this case, parties to the issue send a notification to the Registry informing it of a special agreement to appear before the Court on a particular matter. This notification is expected to include the matter of the disagreement, as well as the parties involved.[24]

b. Matters provided for in Treaties and Conventions.

This method is provided for in Article 36, paragraph 1 of the Statute. This form of application is filed based on agreed treaties and conventions between the parties. In instances like this, the Court is notified by the submission of a unilateral document (a document where the consent of both parties is not required) to the Registry, specifying the subject of the dispute, the parties, and the provision on which the applicant bases the Court's jurisdiction.[25]

c. Forum prorogatum.

The term literally means 'prorogated jurisdiction' extending the jurisdiction of a court by agreement of the parties which would otherwise be outside its jurisdiction.[26] If a State does not acknowledge the Court's jurisdiction at the time an application for starting proceedings is made against it, it has the option of later accepting it in order for the Court to hear the case: the Court has jurisdiction as of the date of acceptance under the *forum prorogatum* rule.[27]

d. Interpretation of Judgement

According to Article 60 of the Statute, if there is a disagreement over the interpretation or scope of a ruling, the Court will construe it at the request of any party. A particular agreement between the parties or an application by one or more of the parties may be used to make the request for interpretation.

e. *Compulsory Jurisdiction of the Court*[28]

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[23]Examples of cases submitted to the Court by means of special agreements include Asylum Case (*Columbia v Peru*); North Sea Continental Shelf (*Federal Republic of Germany v Denmark*); Delimitation of the Maritime Boundary in the Gulf of the Marine Area (*Canada v United States of America*).

[24] Article 40 of the Statute of the ICJ; Article 39 of the Rules of the Court.

[25] Collection of Texts governing the Jurisdiction of the Court (PCIJ, Series D, No. 6, fourth edition) and Chapter X, Annual Reports (PCIJ, Series E, Nos. 8-16).

[26] Vincent Pouliot, "*Forum prorogatum* before the International Court of Justice: the *Djibouti v. France case*" (2008) Vol. 3, *The Hague Justice Journal*.

[27]*Ibid.*

[28] Article 36(2-5), of the Statute of the ICJ.

The compulsory jurisdiction of the Court may be invoked by a State Party by means of a written application and without any need for a special agreement. The subject matter of the dispute to be heard by the Court should concern the interpretation of a treaty, any question of international law or fact, or breach of an international obligation. Declarations are submitted by State Parties pursuant to Article 36 of the Statute of the ICJ, and are deemed to be acceptances of the compulsory jurisdiction of the ICJ. These declarations are deposited with the Secretary General of the UN and are transmitted to the Registrar of the Court.

2. Advisory Function[29]

An advisory opinion is a legal guidance offered by the International Court of Justice to the United Nations or a specialized body in line with Article 96 of the UN Charter. The Court grants the General Assembly and the Security Council the authority to seek legal advice on "any legal subject."[30] However, according to Article 96, paragraph 2 of the Charter, other UN institutions and specialized agencies, which may be so authorized by the General Assembly at any time, may seek advisory opinions from the Court on legal questions arising within the scope of their responsibilities.

Advisory procedures begin with the Secretary-General of the United Nations or the director or secretary-general of the institution seeking the opinion submitting a formal request for an advisory opinion to the Registrar. In emergency situations, the Court may take all necessary steps to expedite the proceedings. The Court has the authority to undertake written and oral procedures in order to gather all required information regarding the subject before it.[31] The Court compiles a list of States and international organisations that are likely to be able to provide information on the issue before the Court a few days after the request is submitted to the Court.[32]

[29] Chapter IV, Articles 65-68 of the Statute of the ICJ; Part IV, Articles 102-109 of the Rules of the Court concern advisory opinions.

[30] *Ibid.*

[31] ICJ, Jurisdiction: Advisory Jurisdiction.

[32] *Ibid.*

The Court may decline to give an advisory opinion requested as it retains a discretionary power on such matters.[33] Relevant grounds for refusal include the political nature of the question posed, the abstract nature of the question and the absence of consent on the part of a state immediately concerned.[34] The PCIJ had set a precedent in its refusal to grant an advisory opinion in the case of *Eastern Carelia*[35]requested by the League of Nations Council because one of the parties in the dispute, (Russia), was not a member of the League and did not agree to, or be represented in the proceedings of the Court. An example of the ICJ refusing to grant advisory opinion was in the request from the World Health Organisation (WHO) and the United Nations General Assembly on the legality of the use of nuclear weapons.[36] The ICJ has identified certain conditions that must be met in order to exercise it advisory jurisdiction, namely, the agency had to be authorized to request opinions in general; the question on which the opinion was to be based must be a legal one; and the question must be one arising within the scope o the requesting agency's activities.[37] Consequently, the ICJ found that while the first two conditions were satisfied, the third had not been met.[38]

Generally, organizations and states allowed to participate in the proceedings may submit written statements, which may be followed by written comments on the statements of others if the Court deems it essential. If the Court believes that such proceedings should take place, these written remarks are normally made accessible to the public at the start of the oral hearings.

In contrast to judgements, and in rare circumstances when it is specifically stated that they have binding effect, advisory opinions of the ICJ are not legally binding.[39] However, the Court's advisory opinions have a lot of legal and moral weight, and may inform the

[33] Pomerance, Michla, *The Advisory Function of the International Court In the League and UN Eras,* 1973 at 281; Liz Hefferman, " The Nuclear Weapos Opinions: Reflections on the Advisory Procedure of the International Court of Justice", *Stetson Law Review,* 1998.

[34] *Ibid.*

[35] *The Status of Eastern Carelia* (Finland v USSR), 1923 PCIJ (Ser. B), No. 5, July 23.

[36] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* Advisory Opinion, ICJ Reports, 1996.

[37] Amit Kumar Meena, *Advisory Jurisdiction of the ICJ, The WHO Case: Implications for Specialised Agencies,* Natinal Law School of India University, Bangalore, India.

[38] *Ibid.*

[39] *Ibid.*

development of international law. They are frequently used as a tool of preventative diplomacy and aid in the maintenance of peace. Advisory views contribute to the clarity and evolution of international law, and hence to the improvement of peaceful relations between States, in their own way.[40]

Recent Court Sessions

As already established, the International Court of Justice addresses and adjudicates upon conflict between state parties. Below are summaries of two of the most recent court sessions held by the Court.

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)[41]

On June 23, 1999, The Democratic Republic of the Congo (DRC) submitted applications in the Court's Registry seeking to institute hearings against Rwanda, Uganda, and Burundi for deeds of armed violence perpetrated in blatant violation of the United Nations Charter and the Charter of the Organisation of African Unity (OAU). The DRC also demanded reparations for deeds of willful damage and raiding, as well as the recovery of national assets and resources taken for the profit of the individual respondent Countries.[42] On January 15, 2001, The DRC however, told the Court that it wanted to cease the actions against Burundi and Rwanda and the two cases were deleted from the list.[43]

The DRC submitted a Petition for Indication of Provisional Measures on June 19, 2000, to end all armed activities and abuses of human liberties and DRC sovereign rights by Uganda.[44] On July 1, 2000, the Court instructed both parties to take all required steps to adhere to all international law duties, as well as to assure complete regard for fundamental human rights and humanitarian law standards.[45] Uganda responded with a Counter-Memorial including

[40] *Ibid.*

[41] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)"

[42] *Ibid.*

[43] *Ibid.*

[44] *Ibid.*

[45] *Ibid.*

three counter-claims. Two of the counter-claims (acts of aggression supposedly perpetrated by the DRC against Uganda; and intrusions on Ugandan diplomatic establishments and officials in Kinshasa and on Ugandan citizens for which the DRC is claimed to be fully accountable) were found admissible and established the basis of the hearings by the Court in an Order dated November 29, 2001.[46]

Following oral arguments in April 2005, the Court issued its merits decision on December 19, 2005. The Court addressed the subject of Uganda's occupation of the DRC and determined that the DRC had not agreed to the deployment of Ugandan soldiers on its borders since August 1998 after reviewing the information presented by the Parties.[47] The Court also dismissed Uganda's assertion that its use of violence was justified since it was not covered by permission, concluding that the prerequisites for self-defense were not met. Furthermore, Uganda's illegal military involvement was of such extent and length that the ICJ deemed it a severe breach of the United Nations Charter's ban on the use of coercion. The ICJ also held that the Republic of Uganda had breached the principles of non-use of force in international affairs and non-intervention by purposely providing military, logistical, fiscal, and monetary help to improper forces acting on DRC lands.

The Court next turned to the issue of invasion and human rights and humanitarian law breaches. After establishing that Uganda was the occupying power, the Court held that under Article 43 of the 1907 Hague Regulations, it was required to take all reasonable steps to maintain and uphold public safety and security in the inhabited territory.[48] While also honouring, unless utterly prohibited, the legislation in force in the DRC, the Court also determined that there was substantial evidence to establish that UPDF (Uganda Peoples' Defense Forces) personnel had violated international humanitarian and human rights standards.[49] The Court was asked to look into the third problem of Uganda's alleged abuse of Congolese environmental assets. In this regard, the Court believed it had sufficient proof to

[46] *Ibid.*

[47] *Ibid.*

[48] Armed Activities on the Territory of the Congo

[49] *Ibid.*

indicate that personnel and troops of the UPDF, along with its highest-ranking officers, were implicated in the pillaging, raiding, and usurpation of the DRC's land and resources.[50]

The Court also held that the evidence brought forward further proved that the army officials failed to take any steps to prevent and stop these actions. Uganda was accountable for the overall behavior of the UPDF as well as the actions of individual UPDF troops and commanders in the DRC.[51] In regards to the first counter-claim made by Uganda concerning Order 29 made in November 2011, the Court held that Uganda had not generated enough proof to demonstrate that the DRC had supplied political and military assistance to anti-Ugandan rebel groups acting in its territory or even to show that the DRC had violated its obligation of vigilance by condoning anti-Ugandan rebels in its region. As a result, the Court dismissed this counterclaim in its totality.[52] Furthermore, the Court initially deemed inadmissible the section of Uganda's subsequent counter-claim dealing with the purported torture of Ugandan citizens without diplomatic status at Ndjili International Airport. In terms of the substance of the case, it was determined that there was enough proof to show that assaults on the Embassy and acts of abuse of Ugandan ambassadors occurred at Ndjili International Airport.

As a result, the DRC was judged to have violated the Vienna Convention on Diplomatic Relations' requirements.[53] Confiscating property, assets, and records from the Ugandan Embassy was also deemed a breach of international law governing diplomatic relations. Also, the ICJ resolved to prepare for a professional analysis on certain types of harm alleged by the DRC, including fatalities, loss of natural resources, and property damages, in line with Article 67, paragraph 1 of its Rules, by an Order dated September 8, 2020. The Court chose four impartial specialists for that objective on October 12, 2020, and they presented a conclusion on settlements on December 19, 2020.[54]

[50] *Ibid.*

[51] *Ibid.*

[52] *Ibid.*

[53] *Ibid.*

[54] *Ibid.*

Finally, after hearing oral arguments in April 2021, the Court issued its restitution decision on February 9, 2022, granting US$225,000,000 for personal injury, US$40,000,000 for property loss, and US$60,000,000 for resource loss. It was determined that the full sum would be reimbursed in five yearly installments of US$65,000,000 beginning September 1, 2022, and that if reimbursement was missed, an interest of 6% would accumulate, commencing from the day after the deposit was required.[55]

Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)

The most recent court session of the ICJ is a contentious case between *Nicaragua v. Colombia*.[56] Nicaragua lodged an application instituting proceedings against Colombia on November 26, 2013, pertaining to a disagreement concerning the infringements of Nicaragua's national sovereignty and coastal zones proclaimed by the ICJ's decision of November 19, 2012 (in the matter involving Borders and Coastal Disagreement)[57] and the threat of Colombia using military means to enforce these infringements. Nicaragua asked the ICJ to rule and proclaim that Colombia had violated various international duties and obligations and was obligated to make complete restitution for the losses incurred by its international wrongdoings.[58] Nicaragua predicated the Court's jurisdiction on Article XXXI of the Bogotá Pact. Furthermore, it claimed that the Court's competence was based on its innate ability to declare the activities necessary by its rulings.

Colombia filed preliminary challenges to the Court's jurisdiction on December 19, 2014. The Court issued its decision on Colombia's preliminary complaints on March 17, 2016. On the premise of Article XXXI of the Bogotá Pact, the Court determined that it had the authority to hear the issue over Colombia's claimed abuses of Nicaragua's sovereignty in coastal territory that, according to Nicaragua, the ICJ ruled to belong to Nicaragua in its decision of November

[55] *Ibid*.

[56] ICJ, "Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)."

[57] Herbert Smith FreeHills 'Columbia redraws from ICJ over Nicaragua v. Colombia.'

[58] ICJ, "Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)."

19, 2012.[59] Colombia filed four opposing claims in its Counter-Memorial on November 17, 2016. The first counterclaim was predicated on Nicaragua's alleged failure to defend and maintain the marine ecosystem of the southwest Caribbean Sea. The second counterclaim was premised on Nicaragua's alleged failure to safeguard the right of the people of the Providencia and Santa Catalina to live in a good, healthy, and nurturing environment.[60] The third counterclaim involved Nicaragua's alleged violation of the San Andrés Archipelago residents' handcrafted fishing rights to access and exploit their long-established fishing areas. Finally, the fourth opposing claim concerned Nicaragua's acceptance of Decree No. 33-2013 of August 19, 2013, which, per Colombia, created direct frameworks and had the consequence of advancing Nicaragua's internal waterways and coastal zones further than what international law allows.[61]

The ICJ determined that the 1st and 2nd rebuttals presented by Colombia were unenforceable as such and did not establish elements of the current deliberations, while the 3rd and 4th counterclaims forwarded were legally valid as such and did establish part of the ongoing court hearings in an Order dated November 15, 2017[62]. From September 20 to October 1, 2021, proceedings on the issue's merits were conducted in a hybrid format, i.e., online and physical proceedings. The Court issued its merits decision on April 21, 2022, finding that Colombia had infringed on Nicaragua's national sovereignty and competence in the latter's exclusive trade zone.[63]

Annotated Bibliography

UN, *Charter of the United Nations,* 1945, 1 UNTS XVI available at: https://treaties.un.org/doc/publication/ctc/uncharter.pdf (accessed 18 May, 2022)

> *UN Member States are obligated by the UN Charter, which is a document of international law. The basic tenets of international relations, such as the*

[59] *Ibid.*

[60] *Ibid.*

[61] *Ibid.*

[62] *Ibid.*

[63] *Ibid.*

sovereign equality of States and the proscription of the use of aggression in such interactions, are codified in the UN Charter.

Handbook of the International Court of Justice available at: https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf (accessed 18 May, 2022)

This document provides in-depth and practical understanding of the facts concerning the history, composition, jurisdiction, procedure and decisions of the International Court of Justice. With sixth editions released, with the last update released 31 December 2018.

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Contentious Case:

Application Of The International Convention On The Elimination Of All Forms Of Discrimination (Qatar V United Arab Emirates)

"...the United Nations Organisation had been founded principally to combat discrimination in the world".

-A Delegate to the Third Committee[64]

Summary Of Facts

Qatar instituted an action[65] against the United Arab Emirates on 11 June 2018 for acts amounting to racial discrimination and a contravention to the International Convention on the Elimination of All forms of Discrimination.

On 5 June 2017, the United Arab Emirates, along with Egypt, Bahrain and Saudi Arabia, established measures against Qatar on suspicion of the Qataris supporting terrorist activities.[66] Some of these measures included the expulsion of all Qatari citizens living in the UAE, the prohibition of all their citizens from travelling to Qatar and the closure of their airspace and territorial waters to Qatari aircraft and vessels. This severing of diplomatic ties was brought about by claims of Qatar's support, funding and hosting of terror groups. Additional measures were taken relating to Qatari media and speech in support of Qatar, considering any form of support as a crime. Qatar further submitted a Request for the indication of provisional measures[67] which was granted by the ICJ by its Order of 23 July 2018

[64] Cited in McKean, Warwick. "*The Meaning of Discrimination in International and Municipal Law.*" British Yearbook of International Law 44 (1970): 177–192.

[65] The case was referred to the Court under Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 36(1) Statute of the Court.

[66] Al Jazeera, News Agencies 'Saudi Arabia, UAE, Egypt, Bahrain cut ties to Qatar'.

[67] Pursuant to Article 41 of the Statute of the ICJ; and Articles 73, 74 and 75 of the Rules of Court.

ensuring that families separated by the measure of 5 June 2017 are reunited; students affected should be given the opportunity to complete their education or obtain their educational records if they wish to continue their education elsewhere; and Qataris are allowed access to tribunals and other judicial organs of the UAE. Both Parties are prohibited from taking any actions which may aggravate or extend the dispute or make it more difficult to resolve.[68]

Unlike Qatar's request, the ICJ rejected UAE's Request for indication of Provisional Measures on the preservation of the UAE's procedural rights and further aggravation submitted on 22 March 2019 by its Order of 14 June 2019.

Additionally, Qatar instituted a parallel case before the Committee on the Elimination of Racial Discrimination (CERD)[69] which is the international body that monitors the implementation of the treaty by state parties.

The Claims Made By Qatar were the following:

a. *Whether express reference to Qatari nationals constitutes discrimination on the basis of national origin.*
b. *Whether measures directly targeted Qatari corporations in a racially discriminatory manner.*
c. *Whether UAE's expulsion order, travel bans, restrictions on media corporations and limitations on freedom of expression are acts amounting to "indirect discrimination" against persons of Qatari national origin.*

[68] I.C.J. Reports 2018 (II), pp. 433-434, para. 79.

[69] Article 11, CERD.

Timeline Of Events

5 June 2017: UAE severs diplomatic relations with Qatar; bans Qatari aeroplanes from using her airspace and closes territorial waters to Qatari vessels; prohibits people of Qatar nationality from travelling into Qatar.

11 June 2018: Qatar set in motion proceedings against the UAE and made a request for an indication of provisional measures.

23 July 2018: the ICJ approved Qatar's Request for Indication of provisional measures.

22 March 2019: the UAE filed a Request for an indication of provisional measures.

14 June 2019: the court rejected the UAE's request for an indication of provisional measures.

6 June 2017: the Attorney General of the UAE issued a statement indicating that expressions of sympathy for the State of Qatar or objections to the measures taken by the UAE against the Qatari Government were considered crimes punishable by imprisonment and a fine. The UAE blocked several websites operated by Qatari companies, including those run by Al Jazeera Media Network. The Abu Dhabi Department of Economic Development issued a circular prohibiting the broadcasting of certain television channels operated by Qatari companies.

9 – 11 September 2022: Date set to hear the case before the Court.

International And Regional Legal Framework

The Principle of Non-discrimination is one that is supported and enforced by multiple documents making up international law and other regional framework showing the commitment of countries to its eradication. While this case focuses on the application and interpretation of the International Convention on the Elimination of All Forms of Discrimination, and particularly, the claim of discrimination based on nationality/national origin, there are other conventions and resolutions that protect the principle as a right and an obligation. Below, the major laws enforcing this principle are discussed.

As the primary document governing the organisation, the UN Charter embodies the key principles and ideologies guiding the organisation's mission. One of these principles and purposes as contained in Article 1 of the Charter is to achieve international co-operation in

promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.[70]

The UN General Assembly adopted the *Universal Declaration of Human Rights (UDHR)* in the aftermath of the Second World War in 1948. The convention acknowledges that if people are to be treated with dignity, they require economic and social rights like education, as well as cultural and political rights of participation and civil liberty.[71] The convention states that these rights are to be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or another status.[72]

The UN General Assembly adopted Resolution 2106 establishing the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* and is among the oldest conventions in the UN Human Rights Office to target racial discrimination in all its forms. The convention was created in line with the UN's purpose of promoting, observing, and encouraging universal respect for human rights and fundamental freedoms without distinction to race, sex, language, or religion.[73] It was formed during worldwide civil unrest; apartheid was at its height in South-Africa and many African countries were doing away with colonialism for independence. It is the only international instrument specifically directed at racial discrimination and contain procedures for implementation of its provisions. The ICERD is based on the principles of equality and non-discrimination which are also upheld by the UN Charter. The CERD oversees the implementation of the Convention through its consideration of State report, individual complaints, inter-state complaints, and its preparation of general comments and thematic discussions.[74]

The International Convention on Civil and Political Rights (ICCPR) was created to give legal status to civil and political rights and fundamental freedoms contained in the UDHR.[75] Equality and non-discrimination are discussed throughout this covenant, and it deals with every form of discrimination on any ground. The Human Rights Committee (HRC) is

[70] Article 1(c), UN Charter, 1945.

[71] Racism No Way, 'International Law Relating to Racism and Discrimination.'

[72] Article 2, UDHR, 1948.

[73] The International Convention on the Elimination of Racial Discrimination (ICERD), 1969.

[74] CERD, Guidelines for the CERD-Specific Document to be submitted by State Parties under Article 9, CERD/C/2007/1, 13 June 2008.

[75] Equality and Human Rights Commission, 'International Covenant on Civil and Political Rights.'

responsible for implementing the ICCPR.[76] Article 26 of the convention states that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. This means that the law shall prohibit discrimination and guarantee equivalent and adequate protection against discrimination on many grounds, including race.[77]

The United Nations Educational Scientific and Cultural Organisation (UNESCO) adopted the *Declaration on Race and Racial Prejudice* on 28 November 1978, after its twentieth session.[78] They created the convention in line with their organisation's purpose as laid down in the preamble of their constitution. This purpose is to prevent the denial of the democratic principles of the dignity, equality, and mutual respect of men, through the ignorance and prejudice of the doctrine of the inequality of races.[79] Article 1 of the convention also states that every individual and group has the right to be different, to consider themselves distinct and that the diversity of lifestyles should not, in any circumstances, serve as a pretext for racial prejudice through any law or practice whatsoever.[80]

The General Assembly adopted *Resolution 2142 (XVIII)* in its 21st session on 26 October 1966. The resolution condemned all policies and practices of apartheid, racial discrimination, and segregation, including the practices of discrimination inherent in colonialism. It proffered that in combating discriminatory practices, education, culture, mass media, and literary creation towards removing the prejudices on race should be encouraged. Resolution 2142 also proclaimed the 21 March International Day for the Elimination of Racial Discrimination. The landmark resolution has since been used as a precedent in recent sessions addressing discrimination.[81]

The Declaration on the Rights of Indigenous Peoples (DOTROIP) is a declaration adopted by the UN General Assembly on 13 December 2007. It is also known as the UN Declaration on the Rights of Indigenous People (UNDRIP). The declaration builds on the foundations of the UN Charter and UDHR that indigenous persons have the right to exercise their fundamental human rights as individuals and groups. The declaration promotes and safeguards the

[76] *Ibid*.

[77] Article 26, International Covenant on Civil and Political Rights, 1966.

[78] UNESCO Declaration on Race and Racial Prejudice, 1978.

[79] Constitution of UNESCO, 1945.

[80] Article 1(2), Constitution of UNESCO, 1945.

[81] UN General Assembly, Elimination of All Forms of Racial Discrimination, 26 Oct 1966, A/RES/2142.

existing freedoms and rights made available to indigenous people. The convention holds the Member States to a standard that prohibits all forms of discrimination against indigenous people and encourages them to be vocal and active in pursuing the issues relating to them.[82]

The General Assembly Resolution 70/139 of 17 December 2015 titled 'Combatting Glorification of Nazism Neo-Nazism and Other Practices That Contribute to Fuelling Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Other Related Intolerances' is a principal instrument racial discrimination discussions. Adopted during General Assembly's 70th session, the resolution alerts the world's attention to the sudden increase in extremist movements worldwide that propagate racial violence, discrimination, and hate speech. The resolution addresses concerns over attempts to demolish monuments held in remembrance of those who fought against nazism in World War II and urges States to comply with relevant obligations under The Geneva Conventions. It condemns such practices stating that they fuel contemporary forms of racism, racial discrimination, and related intolerance, which contributes to the spread and multiplication of various policies, movements, and groups.[83]

The Human Rights Committee's General Comment on Non-discrimination (HRC 1989)[84] provides an authoritative overview of the principle including definition, any distinction, exclusion, restriction or preference which is based on a number of identified grounds and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights or freedoms.

Role Of The International System

Discrimination is a virus that plagues the world in various forms (race, sex, ability, religion) and while there are many international and regional laws directed against, it still persists in today's reality. The United Nation plays a very important role with its mandate of eliminating all forms of discrimination through its organs and agencies such as the ICJ and the Human Rights Council. Through the UN, treaties such as the ICERD and the CEDAW were signed and ratified by Member States with committees established to monitor their progress and

[82] UN Declaration on the Rights of Indigenous People (UNDRIP), 13 Dec 2007, (A/RES/61/295).

[83] UN General Assembly, Combatting Glorification of Nazism Neo-Nazism and Other Practices That Contribute to Fueling Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Other Related Intolerances of 17 Dec 2015, A/RES/70/139.

[84] Human Rights Committee, General Comment No. 18: 'Non-discrimination' HRI/GEN/1/Rev.4 (1989).

address any violations by State Parties. For example, the Committee on the Elimination of Discrimination against Women is the body that monitors the implementation of the CEDAW. All State Parties must report on the measures they have adopted relating to the rights described in the Convention.[85] The Committee also hears disputes on matters of discrimination against women in violation of the CEDAW.[86]

With regards to the Gulf Crisis, Saudi Arabia, Egypt and Bahrain – countries which, along with the UAE, have been enforcing a blockade of Qatar since June 2017 – have not signed up to the Convention on the Elimination of All Forms of Discrimination,[87] but also cut land, air and sea links with Qatar on suspicions of backing extremism. It is relevant to point out the consensus feeling that Qatar was too close to Iran.[88]

A look into the financial reactions is also essential in analysing the role of the international community. In the days following the news of the Gulf Crisis Qatar's stock exchange dropped 10% in value. Enhancing trade and integration with other countries, including Iran, may be one of the financial moves Qatar must consider.[89]Additionally, regional powers like Turkey, Israel, and Iran expect to benefit from the new Gulf diplomacy and its economic offers if the safety of key players the Middle East appears to looks unstable.[90]

Moreover, Jared Kushner, senior adviser to Former United States President, Donald Trump, as well as his son-in-law, went to the Gulf at the end of November 2019 to further US Middle East policy, which included ending the Saudi-led blockade of Qatar. US national security adviser Robert O'Brien said in November that allowing Qatari planes to fly over Saudi Arabia via an "air bridge" was a priority for the outgoing Trump administration.[91] This is pertinent as the

[85] UN Office of the High Commissioner, CEDAW's Contribution to the High-level Political Forum on Sustainable Development (HLPF).

[86] X and Y v Georgia Communication No. 24/2009, UN Doc. CEDAW/C/61/D/24/2009 (2015); Angela Gonzalez Carreno v Spain, Communication No. 47/2012, UN Doc. CEDAW/C/58/D47/2012 (2014); V.P.P. v Bulgaria, Communication No. 31/2011, UN Doc, CEDAW/C/53/D/31/2011 (2012).

[87] Al Jazeera "'Violence *and Hatred'* Qatar and UAE go head-to-head at The Hague".

[88] Al Jazeera "UN's top court dismisses Qatar discrimination case against UAE".

[89] Nader Kabbani, "The high cost of high stakes: Economic implication of the 2017 Gulf crisis".

[90] Politics today, Hazal Muslu El Berni "Despite Peace in the Gulf, Qatar and the UAE Still Compete".

[91] Times of Israel, "Kushner visits Qatar with eye to ending Gulf Alliance rift".

Gulf Crisis has a direct impact on the aviation industry as the Middle East is the hub of many key international flight operators.

Principle Of Non-Discrimination: Exploring The Meaning, Interpretation And Application Of 'non-Discrimination' In International Law

Discrimination is the act of unjust and prejudicial treatment of different categories of people, primarily based on race, sex, religion, and disability. Discrimination is a foremost perpetrator of inequality which entails harming someone's rights simply because of who they are or what they believe.[92] If a person cannot enjoy their human rights or legal rights on an equal basis with others because of an unjustified distinction made by a policy or law, it would amount to discrimination. Discrimination is contrary to legal principles of fairness and equality. The UN has continually expressed its intolerance of discrimination and believes that equality and all forms of discrimination are the foundational basis of the rule of law. At the High-level Meeting of the 67th Session of the General Assembly on the Rule of Law at the National and International Levels, Member States declared that all entities, including persons, and institutions, whether public or private are equally accountable and protected by the law and this entitles them to just, fair and equitable laws without any discrimination.[93]

The principle of non-discrimination is a general principle of international law and is present in quite a few areas of international law. It is a key principle in areas such as foreign investment law, international trade agreements, and international human rights and is a fundamental purpose/principle of the United Nations. The importance of the non-discrimination principle under the United Nations is reflected in *Article 1 of the 1945 UN Charter*, which describes one of the four purposes of the organisation as: "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Non-discrimination emerged as a key element and principle in the United Nations regime governing the protection of human rights which took root following the Second World War. The Human Rights Committee explains discrimination to be any distinction, exclusion, restriction or preference which is based on a number of identified grounds and

[92] Amnesty International, 'Discrimination'.

[93] UN High Level Meeting on Rule of Law, 24 September 2012.

which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights or freedoms.[94]

The international human rights legal framework contains international instruments to combat specific forms of discrimination, including discrimination against indigenous peoples,[95] migrants,[96] persons with disabilities,[97] women[98] and even race. The legal framework contributed additional grounds, interpretation and application of the principle of non-discrimination. These Conventions list various human attributes as grounds which a person cannot be discriminated upon.

The grounds for non-discrimination has evolved from including only race, sex, language or religion under the UN Charter to further grounds such as colour,[99] political opinion, sexual orientation as provided by the international and regional legal framework on the principle. Interpretations have argued that the list is inconclusive and covers other features not stated in the conventions. There has also been an evolution detailing a list of substantive rights which are subject to the non-discrimination rule as an independent principle and right in the *ICERD 1965* and the *CEDAW 1981*.

The most recognized international framework against discrimination is the *International Convention on the Elimination of All Forms of Racial Discrimination*. The convention was adopted on 21 December 1965 by the UN *General Assembly Resolution 2106 (XX)* and has been in force since 1969.[100] To ensure adequate execution of the convention provisions by the 182 Member States who ratified it, the UN set up an independent body called the Committee on the Elimination of Racial Discrimination (CERD).[101] In accordance with *Article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination*, CERD

[94] Human Rights Committee, General Comment No. 18: 'Non-discrimination' HRI/GEN/1/Rev.4 (1989).

[95] UN Declaration on the Rights of Indigenous Peoples A/RES/61/295.

[96] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 Dec. 1990. A/RES/45/158.

[97] UN Convention on the Rights of Persons with Disabilities 2008 (CRPD**).**

[98] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women,* 18 Dec. 1979, A/RES/34/180.

[99] Article 2, UDHR.

[100] Office of the United Nations High Commissioner for Human Rights (OHCHR).

[101] United Nations Human Rights Treaty Bosdies, 'Committee on the Elimination of Racial Discrimination'.

consists of 18 independent experts of high moral character elected to a term of four years based on equitable geographical distribution and sufficient legal experience. This body oversees the implementation of anti-discriminatory laws in national and regional legal frameworks. They also review existing laws, policies and regulations that may be inherently discriminatory towards a particular race. The Committee addresses individual and inter-state complaints alike and requires periodic submission of reports from the Member States to aid their monitoring capacities.[102]

On 29 November 2017, the CERD held discussions in Geneva geared toward eliminating racial profiling and ethnic cleansing.[103] Ethnic cleansing is the systemic elimination of people of a certain race or religion from an area through deportation, displacement, mass killings, or other means.[104] After the discussions, attending stakeholders provided viable solutions. The Committee reached an outcome based on using CERD to completely eliminate those practices on national, regional and global levels.[105]

1. Duty to Investigate Discrimination

A State party's obligation includes both positive and negative action to ensure the protection of every person from discrimination. Positive obligations require actions by the state to actively protect against human rights violations while negative obligations require the state to refrain from acting in a manner that violates human rights. Hence, a state is obligated to take necessary steps to investigate suspected discriminatory acts by private actors. Failure to carry out a thorough investigation deprives persons from effective protection and remedies against reported acts of discrimination.[106] The question whether delayed remedy still effective remedy was decided in the case of *Miroslav Lacko v. Slovakia*,[107] where the CERD decided

[102] *Ibid*.

[103] OHCHR, 'Thematic Discussion: Racial Profiling, Ethnic Cleansing and current Global Issues and Challenges, 2017.

[104] History, 'Ethnic Cleansing,' October 14 2009.

[105] OHCHR, 'Thematic Discussion: Racial Profiling, Ethnic Cleansing and current Global Issues and Challenges, 2017.

[106] *Mahali Dawas and Yousef Shava v. Denmark*, CERD/C/80/D/46/2009, UN Committee on the Elimination of Racial Discrimination (CERD), 2 April 2012.

[107] *Miroslav Lacko v. Slovakia*, CERD/C/59/D/11/1998, UN Committee on the Elimination of Racial Discrimination (CERD), 9 August 2001.

that a remedy delayed by three and a half years still satisfy the obligation of a state party to provide remedies to victims.[108]

2. Difference between discrimination and differential treatment

The lines between discrimination and differential treatment may be blurred without proper analysis and authorities explaining the difference between the concepts. Differential treatment is an act that could be classified as discrimination where there is no reasonable or objective justification for such act. The aims and effects of the measures or omissions must be legitimate and compatible with the purpose of the Convention before it is accepted as a differential treatment.[109] In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.[110]

The CERD observed that differential treatment will "constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim".[111] The term "non-discrimination" does not signify the necessity of uniform treatment when there are significant differences in situation between one person or group and another, or, in other words, if there is an objective and reasonable justification for differential treatment. To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons

[108] *M.B. v. Denmark*, CERD/C/60/D/20/2000, UN Committee on the Elimination of Racial Discrimination (CERD), 15 March 2002.

[109] *Committee on Economic, Social and Cultural Rights,* General comment No. 20, Non-discrimination in economic, social and cultural *rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), para. 13, UN Doc. E/C.12/GC/20 (2009).*

[110] Ibid; See also Human Rights Committee, *General comment No. 18, Non-discrimination, para. 13 (1989),* reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.9 (2008), at 198.

[111] CERD General Recommendation No. 30 (2004) on Discrimination against Non-citizens.

whose situations are objectively the same.[112] The Inter-American Court of Human Rights (ACHR) stated that the term "discrimination" will be used to refer to any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights.[113]

Referring to disability as a "prohibited ground" does not mean that it is a ground that can never provide the basis of a lawful difference in treatment, but rather that differential treatment requires a high level of justification. The distinction between differential treatment (irrespective of justification) and "discrimination" (in the absence of sufficient justification) is fundamental in international human rights law, and should also inform the Committee's interpretation of the Convention.

Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

Indirect Discrimination

Indirect discrimination occurs when a policy generally applies to everyone but is disadvantageous to some because they possess a specific, protected characteristic. The policy may be a law, rule, or practice, and it doesn't matter if the entity made the policy to intentionally put a group of people at a disadvantage or not. Indirect discrimination entails a neutral policy where no explicit discriminatory terms are made, which is actually disproportionately disadvantageous to a peculiar group because of the possession of specific quality.[114] For example, suppose an organisation implemented a policy for hiring only people falling within a specific height range. In that case, those who fall outside that given range as a result of their place of origin, disability, and even gender can be said to have been indirectly discriminated against applying for such roles. Another example would be when a company implements a policy where workers cannot wear headwear to work. That policy would be a case of indirect discrimination as it disqualifies people of specific ethnic and racial

[112] Committee on the Elimination of Racial Discrimination, General recommendation No. 32, *The meaning and scope of special measures in the International Covenant on the Elimination of All Forms [of] Racial Discrimination, para. 8, UN Doc. CERD/C/GC/32 (2009).*

[113] Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of the Undocumented Migrants*, paras. 83-84, 18 Inter-Am. Ct. H.R. (ser. A) (2003); *S.A.S. v. France* [GC], no. 43835/11, § 161, ECHR 2014.

[114]Amnesty International, 'Discrimination'.

backgrounds.[115] In both cases of direct and indirect discrimination, rights and opportunities are prejudiced, and it can have a significant negative impact on the social and economic status, well-being and health of a person.

In the HRC case of *Derksen v The Netherlands*,[116] the Committee directly addressed 'indirect discrimination' stating that Article 26 of the ICCPR prohibits both direct and indirect discrimination. It further described indirect discrimination as any rule or measure that may be neutral on its face without any intent to discriminate but nevertheless results in discrimination because of its disproportionate adverse effect on certain category of persons. This case expanded on the HRC General Comment 1989 which discusses the definition of 'discrimination'. Another HRC case[117] referred to any act or law with the 'purpose' or the 'effect' of nullifying or impairing the equal enjoyment or exercise of rights as not compliant with non-discrimination provisions.[118] The concept of 'indirect' discrimination refers to an apparently 'neutral' law, practice or criterion, which has been applied equally to everyone but the result of which favours one group over a more disadvantaged group. In determining the existence of indirect discrimination, it is not relevant whether there was intent to discriminate on any of the prohibited grounds. Rather, the consequences or effects of a law or measure are what matter.[119] A neutrally phrased rule that produces a difference in treatment that has a *statistically* disproportionate impact on the basis of a prohibited ground does not amount per se to indirect discrimination, but rather a finding of indirect discrimination depends on whether the impact is also disproportionate to the purpose that the rule serves.

The Equality and Human Rights Commission outlined four steps to verify whether or not a policy perpetuates indirect discrimination. The first is that there must be a universal policy, that is, a policy that applies to everyone. The second is that the said policy must disadvantage people or groups with particular characteristics like race or gender. The third is that those people or groups must be able to show that they are at a disadvantage because of that policy. And lastly, the policy cannot be said to have merit.[120]

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[115] Australian Human Rights Commission, 'Racial Discrimination'.

[116] *Derksen v. The Netherlands, Communication No. 976/2001, views of 1 April 2004.*

[117] *Althammer et al. v. Austria* Human Rights Committee Communication No. 998/2001.

[118] *Biao v. Denmark* [GC], No. 38590/10, §§ 90-91 (ECHR 2016).

[119] HRC: *Simunek et al. v. The Czech Republic*, Communication No. 516/1992.

[120] Equality and Human Rights Commission, 'What is Direct and Indirect Discrimination'?

In the case of *Eweida* v *the United Kingdom* argued before the European Court of Human Rights. Ms Eweida challenged British Airways' uniform policy against wearing religious jewellery when working in a public capacity. The policy stated that all religious jewellery and apparel be concealed under their clothing or not worn. Ms Eweida proceeded to wear a necklace displaying a small cross, and the airline placed her on unpaid leave. The British Employment Appeal Tribunal held that for Eweida to establish a case on indirect discrimination, "it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate adverse impact on the group." In 2013 when deciding the case, The European Court of Human Rights referred to that decision in ruling that British Airways had violated Eweida's fundamental rights. The court also rendered the UK's discriminatory laws inadequate in covering indirect religious discrimination.[121] Per many nations' legal frameworks, indirect discrimination may be lawful based on objective justification. If the entity that created the policy can provide good enough reasons for the creation of such policy, it would be deemed valid under the law.[122]

In the case of *Bilka-Kaufhaus GmbH* v *Weber von Hartz*, an European Union (EU) labour law case, Karin Webon von Hartz alleged that Bilka-Kaufhaus GmbH denied her pension on the grounds of a company policy. The policy required workers to have worked full time for 15 years to qualify for the pension scheme. Webon von Hartz claimed that the policy was indirectly discriminatory as it was disadvantageous to her because women work more part-time. Bilka-Kaufhaus GmbH, on the other hand, justified the policy, arguing that the higher administrative cost incurred by full-time workers over part-time workers was the qualifying factor for the pension scheme. The European Court of Justice (ECJ) held that the policy indirectly discriminated against women. Still, the court refused to rule in any party's favour because it was not in a position to determine the facts of the case and consider the validity of the justification provided by Bilka-Kaufhaus GmbH.[123]

[121] *Eweida and others* v *United Kingdom* [2013] ECHR 37.

[122] Citizen's Advice, 'Indirect Discrimination.'

[123] *Bilka - Kaufhaus GmbH* v *Karin Weber von Hartz* (1986) C-170/84.

1. Indirect Discrimination and Free Speech

The right to free speech is a fundamental human right. As contained in *Article 19 of the UDHR*, everyone has the right to freedom of opinion and expression, including the right to hold those opinions without interference and seek, receive and impart information and ideas through any media.[124] The exercise of this right without fear of unlawful interference is central to living in an open and fair society where people can access justice and enjoy their human rights.[125] Freedom of expression is the cornerstone of democracy, allowing individuals and groups to enjoy several other human rights and freedoms. Other international conventions enshrine this right.[126]

In 1993, the United Nations Human Rights Council (UNHRC) established a Special Rapporteur on Freedom of Expression and Opinion showing the UN's commitment to protecting and promoting this fundamental right with the mandate to safeguard and advance freedom of opinion and expression, offline and online, in light of global human rights law and benchmarks.[127] In *General Comment No. 34 on ICCPR*, The UN Human Rights Committee noted that the right to freedom of expression includes, for example, political discourse, commentary on one's affairs and public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious speech.[128] In the 27th session of UNHRC on 16 July 2020, the committee adopted *Resolution 44/12* reaffirming that the right to freedom of expression constitutes one of the essential foundations of democratic societies and development. The Resolution also recognised that the right to freedom of expression is a crucial indicator of the protection of other human rights and freedoms.[129] It is vital to note that this right to freedom of speech is not without limitations. According to the UN, people are entitled to hold any opinion, no matter how foul it may be but, if it amounts to instigation, the expression of that opinion must be prohibited.[130]

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[124] Article 19, UDHR 1948.

[125] Amnesty International, 'Freedom of Expression'.

[126] Article 19, ICCPR 1966; Article 10(1), European Convention on Human Rights, 1953; Article 5, International Convention on the Elimination of All forms of Racial Discrimination, 1969.

[127] United Nations Human Rights Special Procedures, Special Rapporteur for Freedom of Expression and Opinion.

[128] General Comment No. 34 on ICCPR, 12 September 2011.

[129] United Nations Human Rights Council Resolutions, Freedom of Opinion and Expression.

[130] Universal Declaration of Human Rights at 70, 28 November 2018.

Article 19(3) of the ICCPR outlines two limitations to this right. The first is respect for the rights and reputation of others. And the second is for the protection of national security or public order, public health or morals.[131] *Article 10(2) of the ECHR* postulates that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to conditions, restrictions or penalties as are prescribed by law and are necessary for a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[132]

These limitations are in place to stifle discrimination through hate speech, among other vices, because they racially or religiously aggravate certain offences. These offences criminalise certain types of speech, written material, and behaviour. The European Court of Human Rights has consistently ruled that expressions of religious and racial hate are not protected by *Article 10 of the ECHR* because they are incompatible with the convention's fundamental values, including tolerance, social peace, and non-discrimination.[133]

2. State Responsibly and Non-State Actors

The notion of state responsibility is a product of international law. The concept concerns an infringement by a State of one or more of its international obligations. This ideology means that the responsibility for violating international law and the consequences of such violation lies with the State. State responsibility outlines the circumstances in which the law will hold the State to have breached its international obligations. It also examines the consequences of the breach of international duty and highlights the implementation of the responsibility arising from a violation of international duty.[134]

[131] Article 19(3), ICCPR, 1966.

[132] Article 10(2), European Convention on Human Rights, 1953.

[133] Index on Censorship, 'Free Speech and the Law', 28 January 2020.

[134] Oxford Bibliographies, 'State Responsibility in International Law.'

In 1949, the UN General Assembly set up the International Law Commission (ILC), a body of legal experts, to codify and progressively develop international law. In August 2001, the ILC completed its ARSIWA to codify the generally applicable rules of State responsibility.[135]

Conclusion

The judgement of the ICJ will be binding on the parties and would serve as an important contribution to the interpretation of the ICERD in international law. The acts of the States will be examined against its provisions to determine whether or not there is a violation.

The ICJ in its capacity to adjudicate over disputes between Member States has the responsibility to ensure that the key principles and values of the UN are recognized and maintained. The ICJ is to consider, in accordance with international law, international conventions establishing rules expressly recognized by the contesting parties, international custom, the general principles of law recognized by civilized nations and teachings of the most highly qualified publicists of the various nations.[136]

Further Research

What are preliminary objections and how do they affect a case before the court? How do the actions of private individuals affect state responsibility in this case? Consider the state-wide measures that were implemented? Is there a difference between nationality and national origin and should both classifications be protected from discrimination? How is a judgement enforced against a State Party? Examine past cases the ICJ enforced a judgement. Can measures taken against a suspected terrorist organization or sponsor be considered as discrimination in international law?

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[135] Encyclopedia, 'Responsibility, State.'

[136] Article 38, Statute of the ICJ.

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Advisory Opinion:
Legal Consequences Of The Separation Of The Chagos Archipelago From Mauritius In 1965

"The will of the people is enough for the declaration of independence to be considered as an exercise of self-determination"

- Kosovo Case[137]

Summary Of Facts

The history of Chagos Archipelago is coloured with multiple controllers of the state. It was discovered in the 16th century by Portuguese and Arab sailors[138] and was then swiftly colonized by a squadron from the Netherlands at the command of Admiral Wybrand Van Warwyck, who proceeded to name the island Mauritius, in honour of Prince Maurice Van Nassau of Holland.[139] While the Portuguese could be said to have discovered it, the French were the first to lay a claim on the archipelago. The French slowly developed the island and yielded proceeds by establishing sugar cane plantations for slaves to work in. During the Napoleonic War, French pirates used the island as a base to execute attacks on British commercial vessels. In 1810, after several unsuccessful attempts, British troops successfully overpowered the French opposition and the British colonial reign over the island began. The Chagos was attached and governed by Mauritius, a British Colony at that time.

The British adopted the mode of indirect rule by keeping the French customs, laws and languages. They faced many obstacles in Mauritius including the abolition of slavery, the competition of beet sugar, the malaria epidemic, and the opening of the Suez Canal in 1869.[140]

Constitutional developments were made during this time and in 1883 there was the addition of elected representatives into the Council of Government. After the Second World War, a

[137] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep. 403 (Kosovo Case).

[138] History of Mauritius.

[139] Maurice of Nassau – Biography.

[140] History of the Suez Canal.

major +constitutional amendment saw a change from the aristocratic style of government to a system that allowed all educated adults the right to elect and be elected representatives. This led to the establishment of the first Legislative Council in 1948. Numerous constitutional conferences were held between 1950 and 1957 which allowed for the implementation of a ministerial system of government.

From 1961, there were political and administrative reforms which set Mauritius on the path of independence. This brought about negotiations between the British Prime Minister and the Premier of Mauritius in 1965 at Lancaster House. During these negotiations, the Chagos Islands was detached from the island of Mauritius and control was given to the British Indian Ocean Territory.[141] Soon after the negotiations, Mauritius adopted a constitution of their own and gained independence on the 12th of March 1968.[142]

In 1964, a U.K./U.S. survey of the Indian Ocean revealed that Diego Garcia, in the remote Chagos Archipelago, would make an ideal site for a U.S. military base.[143] Between 1968 and 1973, the United Kingdom forcibly depopulated the Chagos, forcing thousands of Chagossians away from their habitation and into neighbouring islands like Mauritius and Seychelles. This was part of the mass expulsion of inhabitants from the various islands controlled by British Indian Ocean Territory to accommodate military bases.

In 1965, the United Kingdom entered into the "Lancaster House Agreement" with Mauritian ministers to detach the Chagos Islands from Mauritius. It applied considerable pressure to obtain consent and the transaction was tied up with the decision to grant Mauritius its independence. The British Indian Ocean Territory (BIOT)was created in 1965 and the Chagos Islands were separated from Mauritius accordingly. In 1966, the United Kingdom and United States concluded a treaty regarding the use of Diego Garcia.[144] Pursuant to the planned construction of a U.S. base on this island, the Chagossians were forcibly removed from the entire Archipelago.

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[141] Shagun Gupta, The Chagos Archipelago: The Theatre of Opportunity and Challenge in the Indian Ocean, ORF Issue Brief No. 123, December 2015.

[142] Mauritius Independence Day.

[143] V.B. Bandjunis, *Diego Garcia: Creation of the Indian Ocean Base* (Writer's Showcase: San José/CA 2001) 309–310.

[144] Peter Sand, 'The Chagos Archipelago – Footprint of Empire, or World Heritage', *Environmental Policy and Law*, 40/5 (2010).

In April 1973, some Chagossians instituted legal action against the United Kingdom, claiming compensation for their exile and the rights of abode on their territory. In 1984, the Chagossians received monetary and land compensations from the United Kingdom. This was the first of various petitions and suits over the dispute.[145] In 2010, it instituted proceedings under the UN Convention on the Law of the Sea (LOSC) in response to the United Kingdom's declaration of a huge Marine Protected Area (MPA) around the Archipelago.[146] However, in its Chagos Award, the Tribunal ruled that it lacked the jurisdiction to adjudicate this specific claim.[147] Nonetheless, it decided that the MPA's creation had violated the Convention's provisions. When subsequent bilateral discussions failed, Mauritius approached the UN General Assembly.

The Questions presented before the General Assembly were the following:

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, including obligations reflected in the General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?[148]
b. What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the

[145] J.C. de l'Estrac, 'Diego Garcia: Mauritius Battles a Superpower to Reclaim a Cold War Hostage, *Parliamentarian: Journal of the Parliaments of the Commonwealth* 72 (1991) 267–270.

[146] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

[147] Chagos Marine Protected Area (Mauritius v. U.K.), Award (Annex VII LOSC Tribunal, Perm. Ct. Arb. 2015). However, Judges Katega and Wolfrum, reached an opposite conclusion.

[148] UN General assembly Resolution 71/292 "Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965" (A/RES/71/292 of 22 June 2017).

resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origins?[149]

Timeline Of Events

1814: The cesation of Mauritius to the United Kingdom. The British government's administration of the Chagos Archipelago begins.

14 December 1960: the General Assembly adopted resolution 1514, granting freedom and independence of colonial countries based on the principles of self-determination and territorial integrity.[150]

1965: Constitutional conference at Lancaster House.

3 September 1965: the Lancaster House Agreement was signed. The agreement included provisions to detach the Chagos Archipelago from Mauritian territories. Also, administration of the Chagos Archipelago was given to the British Indian Ocean Territory.

12 March 1968: Mauritius declared independence.

Between 1968 and 1973: the United Kingdom forcibly depopulated the Chagos Archipelago, expelling thousands of Mauritian nationals, especially those of Chagossian origin, away from their habitation and into neighbouring islands.

20 December 2010: the Republic of Mauritius instituted arbitral proceedings at the Permanent Court of Arbitration (PCA) concerning the establishment of a Marine Protected Area around the Chagos Archipelago by the United Kingdom.[151]

22 June 2017: the General Assembly adopted Resolution 71/292 requesting for the advisory opinion of the ICJ on the territorial dispute.[152]

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[149] UN General assembly Resolution 71/292 "Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965" (A/RES/71/292 of 22 June 2017).

[150] U.N. General Assembly, 15th Session, Declaration on the granting of independence to colonial countries and peoples, U.N. Doc. A/RES/1514(XV) (14 Dec. 1960).

[151] Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom).

[152] UN General assembly Resolution 71/292 "Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965" (A/RES/71/292 of 22 June 2017).

International And Regional Legal Framework

The *United Nations Charter* is the product of the 1945 San Francisco Conference in relation to World War II and serves as the foundational document on which the organisation functions. It is one of the most important documents in International Law and takes precedence over others. Its focus is to promote peace as well as economic and social prosperity globally. The Charter supports the rights of self-determination. People have a right to choose their sovereignty,[153] which is why the UN Charter is important when looking at the separation of the Chagos Archipelago.

The Statute of the ICJ is an integral part of the UN Charter.[154] According to the Charter, the General Assembly, Security Council and other authorized specialized agencies can request for the advisory opinion of the ICJ on legal questions arising within the scope of their jurisdiction.[155] A similar provision is contained in the ICJ's Statute serving as a derivative from that of the UN Charter.

The ICJ also consults the Charter in finding its jurisdiction for advisory opinions. The court would refer to the charter in ensuring the requesting organ or agency has made such request within the scope of the powers conferred on them by the Charter. If the requesting agency has exceeded the scope of powers granted to it by the Charter, the ICJ would deny their request for a lack of jurisdictional capacity. This was one of the reasons why the ICJ declined to respond to an advisory opinion request in the WHO Nuclear Weapons Case.[156] Also, when responding to a request for its advisory opinion, the ICJ would reference the UN Charter as a guide to its judgements. It would turn to what principles and articles are relevant to the matter in question.

In the Chagos case, one relevant applicable principle contained in Chapter 1 of the UN Charter is the principle of self-determination and political independence. *Article 1* of the Charter outlines respect for the principle of equal rights and self-determination of peoples,

[153] UN Charter, Art. 1.2

[154] Charter of the United Nations, International Court of Justice.

[155] Article 96 of the UN Charter, 1945.

[156] Legality of the Use by a State of Nuclear Weapons in Armed Conflict (General List No. 93)

and obligates Member States to take appropriate measures to strengthen universal peace as it is a key purpose of the organisation's formation.[157]

Article 2 further expatiates on these principles by stating that all its Member States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state due to its inconsistency with the UN's purpose.[158] When analysing the General Assembly's request, these provisions would be fundamental to the outcome reached by the court.

The United Nations Convention on the Law of the Sea (UNCLOS) was officially established in 1982 after several conferences.[159] It is an agreement which governs marine and maritime works. The convention covers but is not limited to regulations on internal, territorial and archipelagic waters. It codifies principles of international maritime law that have been practiced and amended. According to *Article 2* of the provision, "The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil."[160]

In 2010, Mauritius instituted proceedings against the United Kingdom under the arbitration clauses in *Article 287 of UNCLOS*.[161] The claim was brought upon the status of the Chagos Archipelago and the United Kingdom's intention to create a Marine Protected Area around it. Together with the UB Charter, UNCLOS is the only other major international legal framework governing marine activities. As such, it would be pivotal in reaching a decision on the archipelagic waters dispute.

[157] Article 1, Chapter I of the United Nations Charter 1945.

[158] Article 2 (4) of the United Nations Charter 1945.

[159] An Overview of Law of the Sea by Science Direct available at Law of the Sea - an overview | ScienceDirect Topics (accessed in 28th April 2022).

[160] Article 2 (1) (2) of UNCLOS.

[161] Chagos Marine Protected Area Arbitration, Mauritius v. United Kingdom.

The International Covenant on Civil and Political Rights (ICCPR)[162] is a multilateral treaty that obligates its signatories to promote and uphold the civil and political rights of all people and was adopted on 16 December 1966 By General Assembly resolution 2200A (XXI). In the context of the issue it will be important to determine whether the ICCPR's provisions apply to BIOT and have been derogated from.

The UN oversees matters on which they issue formal agreements called resolutions which mirror the stance of representatives on certain issues. Resolutions make suggestions on policy, delegate mandates to the UN Secretariat and the branches of the General Assembly, and furthermore make decisions on all questions pertaining to fiscal planning of the UN. However, with the exception of budgetary considerations, resolutions are typically not binding. Member States must implement decisions domestically. The African Union was not left out in the determination of the sovereignty of the Chagos Archipelago.[163] The African Union lists the Chagos Islands among "African territories under foreign occupation."[164]

Factors Which Should Be Taken Into Account In Deciding Whether A Territory Is Or Is Not A Territory Whose People Have Not Yet Attained A Full Measure Of Self-Government [165] is a resolution that heavily references *Chapter XI of the UN Charter* regarding NSGTs. Here the UN declares that Member States who have or assume responsibility for the administration of territories which have not achieved a measure of self-governance must do so with utmost regard for the wellbeing and interests of its inhabitants.[166] In this case, Mauritius assumes administrative responsibility for the Chagos territory and are expected to act in their best social, economic and commercial interests.

The *UN General Assembly Resolution 1514 (XV)*[167] is a declaration on granting the independence to colonial countries and peoples. This resolution embodies the principles of

[162] UN (General Assembly), "International Covenant on Civil and Political Rights." *Treaty Series,* vol. 999, Dec. 1966, p.171.

[163] 17th session of the OAU Assembly of Heads of State and Government (Freetown, 4 July 1980), Resolution AHG/99 (XVII) on Diego Garcia; 74th session of the OAU Council of Ministers (Lusaka, 8 July 2001), Decision CM/26 (LXXIV) on the Chagos Archipelago including Diego Garcia; and 15th AU Assembly (Kampala, 27 July 2010), Decision 331(XV) on the Sovereignty of the Republic of Mauritius over the Chagos Archipelago.

[164] A.O. Komaré (Ed.), *Strategic Plan of the African Union Commission* 1 (African Union: Addis Ababa, May 2004) Annex 3, at 43.

[165] UN GA Resolution 648 (VII) of 10 December 1952 A/RES/648.

[166] Article 73, Chapter XI of the United Nations Charter, 1945.

[167] UN General Assembly Resolution 1514 (XV) of 14 December 1960, UN. Doc. A/38/711.

self-determination and territorial integrity of a nation against subjugation by alien parties or nations.[168]The declaration states that all States must adhere to the provisions of the UN Charter and Universal Declaration of Human Rights (UDHR) in observing the territorial rights of nations by not interfering with their internal affairs. The right also outlines that steps should be taken to transfer all powers to peoples of NSGTs without any condition or reservations to their free will.[169] This resolution serves as a guide in determining if the process of decolonizing a country was done in adherence to its provisions, and if said decolonization was valid or not.

Question of Mauritius, UN General Assembly Resolution 2066 (XX) of 16 December 1965.[170] The General Assembly invited the Government of the United Kingdom of Great Britain and Northern Ireland to take effective measures with a view to the immediate and full implementation of *Resolution 1514* (XV) and to take no action which would dismember the Territory of Mauritius and violate its territorial integrity, and its *Resolutions 2232 (XXI)* of 20 December 1966 and *2357 (XXII)* of 19 December 1967. The GA expressed deep concern about the detachment of certain islands from the territory of Mauritius for the purpose of establishing a military base and invited the "administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity."

The situation with regard to the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Resolution 1654 (XVI) and the C-24 mandate).[171]The C-24 was established in 1961 by the General Assembly as its subsidiary organ devoted to the issue of decolonization.[172] This resolution reaffirmed the Declaration on the Granting of Independence to Colonial Countries and Peoples in *Resolution (XV)* of 14 December 1960. Furthermore, *Resolutions 2232 (XXI) and 2357 (XXII)*[173] Reiterates its declaration that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and

[168] Human Right Instruments, Declaration on granting of Independence to Colonial Countries and Peoples.

[169] Ibid.

[170] UN General Assembly Resolution 2066 (XX) of 16 December 1965, UN doc. A/6014/57.

[171] UN General Assembly Resolution 1654 (XVI) of 27 December 1961 UN doc. A/RES/1654.

[172] UN, Decolonization. un.org/dppa/decolonization/en/c24/about.

[173] UN General Assembly Resolution 2232 (XXI) of hhh UN doc. A/RES/2232;

installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly *Resolution 1514 (XV)*."

The Role Of The International System

The international community has also condemned the deportation of the Chagossians and the denial of their right to return. The ACP Council of Ministers underlined in November 2016 that "the denial of the right of Mauritians, particularly those of Chagossian origin, to settle in the Chagos Archipelago is a manifest breach of international law and outrageously flouts their human rights".[174]

Various United Nations authorities, notably the Human Rights Committee (HRC) and the Committee on the Elimination of Racial Discrimination (CERD), have expressed ongoing concern over the deportation of the Chagossians and their right to return. The following references shed copious light in this area:

a. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Minorities, Examining Possible Solutions To Problems Involving Minorities, Including the Promotion of Mutual Understanding Between and Among Minorities and Governments.[175]

b. U.N. Human Rights Committee, 93rd Session, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant - Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland.[176]

c. Committee on the Elimination of Racial Discrimination, 79th Session, 2112th Meeting, Summary Record.[177]

[174] African, Caribbean and Pacific Group of States, 104th Session of the ACP Council of Ministers, Support for the Claim of Sovereignty of Mauritius over the Chagos Archipelago, Decision No. 7/CIV/16 (29-30 Nov. 2016)

[175] UN. Doc. No. E/CN.4/Sub.2/AC.5/2002/2 (3 Apr. 2002), para. 36.

[176] U.N. Doc. CCPR/C/GBR/CO/6 (30 July 2008), para. 22.

[177] U.N. Doc. CERD/C/SR.2112 (13 Jan. 2012), p. 7, para. 29.

d. United Nations General Assembly, 66th Session, Report of the Committee on the Elimination of Racial Discrimination relating to the 78th and 79th sessions.[178]

Additionally, credence can be taken from the explication of the expulsion of indigenous people under International Humanitarian Law (IHL) to lean on in this Ilois affair.

Rome Statute, Art. 7(2)(d) states: "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

Article 49, 4th Geneva Convention: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive." … "The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated."

Principle Of Self Determination And The Separation Of The Chagos Archipelago

The consideration of the principle of self-determination with a focus on the separation of the Chagos Islands involves a view at positive international law. According to US Legal, Positive international law[179] is the law of nations that is made through express or tacit agreements between nations, such as international treaties.[180] They are a body of man-made laws enacted by a political entity. In addressing the position of International Law on the principle of self-determination this section will consider the following: the nature, scope and content of the right to self-determination; the status of the right of self-determination as Customary International Law; the effect of duress on the validity of devolution agreements between the colonial power and the non-self-governing territory; and other issues relating to the principle of self-determination in the Chagos Archipelago matter.

[178] U.N. Doc. A/66/18 (2011), p. 115, para. 12.

[179] Ago, R. (1957). Positive Law and International Law. *American Journal of International Law,* 51(4), 691-733.

[180] US Legal, 'Positive International Law and Legal Definition.'

1. Nature, Scope And Content Of The Right To Self-Determination

In the twentieth century, the scope and intent of the principle of self-determination developed dramatically. International support for the right of all people to self-determination increased in the early 1900s. This resulted in successful separatist movements during and after WWI and WWII, as well as laying the framework for decolonization in the 1960s. The major movement in the global community, that is Self-determination, is a fairly recent concept, developing as a demand of countries seeking to split territory in the aftermath of World War I and the fall of the Ottoman and Austro-Hungarian empires. The leader most strongly associated with the notion of self-determination was President Woodrow Wilson.[181]

Self-determination is a primary element of international law; it refers to the legal right of people to decide their own fate in the international order, which stems from customary international law[182] but is also recognized as a general principle of law and enshrined in a number of international treaties. For example, self-determination is recognized as a right of "all peoples" in the UN Charter[183] and the ICCPR. *Article 3 of the UN Declaration on the Rights of Indigenous Peoples* declares that Indigenous peoples possess the right to self-determination.[184] Rosalyn Higgins defined self-determination as the right of the majority within a generally accepted political unit to the exercise of power.[185] *Article 1(2)* and *Chapter XI of the UN Charter*, made the principle of self-determination one of the UN's purposes.[186] Vaughan Lowe posits that "the resolution represents a consensus as to what the concept of self-determination means under the UN Charter"[187].

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[181] Self-Determination Sovereignty, Territorial Integrity, and the Right to Secession: Patricia Carley.

[182] Cornell Law School, 'Customary International Law.'

[183] Article 1(2) of the UN Charter.

[184] 3 GA Res 61/295 (2007).

[185] Rosalyn Higgins, The Development of International Law through the Political Organs of the United Nations, London, 1963, p. 104.

[186] See Thomas D Musgrave, Self-Determination and National Minorities (OUP 2000) 62–66; it needs to be recalled that when called upon to interpret the UN Charter as a constitutional text, the ICJ has adopted a teleological approach of treaty interpretation which allows the aims and purposes of the organisation to be achieved in the contemporary context even if they are not provided for expressly, Reparation for Injuries case [1949] ICJ Rep 174.

[187] Vaughan Lowe, International Law (OUP 2007) 91.

The ICJ first acknowledged the right to self-determination in the Namibia case,[188] where it held that continuing occupation would violate the right to self-determination of the Namibian people. The Court thereafter examined this principle in the colonial context in the cases of Western Sahara,[189] East Timor[190] and the Wall.[191] These case laid the ground work for further development of self-determination and the recognition of the sovereignty of a state according to the UN core principles.

At the General Assembly's fifth session, Afghanistan and Saudi Arabia submitted a proposal[192] in the Third Committee that became the basis for an Assembly resolution requesting the Economic and Social Council "to request the Commission on Human Rights to study ways and means to ensure the right of peoples and nations to self-determination."[193] The General Assembly passed another resolution in February 1952, deciding to "include in the International Covenant or Covenants on Human Rights an article on the right of all peoples and nations to self-determination in reaffirmation of the concept enunciated in the UN Charter."[194] "All peoples have the right to self-determination; by virtue of that right, they freely select their political status and freely pursue their economic, social, and cultural development," declared the *Declaration on Granting Independence to Colonial Countries and Peoples* in 1960.[195]

Self-determination cannot be applied to individuals but has been accepted to be exercised by either whole peoples of a territory seeking independence from colonial rule, or by substantial

[188] 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 (Namibia Case), para 52.

[189] Western Sahara (Advisory Opinion) [1975] ICJ Rep. 12

[190] *Case concerning East Timor* (Portugal v Australia) (Judgement) 1995 ICJ Rep. 90

[191] *Legal Consequences of Constructing a Wall in Palestinian Territory Case*.

[192] U.N. A/C.3/L.88.

[193] General Assembly Resolution 421 D (V), 4 December 1950.

[194] General Assembly Resolution 545 (VI), 5 February 1952.

[195] General Assembly Resolution 1514 (XV), 14 December 1960.

groups noticeably different from the rest of the community in which they live due to physical characteristics, habitual language, religious belief, or political affiliations.[196]

The item on self-determination has been incorporated in similar words in both Covenants, notwithstanding their significant differences in character: The Covenant on Civil and Political Rights recognizes certain rights as existing and imposes legal obligations on states to enforce them, whereas the Covenant on Economic, Social, and Cultural Rights is a "promotional" instrument that binds its signatories to take steps to achieve the specified rights progressively.[197]

2. Status Of The Right Of Self Determination As Customary International Law

In the Western Sahara dispute, both Spain and Algeria claimed before the ICJ in 1975 that self-determination had attained the character of a *jus cogens* rule,[198] also known as Customary International Law (CIL). *Jus cogens* characteristics include custom, *opinio juris*, and state practice. Concurrent State practice would also be required for the emergence of a new *jus cogens* norm; however, practice would have to be vast and almost universal.[199] There is ambiguity as to the period of time involved in the establishment of customary law.[200]
If self-determination had become a rule of customary international law by 1965, the UK would have been under an obligation to respect the territorial integrity of Mauritius and the separation of the Chagos Archipelago would be deemed illegal. The UK could not have acted contrary to international law if such a norm had emerged before 1965. However, if self-determination acquired customary status after independence, the UK would have had the authority to partition the Mauritian colonial unit in 1965 (or 1968 at the latest) as a matter of international law.

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[196] Zubeida Mustafa, The Principle of Self-Determination in International Law, 5 INT'L L. 479 (1971) https://scholar.smu.edu/til/vol5/iss3/7.

[197] Zubeida Mustafa, The Principle of Self-Determination in International Law, 5 INT'L L. 479 (1971).

[198] Western Sahara ICJ Pleadings Vol I 206–208, Vol IV 497–500, Vol V 318–20.

[199] North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark and Netherlands) (1969) ICJ Rep 3, [77].

[200] Antonio Cassese, International Law (2nd ed, OUP 2005) 157–158.

This kind of probe encapsulates the Principle of Inter-Temporal Law (*tempus regit actum*). The principle of intertemporal law - i.e. the application of international law to cases that occurred before treaties, codifications or legal acts entered into force - is fundamental to international legality and the rule of law. It deals with the complications caused by alleged abuse or violation of collective or individual rights in the historical past in a territory whose legal system has undergone significant changes since then.[201] Its first component asserts that acts must be considered in light of the law in effect at the time they were carried out, while its second component compels States to behave themselves in ways that keep pace with legal advances in terms of their (unfulfilled) international commitments.[202] The second component of the inter-temporal law concept has far-reaching ramifications since even pre-existing treaty rules would be supplanted by the creation of new *jus cogens*.[203]

The principle of self-determination was declared in *Article 1(2) of the UN Charte*r. Article 73 acknowledged the "sacred trust" put on administering States to guarantee that the interests and well-being of residents of non-self-governing territories (NSGTs) were prioritized. An inquiry must be made as to whether the right to self-determination achieved Customary International Law status with the adoption of *General Assembly resolution 1514 (XV)(1960) – the 'Declaration on the Granting of Independence to Colonial Countries and Peoples*' or if it acquired its binding quality just as the decolonization process was coming to an end. The customary right must have emerged at some point during the process of decolonization but if the decisive moment was reached in 1970, it would follow that the right became binding after UK's acts.[204]

According to A. Rigo Sureda, the right to self-determination, as enshrined in Article 1 of the two 1966 UN Covenants on Human Rights, was quickly recognized as "a peremptory norm of international law" falling under the realm of *jus cogens*.[205] In the East Timor case (1995), Judge Weeramantry emphasized the essential position that self-determination had been assigned

[201]Law School Article by William Heflin; Case Description in the Online Casebook.

[202] See Judge Huber's treatment of this principle in the Island of Palmas Case (Netherlands/USA)(1928) 2 RIAA 829, 845.

[203] See Arts 53 and 64, Vienna Convention on the Law of Treaties (1969).

[204] Mauritius' argument in Chagos MPA Case, cited by Guatemala, Transcript, 5 September 2018, AM, CR 2018/24, 35.

[205] A. Rigo Sureda, The Evolution of the Right to Self- Determination — A Study of United Nations Practice, op. cit. supra note 6, p. 353.

in the formation of the UN Charter, defining it as one of its fundamental principles. He referred to *Resolution 1514(XV)* as a watershed moment.[206] Judge Kateka and Judge Wolfrum of the Chagos Arbitration both believed that self-determination had become entrenched as a principle prior to 1970.[207] The right to self-determination may not have been recognized before the adoption of UN General Assembly Resolution 2625 in 1970 (Declaration on Principles of International Law) (XXV),[208] which simply proved the normative nature of self-determination in customary law. The ICJ referred to the "second part of the twentieth century" as the critical time in the Kosovo case.[209]

3. Effect Of Duress On The Validity Of Devolution Agreements

It is left to be considered how duress undermines the validity of devolution agreements and the question of whether the elected Mauritian representatives possessed the authority to agree to the Archipelago's detachment under the 1964 Mauritian Constitution

The Lancaster House Agreement of 1965 is historically relevant in this case. This was the devolution agreement negotiating Mauritius' independence, according to which the UK would, among other things, pay Mauritius GBP 3 million in compensation and surrender control over the Chagos Archipelago once it was no longer needed for military purposes. The Lancaster House Agreement, on the other hand, proved to be a lingering sore, as Mauritius believed that its independence was made contingent on losing the Chagos Archipelago and that it had little choice but to accept. At this time Mauritius was still a British colony and consequently, we must ask: does the Lancaster House Agreement amount to an International Agreement? Is it possible to talk of an international agreement when one party is under the authority of another?[210]

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[206] East Timor case (n 46) Sep Op Judge Weeramantry, 196.

[207] Chagos Arbitration, Dissenting and Concurring Opinion Judge Kateka and Judge Wolfrum 585, 601.

[208] Higgins 113; Malanczuk 327, 331; in the Western Sahara case, Judge Petrén appeared to suggest that the law on self-determination was de lege ferenda, Western Sahara case 110.

[209] Kosovo case [79].

[210] Urša Demšar et al, 'The Concept of Duress in the World of Decolonization' (2018) 55 Questions of International Law 119 who argue that the standard of duress in the context of decolonisation is lower than that that would apply between States.

In the Chagos Arbitration, Judge Kateka and Judge Wolfrum concluded that there was a definite condition of inequity between the two parties.[211] They were even more direct in their censure, describing the situation as one of "duress," "intimidation," and "coercion," and accusing the UK of applying intolerable pressure.

A school of thought believes devolution agreements that are coercive, limiting, and adverse to the right to self-determination are unlawful.[212] While the Chagos Arbitration exposed the distasteful realities of Mauritius' Premier being subjected to intimidation, threats, and duress during the Lancaster House process, the prospect of the resulting Agreement being incompatible with the norm entrenched in *Article 51 of the Vienna Convention on the Law of Treaties* (VCLT) against coercion of a State's representative should be considered. DW Greig argues that colonies are not subjects of international law.[213] The position that they have limited personality has also been put forth.[214] As a result, the Lancaster House Agreement may not be considered a treaty under Article *2(1)(a) VCLT*.[215]
If self-determination is a jus cogens norm, as there is considerable evidence to suggest, any treaty incompatible with that standard is null and void. VCLT, Articles 53 (*Treaties conflicting with a peremptory norm of general international law)* and Article 64 *(Emergence of a new peremptory norm of general international law).*

4. Other Issues

Additional important points for consideration in the separation of the Chagos Archipelago exist.
Consideration could be made as to whether the UK's excision of the Chagos Islands from Mauritius amounts to a continuing breach of international law and whether the UK bears responsibility for its internationally wrongful acts.

[211] Chagos Arbitration, Dissenting and Concurring Opinion Judge Kateka and Judge Wolfrum 602.

[212] See for example ILC, 'Yearbook of the International Law Commission' (1976) vol II, part two, 147; Grant and Barker, 631; the point has been made that an administering power is under an obligation to act in the best interests of a non-self-governing territory and the Lancaster House Agreement failed to meet this standard.

[213] DW Greig, International Law (2 nd ed, Butterworths 1976) 178.

[214] Aust, 30; Crawford, 634.

[215] Allen, 122–123.

In 2016, it was announced that the US military base would continue until at least 2036.[216] Determine if the 1966 treaty concerning Diego Garcia between the UK and USA violated the terms of *Article 53 of the VCLT (Treaties conflicting with a peremptory norm of general international law)* and, therefore, it must be considered to be null and void.
The adoption of the Covenants in 1966 did not mean that their shared Article 1 was a binding legal obligation under customary international law. The ICCPR and ICESCR became effective in the United Kingdom and Mauritius in 1976. Although, for Brownlie the right to self-determination came promptly to be regarded as a peremptory norm of international law in the same year of their adoption.[217]

There are 17 NSGTs remaining globally, with a combined population of just under 2 million inhabitants.[218] In its *Resolution 2066(XX) 1965*, the General Assembly particularly asked that the United Kingdom not take any action that might result in the dismemberment of Mauritius' territory. Resolutions of the General Assembly are not legally binding. While an advisory opinion has no legal authority, its jurisprudence and breadth on the right to self-determination may be useful in future ICJ rulings.[219] An analysis of self-determination throws additional questions for consideration, like whether international law recognises the right of secession as corollary to the right of self-determination. However, for the key components discussed in this section the importance of self-determination cannot be drummed too loudly.

Forced Expulsion Of Chagossians

The Chagossians are sometimes referred to as "Ilois." It is believed that there were between 1,000 and 1,500 Chagossians residing in the Chagos Archipelago when the United States declared in March 1967 that building work on Diego Garcia would commence in the second part of 1968. The administering power paid £660,000 to Chagos Agalega Ltd for the property in the Chagos Archipelago and leased the islands back to the firm to continue managing the

[216] Jon Lunn, 'Disputes over the British Indian Ocean Territory: August 2018 Update' (House of Commons Library Briefing Paper No 6908, 2018).

[217] Cf. I. Brownlie, Principles of Public International Law, 1st ed., Oxford, Clarendon Press, 1966, pp. 417-418; a breach of jus cogens would amount to a *delicta juris gentium* (ibid., pp. 415-416).

[218] United Nations, Global Issues: Decolonization.

[219] HS Centre, Global governance, 'The right to self-determination following the Chagos Archipelago Advisory Opinion.

plantations on its behalf. After May 1967, the governing authorities directed Chagos Agalega Ltd to prohibit residents who had left the Chagos Archipelago from returning. Those attempting to board vessels from Mauritius' main island were turned away. Faced with the approaching closure of the plantations, medical and educational personnel began to leave the Chagos Archipelago, and food stockpiles began to dwindle.[220]

Forced displacement is an involuntary or coerced movement of people away from their homes[221]. The forcibly displaced Chagossians were effectively made Internally Displaced Persons (IDPs) within Mauritius. They were abandoned in Seychelles and confined in jail cells before being transferred to Mauritius and brought to a decrepit housing project with no running water or power. Twenty-six families perished in abject poverty there, nine people committed suicide, and girls were pushed into prostitution to survive. All these and more unfortunate happenings have occurred in the years since the former paradise of the Chagos Archipelago has become a military base, from which attacks on Iraq and Afghanistan have been sprung.[222]

In this segment, in considering the expulsion of the Chagossians and its attendant issues, the following components will constitute the crux of this piece: The 1971 BIOT Immigration Ordinance; Inhumane Acts Relating to The Deportation; Displacement Aftermath and British Resettlement Scheme; and Position of the International Community.

1. *The 1971 Biot Immigration Ordinance*

The 1966 Agreement between the United Kingdom and the United States required the administering state to adopt any administrative actions that may be necessary to meet

[220] "British Indian Ocean Territory 1964- 1968: Chronological Summary" (1964-1968), items no. 71 and 78; Vine, Island of Shame (2009) p 92-94 & 100.

[221] Handbook for the Protection of Internally Displaced Persons, Forced and Unlawful Displacement, Action Sheet 1.

[222] Al Jazeera, 'How Britain forcefully depopulated a whole Archipelago.'

military obligations.[223] Officials from the Navy continued to put pressure on their British counterparts to finish the deportations as soon as possible.[224]

Between 1967 and 1973, the governing state forcefully evicted the entire Chagos Archipelago's people. It did so in stages, first by preventing individuals who had temporarily left the Chagos Archipelago from returning, then by transporting those who lived on Diego Garcia to other islands, and ultimately by forcibly removing those who remained. In 1971, the Commissioner, following directions from London Ministers, adopted an Immigration Ordinance making it illegal to enter or remain in British Indian Ocean Territory (BIOT) without permission and allowing anyone who remained to be removed. On January 24, 1971, the "Administrator" of the "BIOT" informed the residents of Diego Garcia that the island will be closed soon. Many Chagossians, perplexed, elected to remain in the Chagos Archipelago and migrated to Peros Banhos and Salomon. Those who refused to evacuate Diego Garcia were threatened with death by shooting or bombing.[225] Sir Bruce Greatbatch, the "BIOT Commissioner," enacted the Immigration Ordinance 1971, which prohibited anybody from entering or remaining in the Chagos Archipelago without permission. Shortly after, representatives of the "BIOT" and Moulinie & Co continued to relocate residents to other islands such as Peros Banhos and Salomon.

The administering state depopulated the Chagos Archipelago in part to avoid the BIOT being included in the list of non-self-governing territories (NSGT) maintained by the United Nations Committee of 24 and their obligations arising under Article 73(e) of the U.N. Charter. The administering authority went on to argue in the United Nations and in submissions to Parliament that there was no "permanent population" in the Chagos Archipelago, despite the fact that it was fully aware of the realities. The governing authorities referred to the Chagossians as "contract laborers" and "contract workers.".[226] Understandably, Mauritius is opposed to the categorization of Chagossians as "contract employees" and "contract

[223] "Exchange of Notes Constituting an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of United States of America Concerning the Availability for Defence Purposes of the British Indian Ocean Territory", para. 2(a), 603 U.N.T.S. 273 (No. 8737) (22 Aug. 1967), entered into force 30 Dec. 1966.

[224] Vine, Island of Shame (2009), p. 112.

[225] J. Pilger, Freedom Next Time (2006), p. 46.

[226] Vine, Island of Shame (2009) pp. 92 and 105.

laborers," claiming that the Chagossians are, and have always been, citizens of Mauritius residing on Mauritian soil.

2. *Inhumane Acts Relating To The Deportation*

Sir Bruce Greatbatch, who had been placed in control of the island, ordered Marcel Moulinie to slaughter the Chagossians' beloved dogs just days before the final occupants were transported from Diego Garcia. He poisoned the wailing dogs with exhaust from US military trucks then disposed of the dogs' carcasses by burning in the shed. The Chagossians were left to watch and wonder about their own fate.[227] Many Chagossians said they were threatened with being bombed or shot if they did not leave the island. Children hid in horror as military planes flew overhead.[228]

It was clear the powers responsible for the displacement of thousands had little regard for keeping their home intact. As evinced by Vine: “They used Caterpillar bulldozers and chains to rip coconut trees from the ground. They blasted Diego's reef with explosives to excavate coral rock for the runway. Diesel fuel sludge began fouling the water”[229].

Figure 1: Nordvaer, 1968. The BIOT cargo ship used to deport Chagossians, at times with more than 100 aboard. Photo courtesy of Kirby Crawford.

[227] J. Pilger, Freedom Next Time (2006), pp. 45-46; Vine, Island of Shame (2009), pp. 113-114.

[228] Vine, Island of Shame (2009).

[229] Vine, Island of Shame (2009) p 112.

The Deportation Conditions featured gross derogations on the dignity of the people. Agents of the "BIOT" and Moulinie & Co. proceeded to relocate residents to other islands such as Peros Banhos and Salomon. The BIOT despatched its 500-ton cargo ship, *the M.V. Nordvaer*, to Diego in August 1971 to transfer the final families from the island.[230] The *Nordvaer* featured a cabin for twelve people and a deck for sixty, aggregating a maximum ideal capacity of 72 passengers. However, the ship carried 146 people on its last journey. [231]Most of those on board were exposed to the elements during the initial four-day voyage to Seychelles and the subsequent 1200 miles to Mauritius. Many people felt unwell, and two ladies are said to have miscarried.[232] By May 1973, all the residents of Peros Banhos and Salomon had been gathered up and taken from the Chagos Archipelago.[233]

3. Displacement Aftermath And British Resettlement Scheme

The Prime Minister of Mauritius met with British authorities to propose a resettlement scheme for inhabitants of the Chagos Archipelago on February 23 and June 23, 1972. The United Kingdom agreed to pay the Mauritian Government £650,000 "provided that the Mauritius Government accept such payment in full and final discharge of [the United Kingdom's] undertaking, given at Lancaster House, London, on September 23, 1965, to meet the cost of resettlement of persons displaced from the Chagos Archipelago." The Mauritian Prime Minister received a payment of £650,000 as the price of the resettlement project on September 4, 1972.[234]

Michel Vencatassen, a former inhabitant of the Chagos Archipelago who was forcefully relocated in 1971, filed a compensation suit against the British Government in the High Court of London in 1975. The claim was for "damages for intimidation and loss of liberty in connection with his departure from Diego Garcia," but the proceedings were regarded by all sides as addressing the entire subject of the legality of the Chagossian expulsion from the

[230] Vine, Island of Shame (2009), p 113.

[231] Vine, Island of Shame (2009), p 114.

[232] Vine, Island of Shame (2009), p 114.

[233] David Vine, “From the Birth of the Ilois to the ‘Footprint to Freedom’: A History of Chagos and the Chagossians”, in EVICTION FROM THE CHAGOS ISLANDS (S. Evers & M. Kooy eds., 2011), p. 34.

[234] Letter from the British High Commission in Port Louis to the Prime Minister of Mauritius (26 June 1972).

islands.[235] The dispute was resolved in 1982 after extensive talks on the basis that the United Kingdom Government pay £4 million into a trust fund for former residents of the Chagos Archipelago on the condition that they surrender their rights to future claims resulting from their relocation from the islands.[236] On July 30, 1982, the Ilois Trust Fund Act was passed, establishing the mechanism needed under the 1982 Agreement.[237] Although, the 1982 agreement had a "no return" clause that many uneducated Illois allegedly could not understand.[238]

Moreover, in 1998, Olivier Bancoult, another former inhabitant of the Chagos Archipelago, petitioned the High Court in London for judicial review of the United Kingdom Immigration Ordinance 1971, Section 4(1) of which stated: “No person shall enter the Territory or, being in the Territory, shall be present or remain in the Territory, unless he is in possession of a permit…”[239]. This clause allegedly provided the legal foundation for the deportation, and subsequent continuous exclusion, of Chagossians from the Chagos Archipelago. Mr Bancoult sought a ruling that the Ordinance was void because it claimed to authorize the deportation of Chagossians from the Chagos Archipelago, as well as a determination that the policy that barred him from returning to and remaining in the Archipelago was unlawful. On 3 November 2000, the High Court ruled in favour of Mr Bancoult, finding that the 1971 Ordinance was unlawful since the Administration claimed to make it under a capacity to legislate for the territory's "peace, order, and good government," which did not include the

[235] As summarised by Lord Hoffmann in R (on the application of Bancoult) v. Secretary of State for Foreign Commonwealth Affairs, [2008] UKHL 61 (22 Oct. 2008), para. 12.

[236] Agreement concerning the Ilois from the Chagos Archipelago (with exchange notes of 26 October 1982), 1316 U.N.T.S. 21924 (7 July 1982), entered into force 28 Oct. 1982.

[237] Republic of Mauritius, Ilois Trust Fund Act 1982, Act No. 6 of 1982 (30 July 1982). Section 12 of the Act provided that: “Nothing in this Act shall affect the sovereignty of Mauritius over the Chagos Archipelago, including Diego Garcia.”

[238] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Minorities, Report on the visit by the Working Group to Mauritius, Examining Possible Solutions to Problems Involving Minorities, Including the Promotion of Mutual Understanding Between and Among Minorities and Governments, U.N. Doc. E/CN.4/Sub.2/AC.5/2002/2 (3 April 2002), para. 37.

[239] R (on the application of Bancoult) v. Secretary of State for the Foreign and Commonwealth Office, [2001] Q.B. 1067 (3 Nov. 2000), para. 5.

ability to remove citizens. As a result, the Ordinance was overturned by the Court.[240] Eventually, The British Government passed the Immigration Ordinance 2000, which was virtually identical to the 1971 Ordinance except that it stated that the limits on immigration to the Chagos Archipelago did not apply to Chagossians, save for Diego Garcia.

Furthermore, In *Chagos Islanders v. The Attorney General* the English Court of Appeal recognised that the compensation that the former residents had received "has done little to repair the wrecking of their families and communities, to restore their self-respect or to make amends for the underhand official conduct now publicly revealed by the documentary record."[241] The British Government's feasibility assessment on the resettlement of Chagossians found that 98% of respondents expressed a wish to return to the Chagos Archipelago.[242]

State Sovereignty And Territorial Integrity

Since the end of the Second World War, the international political system has been built on three pillars: state equality, internal competence for domestic jurisdiction, and territorial preservation of current borders. The UN Charter emphasizes this in its inaugural chapter, stating that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations."[243]

These fundamental doctrines are further emphasized in other articles of the founding charters of the United Nations, such as Security Council and General Assembly resolutions.[244]

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[240] R (on the application of Bancoult) v. Secretary of State for the Foreign and Commonwealth Office, [2001] Q.B. 1067 (3 Nov. 2000).

[241] Chagos Islanders v. The Attorney General, [2004] EWCA Civ 997 (22 July 2004), para. 54.

[242] U.K. Foreign and Commonwealth Office, "BIOT Resettlement Policy Review: Summary of Responses to Public Consultation" (21 Jan. 2016), p. 3

[243] UN Charter Article 2, Paragraph 4

[244] Elden, S. (2006). Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders. *The SAIS Review of International Affairs*, *26*(1), 11–24. https://www.jstor.org/stable/26999291.

Other existing international charters like the Helsinki Final Act (1975)[245], the Arab League (1945)[246], and the African Union (2000)[247] all emphasize the importance of these concepts, notably territorial integrity in their founding charters. The Vienna Convention on the Succession of States in Respect of Treaties[248] especially stresses the importance of territorial integrity. It states in Article 11 of the convention, "a succession of States does not as such effect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary."[249] With that said, it is further important to individually examine the principle of State Sovereignty and Territorial Integrity.

1. *The Principle of State Sovereignty*

A basic concept of international law is that a country has complete authority over all activities that occur on its territory. A state's ability to control its people's actions and boats or planes licensed in its area is often limited outside its territory. Sovereignty is an incredibly complex concept to define. However, according to international law, it is a power and right, acknowledged or efficiently affirmed in regard to a clearly delineated region of the world, to govern in that part to the exclusion of territories, countries, or persons inhabiting other areas of the world.[250]

Over the years, the international community has adopted and accepted certain ways to create an independent sovereign territory. Although these criteria are elementary and often used in overlapping ways to establish sovereign territories and settle boundary disputes, they are the only ways internationally recognized. An example of one of these ways is conquest or annexation. When an area is annexed by threat or force, this is known as conquest. Although this mode of acquiring or creating a sovereign territory has been used, justified, and

[245] Organisation for Security and Co-operation in Europe, 1975, sec. 1.a.X .

[246] League of Arab States, *charter of Arab League,* 22 March 1945.

[247] Organisation of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000.

[248] UN General Assembly, *Vienna Convention on Succession of States in respect of Treaties*, 6 November 1996.

[249] *Ibid.*

[250] NSW v Commonwealth (1975) 135 CLR 337 (the Seas and Submerged Lands Act Case) at 479, Jacobs J; Island of Palmas Case (1928) 2 UNRIAA, 829; Legal Status of Eastern Greenland 1933 PCIJ Ser. A/B No. 53: 22; Clipperton Island Case (1932) 2 UNRIAA, 1105.

acknowledged for many centuries, it is no longer recognized by virtue of the *Charter of the United Nations* entered into force in 1945.[251]

The use of military force to gain territory is prohibited by Article 2 of the UN Charter. The concept of inter-temporal law protects the validity of titles gained by force before 1945. Except otherwise consented in an agreement, the duty to recognize existing political borders is often voiced in the doctrine uti possidetis. It is a phrase which is commonly adopted to assess post-colonial geographical boundaries. An example of where this principle was applied was when the ex-Soviet states dissolved from the USSR between 1988 and 1991. The doctrine was also applied during the breakup of the former Yugoslavia.[252]

Another method by which sovereign territory is recognized is applying the principle of terra nullius. This means to possess a territory because it is uninhabited and belongs to no one. Some other method of establishing independent areas is by prescription. This happens when a doubtful claim is legitimized by long-term, unbroken, and peaceful occupancy where another state has failed or refused to exercise its rights. Cession is also an internationally recognized method of establishing independent territories. This might also occur through a voluntary treaty transfer (such as the United States' purchase of Alaska from Russia in 1867). Finally, when cases involving boundary disputes are presented to the ICJ, it has the authority to award territory.

The concepts of "effective occupation" are especially crucial when it comes to defining sovereignty over distant and unoccupied terrain, such as tiny islands and occasionally enormous swaths of inhospitable dry and arctic regions. Effective occupation is a matter of fact that necessitates the taking of actual possession and the establishing of effective administrative authority over the region, not only discovery or recognition.[253] There must be a desire to behave as sovereign, as well as some real exercise or demonstration of that power.[254] Flexible and comparable criteria are used to pass the exam, which is based on the degree and

[251] Article 2 of the UN Charter.

[252]Triggs G, International Law: contemporary principles and practices, pp 237-238 and 240-241.

[253] Island of Palmas Case (1928) 2 UNRIAA, 829; Legal Status of Eastern Greenland 1933 PCIJ Ser. A/B No. 53: 22; Clipperton Island Case (1932) 2 UNRIAA, 1105. Sir Arthur Watts, International Law and the Antarctic Treaty System (Grotius Publications Ltd, Cambridge, 1992), p 121.

[254] Legal Status of Eastern Greenland 1933 PCIJ Ser. A/B No. 53: 22 at 46.

kind of control relevant to the conditions and nature of the region. For remote and hostile places, just a little physical presence may be required.

Furthermore, resolving contested territorial sovereignty and boundaries is almost always frustrated by historical developments in nationhood and government of the territories involved, as well as continuing political conflicts. For example, the conflict involving Southeast Asian states such as China, Vietnam, and Taiwan asserting a claim to some islands along the South China Sea.[255]

When a dispute goes to arbitral proceedings, tribunals will evaluate a number of factors such as acknowledgement, complicity, and a key period at which the controversy should be considered and the legislation of the period employed to ascertain the strengths of conflicting sovereignty claims. While other nations' acknowledgment of territorial sovereignty is not a definite foundation for sovereignty under international law, broad acknowledgment provides strong evidence of sovereignty. For more than a century, customary international law has recognized that a country possesses sovereignty within the coastline or territorial seas contiguous to the territory it controls.[256] A coastal state's sovereignty extends out to 12 nautical miles[257] under the *1982 United Nations Convention on the Law of the Sea* ("UNCLOS"), although sovereign rights may extend out to 200 nautical miles, the exclusive economic zone ("EEZ").[258]

The Australian Antarctic Territory ("AAT") and accompanying EEZ and continental shelf are examples of contested sovereignty and marine regions. Australia's sovereignty in Antarctica is founded on applicable international standards.[259] In contrast, Australia's sovereignty over the waters within 200 nautical miles of the AAT and adjacent continental shelf is based on UNCLOS treaty law.[260] As a consequence of a transfer of ownership from the United Kingdom and groundbreaking work by Australians in the area of Antarctica directly to Australia's south

[255] China: Maritime Claims in the South China Sea (US Department of State, Washington DC, 2014).

[256] Icelandic Fisheries Cases (UK v Iceland) (1973) ICJ Rep 3; and (FRG v Iceland) (1974) ICJ Rep 175.

[257] UNCLOS, Article 2.

[258] UNCLOS, Articles 56 and 77.

[259] Principle of Sovereignty in International Law, – Dr Chris McGrath – 10 December 2018.

[260] *Ibid.*

and south-west, Australia declared the AAT in 1936.[261] The AAT is a territorial claim that covers the Antarctic continent and islands leading to the South Pole. While only four counties (Norway, France, New Zealand, and the United Kingdom) recognize Australian sovereignty over the AAT,[262]Australia has launched territorial sovereignty in Antarctica via "effective occupation" of the shorelines enclosing its three permanent Antarctic outposts.[263]

Under the Antarctic Treaty, Australia and Japan, as well as other countries interested in the governance and usage of Antarctica, agreed to put any further claims to sovereignty in Antarctica on hold in 1959. However, the treaty does not take away Australia's authority over the AAT, nor does it preclude Australia from having authority over citizens of other treaty countries.[264] While conventional international law principles uphold Australian sovereignty over the AAT, Australia has made it a policy not to enforce its laws on foreign citizens in the AAT. Other countries disregard Australian sovereignty when performing actions within the AAT, excluding the four countries that recognize it.[265]

2. *Principle of Territorial Integrity*

During the nineteenth century, the notion of territorial integrity became a universal basis of international law. The vocabulary on territorial protection that is still used today was already entrenched within the discourse on international law by the middle of the nineteenth century. It also found its way into state practice. The signing governments agreed to recognize the Ottoman Empire's sovereignty and geographical integrity in the 1856 General

[261] *Ibid.*

[262] House of Representatives Standing Committee on Legal and Constitutional Affairs, Australian Law in Antarctica: The report of the second phase of an inquiry into the legal regimes of Australia's external Territories and the Jervis Bay Territory (AGPS, Canberra, 1992), para 2.8.

[263] Mawson was established in 1954, Davis in 1957 and Casey (previously Wilkes Station established by the USA) in 1958.

[264] Principle of Sovereignty in International Law, – Dr Chris McGrath – 10 December 2018.

[265] *Ibid.*

Treaty for the Re-Establishment of Peace between Russia, Sardinia, Turkey, Prussia, France, Great Britain, and Austria.[266]

The notion of territorial integrity was further established post World War I. In his speech delivered to a special sitting of the US Congress in January 1918, President Woodrow Wilson recommended the establishment of a peaceful post-war Europe, including specific agreements to enable consensual safeguards of national sovereignty and territorial integrity of all countries alike.[267] The *Charter of the League of Nations* was the first legal text to embrace the term. *Article 10 of the Charter* required members to protect the geographical integrity and present political autonomy of all League members from foreign assault.

The preservation of territorial integrity is now clearly referenced in the UN Charter as a necessary element of the restriction of the use of violent means, as stated in Article 2 (4):

> *"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".*[268]

Article 2 (4) has an interesting drafting background. The 1944 Dumbarton Oaks Proposal, the first draft of the UN Charter, only mentioned the limitation of the use of violence,[269] and it was on the initiative of less powerful governments that the Charter was amended to incorporate references to territorial integrity and political sovereignty.[270] The addition of the preservation of countries' territorial integrity in the Charter was advocated by Australia, Bolivia, Brazil, Czechoslovakia, Ecuador, Egypt, Ethiopia, Mexico, Peru, and Uruguay. However, Australia's suggestion was eventually largely adopted into the UN Charter.

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[266] General Treaty for the Re-Establishment of Peace between Austria, France, Great Britain, Prussia, Sardinia and Turkey, and Russia (1855-1856), 30.3.1856, CTS 114, 409, Article 7.

[267] W. Wilson, 65th Cong., 2d sess., Congressional Record Vol. 56, 8.1.1918, 681.

[268] Article 2 (4) of the UN Charter.

[269] See the Dumbarton Oaks Proposal for the Establishment of a General International Organisation, UNCIO Vol. III.

[270] UNCIO, Vol. VI, 556 et seq., .l UNCIO, Vol. VI, 557.

The addition of territorial integrity was mainly done to increase the defense against stronger powers using violence. This component of territorial integrity has been a basic part of the idea ever since. The safeguarding of land is a representation of all states' sovereign equality. No matter how strong a state is, international law maintains its geographical integrity.

a. Violation of Territorial Integrity

When discussing how a country's activity might compromise another state's territorial integrity, a distinction must be made between two types of infringements: direct and indirect. Direct infractions are those in which another state is responsible for the use of violence. The *International Law Commission's Draft Articles on State Responsibility* mainly articulate the common law on state responsibility in this way. Actions by a government's organs, especially its military, are directly attributed to it. Organs are distinguished by their entire reliance on a country,[271] and this status is to be decided in line with the country's domestic legislation, according to the proposed articles of the International Law Commission.[272]

The second alternative of direct attribution is presented when the country had instructed irregular combatants, such as militias or armed organisations, or when such fighters were acting under the country's effective authority.[273] In contrast to organ status, such effective control does not need total actor dependency.[274] The ICJ has established the condition that a state has a guiding effect over the quasi actor's tangible actions. It stated that it must be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the

[271] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 2007, 205 (para. 392).

[272] Draft Articles on State Responsibility, Article 4; but see also the ICJ that treats also such actors as organs of a state that act in complete dependence of it, ICJ, Genocide case, 205 (para. 392).

[273] See Draft Articles on State Responsibility (note 39), Article 8, which the ICJ has declared to express customary international law

[274] ICJ, Genocide case, 208 (para. 400).

violations.[275] With this decision, the court rejects the ICTY's less stringent "overall control test" used in the Tadi case. The *1974 Definition of Aggression*, which enumerates pertinent examples, provides a stronger insight into what activities might constitute a direct breach of a state's territorial integrity.[276]

Conquest, possession, annexation, bombing, port siege, and the employment of hostile troops deployed within a country's territory beyond what has been consented to by the troop-sending and troop-receiving states are all included in the resolution.[277] The last option of breaking a stationing arrangement is particularly significant given the Black Sea Fleet's presence on Ukrainian soil. Non-state actors operating under the direct control of a country are included in the Definition of Aggression. Aggression is defined as "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State."[278]

Indirect infractions are the second sort of violation. Such indirect breaches occur when real military acts against territorial integrity are not traceable to the state since the possible aggressor country has not employed its organs or deployed or directed irregular soldiers. These indirect forms of force are described by the ICJ as less severe forms of the use of violence in comparison to direct infractions that normally comprise an armed assault.[279]

International law, on the other hand, precludes certain types of interference. This has already been stated in the *1949 Draft Declaration on the Rights and Duties of States by the International Law Commission,*[280] in the *1965 UN General Assembly Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their*

[275] ICJ, Genocide case, 208 (para. 400).

[276] ICTY, Appeals Chamber, Tadić, 15.7.1999, (Case No. IT-94-1-A), para. 131.

[277] Definition of Aggression, Article 3.

[278] Definition of Aggression, Article 3 (g).

[279] Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986, 101 (para. 191); this differentiation has also been taken up in the Case concerning Oil Platforms, I.C.J. Reports 2003, 187 (para. 51).

[280] YBILC 1949, 287, Article 4: “Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organisation within its territory of activities calculated to foment such civil strife.”

Independence and Sovereignty,[281] and, most notably, in the *General Assembly's Friendly Relations Declaration*. The ICJ has ruled that the latter statement represents customary international law and that the fundamental doctrines are thereby obligatory on all governments. The *Friendly Relations Declaration* points out:

> *"Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."*[282]

The ICJ found in its Nicaragua ruling that the equipping and training of rebels is illegal under the doctrine of non-use of violence, citing this resolution.[283] In principle, a country may not assist operations that require the use of aggression within another state's territory and so breach the country's territorial integrity. Furthermore, a state may not permit operations on its own soil that are intended to use or threaten aggression against another country.

Countries may neither give arms or training to rebels operating in another state's territory nor may they permit their own region to be used as a platform for combat activities against another country or territory. To summarize, international law safeguards nations' territorial integrity and establishes the need for states to respect one another's borders. Non-state players are often excluded from the concept. However, it does relate to them in specific cases, particularly where non-state actors have created a stable authority inside a given region. A breach of territorial integrity in regard to countries must be proven in all other circumstances. Such infractions can happen either directly, as when a state uses force, or indirectly, as when a country uses violence. They can also occur indirectly through the providing of rebel assistance.

b. <u>Limitations of Territorial Integrity</u>

[281] UN General Assembly Resolution 2131 (XX), 21.12.1965.

[282] Friendly Relations Declaration.

[283] ICJ, Nicaragua Judgment 118-119 (para. 228).

International law does not unconditionally safeguard a country's territorial integrity, but it does impose restrictions. The potential of Security Council action under Chapter VII of the UN Charter is the first constraint.[284] The Security Council has the authority to employ force in the territory of nations participating in a conflict in order to preserve or re-establish international peace and security. Furthermore, if the operating country was responding to a military assault and so acting in self-protection under Article 51 of the Charter, the geographical integrity of the country would not be infringed.

Another legal rationale for a foreign military presence on another state's territory occurs when the recipient country consents to the deployment. A so-called interference on invitation does not infringe a country's national autonomy or sovereignty since it is carried out in conformity with the intent of the government's organs.[285]

Conclusion

While the United Kingdom Government has granted most Chagossians a United Kingdom Dependant Territories passport, they have continued to seek the right to return to Chagos Island. The Mauritius government has tried to recover the islands and return them to Mauritius' sovereignty, and has asked the United Kingdom government to ensure the rights of around 4,000 people to return. Nevertheless, the US still occupies Diego Garcia and the issue of the Chagossian people's repatriation remains unresolved.[286]The expulsion of Chagossians is highly notable as the flowing opinions from this affair will present highly efficacious jurisprudence in the domain of rights of indigenous people, particularly their freedom from displacement.

[284] See Article 42 UN Charter.

[285] See Draft Articles on State Responsibility, Article 20, which states that the valid consent by a state precludes wrongfulness of an act.

[286] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Minorities, Report on the visit by the Working Group to Mauritius, Examining Possible Solutions to Problems Involving Minorities, Including the Promotion of Mutual Understanding Between and Among Minorities and Governments, U.N. Doc. E/CN.4/Sub.2/AC.5/2002/2 (3 April 2002), para. 37

Further Research

What is the binding effect of an Advisory Opinion? Examine how Advisory Opinions in the past has shaped international law and what effects has it had on the parties involved. Consider the timeline between the resolutions condemning colonialism and the Lancaster House agreement? What is the significance? What effects has the forceful expulsion has on the inhabitants of the territory and the African continent? What measures has the African Union taken to aid the Chagossians and what is the significance of such actions? What characteristics define an independent state and how has the expulsion affected the state?

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