

The international law gaze: the International Court of Justice strikes at colonialism

Dr. Alberto Alvarez-Jimenez, University of Waikato, on the Court's advisory opinion related to the United Kingdom and the Chagos Archipelago (With insight from Doris Lessing and Andrea Levy)

The International Court of Justice (the Court) rendered a few weeks ago a blow to the excesses of colonialism and its disdain for humanity in its advisory opinion (See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] (*Chagos*)). The advisory opinion deals with some dimensions of the right to self-determination and is of interest to New Zealand. The opinion is related to international law obligations New Zealand has as a result of its being administrator of Tokelau, and second, because the U.N Declaration on the Rights of Indigenous Peoples is mentioned by two judges in their separate opinions (see Separate Opinion of Judge Cançado Trindade at [244] (Cançado Trindade) and Separate Opinion of Judge Robinson at [70(g)] (Robinson)).

What is the context? Recounting a visit to an exhibition at the British Museum before World War II one of the characters in Andrea Levy's *Small Island*, a white girl, states:

The Empire in little. The palace of engineering, the palace of industry, and building after building that housed every country we British owned. ... Practically the whole world there to be looked at.

'Makes you proud', Graham said to Father.

There is nothing to be proud of in the United Kingdom's handling of the Chagos Archipelago, still a colony today. For this reason, and at the initiative of African States, the United Nations General Assembly asked the Court the following two questions (*Chagos* at [1]):

(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 ...?';

(b) 'What are the consequences under international law ... arising from the continued administration by the United Kingdom ... of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals ... ?'."

By thirteen votes to one, the Court answers in the negative question (a). And as to question (b), the Court concludes that it "[i]s of the opinion that the United Kingdom is under an obligation to bring an end its administration of the Chagos Archipelago as rapidly as possible" (at [183.3], emphasis in original).

This article presents a summary of the *Chagos* advisory opinion, of the dissenting opinions, and of the specific guidance that the separate opinions of Judges Sebutinde, Robinson and Cançado Trindade can offer to the United Nations (UN) General Assembly on the content and categorization of the right to self-determination.

Context of the Partial and Unlawful Decolonization of Mauritius by the United Kingdom (UK)

Mauritius is a republic that consists of a set of islands in the Indian Ocean located 900 km east of Madagascar. The Chagos Archipelago has a number of islands and atolls, and its main island is called Diego Garcia. The Archipelago was administered by the UK as a dependency of the colony of Mauritius from 1814 to 1965. After the end of World War II, the UK regularly informed the UN General Assembly about its administration of Mauritius as a non-self-governing territory, and referred to the Chagos Archipelago as one of its dependencies.

The General Assembly adopted in 1960 Res 1514 (XV), titled “Declaration on the Granting of Independence to Colonial Countries and Peoples”, and in Res 1654 (XVI) of 1970 the Assembly created the United Nations Special Committee on Decolonization. In 1964 a new actor entered the scene, the United States. It was interested in establishing a military base in Diego Garcia due to its strategic location in the Indian Ocean.

To this end, United States started negotiations with the UK. The latter would be responsible for the acquisition of land in Diego Garcia, for the resettling of its entire population and the payment of compensation. The United States would bear the costs of the construction and maintenance of the military communication facility. Both parties agreed that the best course of action would be to detach the Chagos Archipelago from Mauritius prior to its independence. In 1964 the UK promulgated the Mauritius Constitution order and established a Legislative Assembly, Council of Ministers, a Chief Secretary and the post of Premier of Mauritius, among other authorities. The same year, the UN Committee of Twenty-Four stated that the UK had kept significant influence and that the Constitution did not grant the representatives of the people of Mauritius the possibility to exercise real powers.

In 1964 and 1965, the United Kingdom discussed with the Premier of the colony of Mauritius the detachment of the Chagos Archipelago from the colony. The Premier opposed the detachment and favoured a long term lease, but the UK indicated that the United States would not accept it. The potential detachment was not well received by the UN, the African and Asian States and the Non-Aligned Movement. The negotiating strategy of the UK was illustrated in a note prepared for the British Premier Minister at the end of the negotiations on September 7 1965 (at [105]):

Sir Seewoosagur Ramgoolam is coming to see you at 10:00 tomorrow morning. The object is to frighten him with hope: hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago...

On this basis, the UK Primer Minister told the Premier of Mauritius at a meeting in London that (at [107]):

[i]n theory there were a number of possibilities. The Premier and his colleagues could return to Mauritius either with Independence or without it. On the Defence point, Diego Garcia could either be detached by order in Council or with the agreement of the Premier and his colleagues. The best solution of all might be Independence and detachment by agreement, although he could not of course commit the Colonial Secretary at this point.

The Premier of Mauritius and the UK Secretary of State held at the same time negotiations on defence matters. Two main issues were agreed in what the parties called the Lancaster House Agreement. First, the UK would pay Mauritius £3 million pounds over and above compensations paid directly to landowners in the Chagos Archipelago and to those who would be resettled. The Mauritian delegation agreed on this compensation in the understanding that the Chagossian population would remain in the Archipelago along the military base, something the United States and UK had already discarded as incompatible with military needs.

And the second issue that was agreed on was that if there were no longer needs for the facilities for the purpose of defence, the Archipelago would be returned to Mauritius. On these main bases, the Premier of Mauritius accepted the detachment.

The detachment took place at the end of 1965, when the UK established a new colony, called British Indian Ocean Territory (BIOT). It consisted of the Chagos Archipelago, no longer a part of Mauritius, and other islands. Within days, the General Assembly reacted to the detachment and its motivation and invited, in Res 2066 (XX) of 1965, “the administering power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity” (as quoted in *Chagos* at [34]). A year later, in 1966, the General Assembly affirmed this statement but in general terms and categorized such acts in Res 2232 (XXI) as “incompatible with the purpose and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)” (as quoted in *Chagos* at [35]). The res was a direct reaction to the UK’s actions.

Meanwhile, the United States and the UK concluded in December 1966 “The Agreement concerning the Availability for Defence Purposes of the British Ocean Territory”. The agreement provided that the UK would take all administrative actions required to meet the defence needs. One of them was the resettling of all inhabitants of the islands.

In 1967, the UN Committee of Twenty-Four condemned the dismemberment of Mauritius by the UK for being contrary to the General Assembly Res 2066 (XX) and 2232 (XXI) and called upon the UK to return to Mauritius the detached islands. In August 1967, Mauritius held general elections and the wish to become independent prevailed. Also in 1967, the General Assembly adopted Res 2357 (XXII) referring to several territories, including Mauritius, and reaffirmed statements made in Res 2232 (XXI).

Mauritius achieved independence on 26 April 1968. Its Constitution, adopted by the UK, excluded the Chagos Archipelago as part of Mauritius's territory. The entire population of Diego Garcia was forcibly removed or prevented from returning by the UK from 1967 to 1973.

In 1980, the then Prime Minister of Mauritius declared before UN General Assembly that the BIOT should be disbanded and the Chagos Archipelago and the other islands returned to Mauritius. The African Union, Mauritius is a member, adopted a decision in 2010 in similar terms claiming also the violation of the General Assembly res 1514 and res 2066 by the UK. In 2017, the African Union adopted res 1 (XXVIII) asking for the completion of Mauritius's decolonization process.

The UK paid Mauritius £650000 as full and final discharge of its obligations under the Lancaster House Agreement, and paid an additional £4 million under a new agreement made in 1982 to compensate 1344 islanders. Each had to sign a document renouncing her right to return to the Archipelago. The Human Rights Committee twice, in 2001 and 2008, recommended the UK to "should ensure that the Chagois islanders can exercise their right to return to they territory ..." (as quoted by *Chagos* at [126]). As to the situation of the Chagossians today, they are dispersed in UK, Mauritius and Seychelles, and by virtue of UK law, it is unlawful for them to return to the Archipelago.

Finally the original agreement between the UK and the United States lasted for 50 years and was renewed for an additional twenty in 2016. This is the background of the request of an advisory opinion by the General Assembly to the Court. Doris Lessing was entirely right when one of its characters in *The Sweetest Dream* expressed:

A sentence in our textbook goes something like this: 'In the latter part of the nineteenth century, and until the First World War, the Great Powers fought over Africa like dogs over a bone.' What we read less often is that Africa, considered a bone, was not less fought over the rest of the twentieth century, though the dog packs were not the same.

The Chagos Advisory Opinion

"Procedural" Issues

Some participants were of the view that the Court should not render the opinion. Two reasons are worth mentioning. First, it was argued that the opinion would not assist the General Assembly to perform its functions in relation to the decolonization of Mauritius, since the General Assembly had not deal with it since 1968. The Court responded that the assessment of the usefulness of an advisory opinion is a matter for the requesting organ to make.

The second objection to the opinion was more fundamental. The request by the General Assembly was, in reality, a way to compel the Court to deal with a territorial dispute between Mauritius and the UK. The settlement of this dispute was beyond the jurisdiction of the Court, since the UK had not accepted its compulsory jurisdiction in relation to any dispute with other country which is or has been a Member of the Commonwealth. The Court responded that the questions posed by the General

Assembly were not aimed at resolving a territorial dispute. They sought the Court's guidance on the discharge of the Assembly's functions in relation to the decolonization of Mauritius.

Question (a): Was the decolonization of Mauritius according with international law?

To answer question (a), the Court determined the applicable international law on the right to self-determination at the time Mauritius achieved independence. As was illustrated, the period of independence of Mauritius took place between 1965 and 1968. However, the Court indicated that the evolution of the right had to be assessed before and after this period.

The General Assembly, as was shown, enacted several resolutions on the right to self-determination. The Court demonstrated that they had crystallized into customary international law in the mid-sixties and constituted general practice accepted as law (*opinion juris*). The Court stated (at [151]):

General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.

As expected, the analysis started with art 1.2 of the UN Charter indicating, as one of the purposes of the United Nations "respect for the principles of equal rights and self-determination of peoples" (Chagos at [146]). Developing this principle is Chapter XI titled Declaration regarding Non-Self governing Territories. The Court referred to art 73, which indicates that those UN members who have assumed responsibilities regarding non-self-governing territories accepts to develop self-government.

The Court stated that the General Assembly had adopted several resolutions on self-determination: Res 637 (1952), Res 738 (1953) and Res 1188 (1957). However, according to the Court, Res 1514 "represents a defining moment in the consolidation of State practice on decolonization" (at [150]). To ground its conclusion on the customary nature of the right to self-determination, the Court relied on state practice after the resolution, on the conditions of its adoption, and on its language.

The Court expressed that after the adoption of Res 1514 the peoples of 28 non-self-governing territories had achieved their independence. Although this resolution was just a recommendation, the Court stated that the resolution was declaratory of the customary nature of the right to self-determination. The Court also highlighted that the resolution had been adopted by 89 votes with 9 abstentions and that no State participating in the vote had opposed the existence of the right. The Court also looked at the normative nature of the text: "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights [and] is contrary to the Charter of the United Nations" (as quoted by Chagos at [153]).

The Court then recalled the Declaration of the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations and its inclusion in General Assembly Res 2625 (XXV) of 1970. The Court mentioned that the resolution

recognized the right to self-determination as a basic principle of international law. Based on this recognition, the Court concluded that the Declaration confirmed the customary nature of the right.

The Court then moved on to illustrate that the right to territorial integrity was a corollary of the right to self-determination as a matter of customary international law. The Court, obviously, began with the text of Res 1514 mandating the preservation of such integrity: “Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations” (GA Res 1514, XXV (1960) operative para. 6).

In addition, the Court looked at state practice and pointed out that States had consistently recognized that respect for the territorial integrity was a fundamental element of the said right. Equally important is that the Court also assessed the practice of UN organs and found no practice in which a detachment for the purpose of preserving a colonial rule had been regarded as lawful. The Court also recognized one exception: when any territorial detachment is based on “the freely expressed and genuine will of the people of the territory concerned” (*Chagos* at [160]).

The Court then continued with an assessment of the role the General Assembly had played regarding decolonization. The Court illustrated that the General Assembly had overseen compliance with the Charter and resolution 1514 by administering Powers. In this regard, the General Assembly had also monitored the means by which peoples of non-self-governing territories had expressed their free and genuine will. The Court also highlighted that the General Assembly had called on administering Powers to respect the territorial integrity not only of Mauritius but also of other non-self-governing territories.

The Court then proceeded to answer the first question in light of the facts and applicable customary international law. The Court found that the Chagos Archipelago was an integral part of Mauritius as a non-self-governing territory. The Court also pointed out that the Premier and representatives of Mauritius accepted the detachment of the Chagos Archipelago in the Lancaster house Agreement on the condition that the Archipelago would not be ceded to any third party. Finally, the Court examined the free will of Mauritius at the time of the detachment. The Court recalled that Mauritius was then still a colony and that the Committee of Twenty-Four had noted that the representatives of the people of Mauritius under the Constitution lacked real legislative or executive powers. The Court expressed that (at [172]):

[I]t is not possible to talk of an international agreement, when one of the parties to it, Mauritius, which is said to have ceded the territory to the United Kingdom, was under the authority of the latter. The Court is of the view that heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony.

On this basis, the Court indicated that the detachment was not the expression of a free and genuine will of the Mauritian people.

The Court concluded that General Assembly resolution 2066 required the UK to respect the territorial integrity of Mauritius and that the detachment of the Chagos Archipelago and its incorporation within a new colony, the BIOT, had meant that the “process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968” (at [174]).

Question (b). Consequences under international law from the continued administration by the UK

The applicable law to identify the consequences of the unlawfulness of the decolonization process of was different in this question. It was not the one at the time of the decolonization of Mauritius but the international law applicable in 2019. The Court identified three consequences

First, the continued administration of the Chagos Archipelago is a continuing wrongful act that gives rise to the international responsibility of the UK. Second, the UK has the international law obligation to terminate the administration of the Archipelago as fast as possible. The Court also indicates that it is up to the General Assembly to determine how the process of decolonization of Mauritius should be completed.

Third, given the *erga omnes* nature of the obligation to respect the right to self-determination, all States must co-operate with the UN to complete the decolonization of Mauritius. To recall, these obligations were defined by the Court (*Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) Second Phase (Merits)*, [1970] ICJ Rep 32 at paras. 33 – 34).

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

And fourth, in terms of the resettlement of the Chagossians, the Court points out that it was a matter for the General Assembly to address as part of the completion of the decolonization process.

Dissenting Opinions

Judges Tomka and Donoghue were the only dissenting judges. They expressed that the Court should have used its discretion not to render the advisory opinion.

Judge Donoghue emphasized that the subject-matter of the advisory opinion was a bilateral dispute between the UK and Mauritius that the Court had no jurisdiction to settle. In fact, Mauritius had proposed to UK to take the dispute to the Court and the UK rejected the proposal. In Judge Donoghue’s view, “[t]he question of decolonization and sovereignty cannot be separated” (Dissenting Opinion of Judge Donoghue at [18]). According to her, the main outcome of the opinion is that the UK had an obligation to relinquish sovereignty over the Archipelago to Mauritius.

Judge Tomka added some arguments. First, he held that there was no point for the Court to offer guidance to the Assembly since the latter had not dealt with Mauritius and the Chagos Archipelago for five decades. Second, Judge Tomka highlighted that the decolonization process of Mauritius would have to be completed through negotiations. He said that Mauritius expressed before the Court that it “recognizes [the] existence [of the base of Diego Garcia] and has repeatedly made it clear to the United States and Administering Power that it accepts the future operation of the base in accordance with international law” (Dissenting Opinion of Judge Tomka at [10]). He recalled that this advisory opinion could have the same fate of the opinion in *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, which had not prompted any further action by the General Assembly after the opinion had been rendered.

Separate Opinions

Several judges penned separate opinions. Those of Judges Sebutinde, Robinson and Cançado Trindade may be important for the future development of the right to self-determination and for the guidance they offer to the General Assembly on potential ways to vindicate the Chagossians.

Right to Self-determination as a human right

Judge Robinson included a detailed analysis of the human dimension that the advisory opinion did not sufficiently emphasize. He carried out a detailed assessment of the human rights nature of the right of self-determination. It was crystallized in Res 1514 and further developed by the General Assembly in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights in Common art 1.

Judge Robinson also devoted some part of his separate opinion to highlight the plight of the Chagossians and the conditions under which they were removed from the Archipelago. Liseby Elysé, born in 1953, stated before the Court (at [104]):

In Chagos everyone lived a happy life. ...

But then one day, a ship called Nordvaer came. The administrator told us we had to board the ship, leaving everything, leaving all our personal belongings behind except a few clothes and go. People were very angry about that and when this was done, it was done in the dark. We boarded the ship in the dark so that we could not see our island. And when we boarded the ship, conditions in the hull of the ship were bad. We were like animals and slaves in that ship. People were dying of sadness in that ship.

And as for me I was 4 months pregnant at that time. The ship took 4 days to reach Mauritius. After our arrival, my child was born and died. Why did my child die? For me, it was because I was traumatized on that ship, I was very worried, I was upset. This is why when my child was born, he died. I maintain we must not lose hope. We must think one day will come when we will return on the land where we were born.

It is important to illustrate, at least, the human magnitude in terms of suffering caused by the detachment. Only then can the connection between the violation of the right to self-determination of the Chagossians and the impact on their human rights be fully appreciated.

Right to self-determination as *jus cogens*

The three judges agreed that the right to self-determination had achieved the status of *jus cogens*, a peremptory norm of international law.

Judge Robinson made a very detailed assessment that will likely serve as a framework for the future categorization of the right to self-determination as *jus cogens*. His analysis covered the previous decisions by the Court defining the requirements of these norms; international instruments of universal application referring to the right and from which its *jus cogens* nature could be inferred; the views on this nature of States and of other international bodies, such as the International Law Commission. He concluded on the requirements for the existence of *jus cogens* norms and the consequences that follow (at [75]).

First, the consequence of a breach of the norm by a treaty is that the treaty is rendered void. ... Second, the norm in question must be a norm of general international law and must obviously meet the requirements for that status. As we have seen, it is most usually norms of customary international law that become peremptory norms of general international law. Third, the norm in question must not only be a norm of general international law; it must be a norm that is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. This is indeed the most important criterion for the identification of a norm of *jus cogens*. ... What is required is acceptance and recognition by the international community of States as a whole — an important consideration, signifying that unanimity among all States is not required. Fourth, the consequence of a norm being a peremptory norm of general international law is that there can be no derogation from it ...

The consequences that follows for acting against these norms are defined in art 53 of the Vienna Convention on the Law of Treaties:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Thus, Judge Sebutinde indicated that (Sebutinde at [45]):

[A]ny treaty that conflicts with the right of the Mauritian people to exercise their right to self-determination with respect to the Chagos Archipelago is void. This has clear implications for the agreement between the United Kingdom/United States.

Reparation to the Chagossians

Judge Sebutinde stated that the UK was under an obligation not to adopt any measure that prevents the people of Mauritius from exercising their right to self-determination. As to the resettlement of Chagossians, she held that, consistent with their right, they should freely decide whether to return or not to the Archipelago. Finally, Judge Sebutinde indicated that the UK had to wipe out all of the consequences of its illegal actions.

Judge Cançado Trindade offers important guidance to the General Assembly on how to vindicate the rights of the Chagossians. He recalls that the 1974 U.N Charter of Economic Rights and Duties of States adopted by the General Assembly in Resolution 3281 (XXIX) of 1974 established in art 16 that the persistence of colonialism gives rise to a duty of restitution and full compensation and the obligation to liberate territory occupied by force. He carries out a full analysis of the content of reparation: full restitution, appropriate compensation, public apology, and guarantee of non-repetition. Judge Cançado Trindade also mentions decisions by the African Commission and the Inter-American Court of Human Rights dealing with forcible eviction of peoples and argues that new generations of Chagossians should also be regarded as harmed by the continuing breach of the United Kingdom. His approach to reparation is detailed and comprehensive.

Perspective

The Court was right in rejecting the argument about the existence of a dispute. The questions posed by the General Assembly certainly had a connection with a territorial controversy. But it would have been a radical oversimplification to reduce the scope of the request only to this territorial dimension. The Court and the judges in their separate opinions assessed in depth the human rights layers of the request and the implications for international peace and security.

Chagos was not an opportunity for judicial restraint and the main conclusion reached by the Court, the unlawfulness of the decolonization process, was anticipated by British officials half a century ago. The UK went on with the detachment not because it thought it was lawful, but because it did not like to disturb its relationship with the United States. The docile behaviour in relation to the United States was in stark contrast with the British demeanor in relation to the Mauritian colonial authorities. Judge Robinson had some words: “September 23, 1965 was a dark day in British diplomacy; on that day British colonial relations reached a nadir. The intent to bully, frighten and coerce the Mauritian Premier was all too obvious” (Robinson at [93]). “Oppressive with his subordinates and submissive with his superiors” a line someone once said nicely describes the British conduct.

Judge Tomka was not at his best. His argument that lack of action by the General Assembly meant that no guidance was needed from the Court is misleading. The fact that the General Assembly does not deal with a topic for decades does not create a path dependence that prevents the Assembly from acting in the future. The very fact that the General Assembly made the request is enough to show that the topic has become again important. Not to mention that the advisory opinion on self-determination might be relevant in other situations beyond Mauritius and the Chagos Archipelago. For him, and to

cite the great James Baldwin in a different context, the Chagos Archipelago was “a footnote to the twentieth-century torment”. Fortunately, the majority of the Court did not think so.

The reasons why despite that several participants referred to the *jus cogens* nature of the right to self-determination the Court decided not to explore this domain on this occasion and stopped at the *erga omnes* nature of the right are not difficult to guess. It was not necessary to make a pronouncement on this topic, even if the present author agrees with the separate opinions. Perhaps, the Court’s silence may have to do less with the Court’s belief that the right to self-determination is not a norm of *jus cogens*, than with the international politics of the opinion, sometimes a necessary element of the legitimacy of the Court in some (powerful) quarters. The silence avoided the necessary implication that the US/UK agreement was void. Such implication would have likely got a rebuke by the Trump administration with its current policy of harassing international courts, such as the WTO Appellate Body and the International Criminal Court. Instead, the *erga omnes* nature implies that the United States must cooperate with the UN to the completion of the decolonization process of Mauritius, which means it has to negotiate with both the UK and Mauritius. The conditions for these negotiations seem to be ripe in light of the positions indicated by Mauritius regarding the military base at Diego Garcia. On the contrary, a conclusion on *jus cogens* would have made these potential negotiations more difficult.

IN A NUTSHELL

The Court strikes at colonialism in its *Chagos* advisory opinion. Although the opinion is non-binding on the United Kingdom, the Court regards unlawful and incomplete the decolonization process of Mauritius and calls for its completion. The Court also orders all States, meaning also the United States, to cooperate in this process, and leaves in the hands of the General Assembly the means to protect the Chagossians. The separate opinions of Judges Sebutinde, Robinson and Cançado Trindade may have an impact on the future categorization of the right to self-determination as *jus cogens*. Equally important is the type of guidance they offer on the extent of the diverse forms of reparations to the Chagossians that the General Assembly could consider.

It was Edward Said who, in *Culture and Imperialism*, showed how European writers and their novels developed and accentuated the idea that European should rule and non-European be ruled. Literature sustained empires. Judicial decisions could do it as well. Offered with the opportunity to follow this path by declining the request, as some participants suggested, the Court refused to take a passive role and, in *Chagos*, rendered a 21st century opinion on colonialism.