

‘in tragic situations, as their lifestyles, values, and cultures are put on trial in disputes they are not party to’ (at 201–202). So how, through what concrete steps, can local communities be made visible? How might foreign investors be re-embedded into local contexts?

In the conclusion, Perrone draws lessons from the norm entrepreneurs on how to re-imagine investment law: ‘our efforts must be ambitious, like theirs, and ideas alone are not enough’ since their success at dis-embedding disputes from context is due to their mix of theory and practice, with practice including lobbying for specific policies (at 205–206). If one were to push for an alternative legal imagination, what specific policies would one push and where? How would one include the issues that have been silenced and ensure the actors who have been made invisible are heard? Who is in a position to take what concrete steps, and what constraints do they face? Perrone’s book takes us to the brink of a new legal imagination, one in which foreign investors are no longer extraordinary, but rather embedded in communities and national contexts like other actors. The question now is: How do we get there?

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Thomas Burri and Jamie Trinidad (eds). ***The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion***. Cambridge: Cambridge University Press, 2021. Pp. 300. £85. ISBN: 9781108841276.

As Friedrich Nietzsche once noted, only that which has no history can be defined. This dilemma, however, has not prevented the decades-long efforts by international lawyers to condense self-determination’s ‘amusing history’, as C.E. Carrington once described it, into a concrete legal definition.¹ The International Court of Justice’s (ICJ) role in this process has been a chequered one, though not for want of opportunities. Cases arising out of the colonial era’s application of self-determination have offered numerous junctures for the Court to confront the rules governing the exercise of self-determination and the entitlements of its beneficiary peoples. Its most recent judgment on the right of self-determination is the subject of a new edited collection by Thomas Burri and Jamie Trinidad that provides a comprehensive overview of the Court’s reasoning and explores some of the broader ramifications of the decision. The Court’s 2019 advisory opinion on the separation by the United Kingdom (UK) of the Chagos Archipelago from Mauritius, during the latter’s independence, follows a near 60-year battle by the Chagossians to redress their enforced exile from the islands. The opinion ultimately affirmed what had already become a political and material reality for the islanders: that the UK had wrongly detached and maintained control of the

¹ C.E. Carrington, *The Liquidation of the British Empire* (1962), at 11.

islands after Mauritius asserted its independence, given that self-determination was a customary right by this time.²

The book adopts a broadly legalistic approach to the advisory opinion and its relevance for adjacent areas of international law. The overarching question of the content, and crystallization, of customary rules on self-determination and the Court's reliance upon United Nations General Assembly (UNGA) resolutions in relation to the formation of customary international law are addressed in Chapters 2 and 3 by James Summers and Stephen Allen respectively. Despite criticisms over its decision not to make recourse to state practice or *opinio juris*, Summers sees the Court's reliance on UNGA resolutions as 'reflective' of custom in this area as an important development. Allen, meanwhile, takes a more conservative stance, concluding that it remains unclear whether the opinion constitutes 'evidence of a paradigm shift' in the area of interpretation of custom or whether it merely amounts to a 'highly exceptional response to the UK's flagrant contraventions of those international instruments which epitomise the overriding ethical imperative of decolonisation' (at 76). Other chapters, like those of Zeno Crespi and Fernando Lusa Bordin, touch on the Court's procedural approach on jurisdiction and discretion and consent to jurisdiction as well as on the question of state responsibility, specifically its finding that the UK's administration of the Chagos Archipelago constitutes 'an unlawful act of continuing character'.

For the editors, the *Chagos* advisory opinion is a decision of 'enduring importance', joining the previous *Namibia* and *Western Sahara* decisions, which they argue were 'in step with the progressive march of decolonisation in the 1970s' (at 30).³ A less generous reading might underline the Court's much-criticized stance on decolonization prior to 1971 and the 'storm of indignation' raised by the *South West Africa* cases. The year following the Chagossians' forced removal from the islands in 1965, the Court, led by Sir Percy Spender, had denied the standing of Ethiopia and Liberia to bring a claim regarding the self-determination of Namibia. While the decision was effectively reversed by the 1971 *Namibia* advisory opinion, the Court was criticized for deftly side-stepping a slew of substantive questions, many of which have remained unanswered to this day.⁴ Similarly, while the *Western Sahara* opinion is much vaunted for stirring pronouncements on the right of peoples to freely decide their fate, the decision takes a largely agnostic stance on substantive outcome so long as the procedural aspects of the right have been followed, but it also leaves the concrete demands of this requirement uncertain. There is also the Court's much criticized *East Timor* judgment, dismissing Portugal's claim on jurisdictional grounds, which, as Christine Chinkin has argued, reveals an inherent structural bias in the international law system that

² *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, para. 182.

³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 12; *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975).

⁴ See *Chagos*, *supra* note 1, at 16, paras 72–73, Separate Opinion of Judge Ammoun.

favours the procedural rights of absent third states over the substantive rights of peoples.⁵ In sum, previous ICJ dealings with self-determination have often left much to be desired both from a legal standpoint as well as from the perspective of the people involved, who are often relegated to the periphery.

The ICJ's latest opinion unfortunately does little to deviate from this previous pattern, doing little to account for the human and material experience of the Chagossians by focusing overwhelmingly on Mauritius' territorial sovereignty rather than the Chagossians' right to return.⁶ As Bordin notes in Chapter 6, despite the significance of the finding, the Court's reasoning is puzzlingly curt. The Court neglects to spell out the legal consequences flowing from the UK's breach of the Mauritian people's right to self-determination, including any right of reparations owed to the Chagossians. As John Reynolds has argued elsewhere, 'the substantive findings section of the Court's advisory opinion devotes just a single sentence to the uprooted Chagossians', and it largely deflects the issue of the islanders' right of return.⁷ Of particular note and 'concern', Bordin explains, is the fact that the Court did not pronounce that states are under an obligation to deny recognition to the UK's presence in the Chagos Archipelago, to refrain from providing any aid or assistance in maintaining the situation created and to cooperate through lawful means in order to bring that illegality to an end. As Bordin notes, given that self-determination has also been described as a *ius cogens* norm giving rise to *erga omnes* obligations, it is also puzzling why the Court does not find that the breach should trigger the rules for the collective enforcement of multilateral obligations under the International Law Commission's 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts.⁸ This omission, as Antoni Pigrau explores in his chapter on the *ius cogens* implications of the decision, may in fact generate the impression that the Court does not accept that this right has the character of a *ius cogens* norm or that the consequences arising from breaches of a peremptory norm are not always the same; indeed, the majority's decision not to declare self-determination in the context of decolonization as a *ius cogens* norm was criticized in the separate opinions of Judge Sebutinde and Judge Robinson.

While highlighting the Chagossians' long struggle for justice, the ICJ casts its situation as a human rights issue, which is beyond the scope of the Court itself. Although, even here, the Court signals a missed opportunity, as Irini Papanicolopulu and Thomas Burri note in their chapter on the human rights implications of the *Chagos* case. By largely glossing over these human rights implications (which include not only the right to self-determination but also the freedom of movement and the right of abode, the fundamental prohibition of forced displacement and the violation of the economic

⁵ *Case Concerning East Timor* (Portugal v Australia), 30 June 1995, ICJ Reports 1995. See Chinkin, 'The East Timor Case (Portugal v. Australia)', 45 *International and Comparative Law Quarterly* (1996) 712, at 724–725.

⁶ See Reynolds, 'Decolonising the Chagos Islands?', 2 *Nigerian Yearbook of International Law* (2019) 224.

⁷ *Ibid.*

⁸ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/83, 3 August 2001.

rights of the islanders) and providing little guidance about the consequences of the breach for states and other actors, including the specific individuals who have been deported from Chagos and denied the right to return, the Court missed the chance to extend its usual narrow, statist approach to redressing self-determination conflicts. The *Chagos* opinion, as Papanicolopulu and Burri rightly note, ‘offered the Court a significant opportunity to showcase that, as a judicial body, it is not limited to inter-state disputes but is also capable of addressing direct concerns of actors other than states ... [including] ... groups and private individuals who have suffered violations of their rights’ (at 260). Instead, the ICJ chose to affirm a sovereignty-centred articulation of self-determination, one that ultimately elevated the rights of Mauritius (and its right to complete ‘the decolonization of its territory in a manner consistent with the right of peoples to self-determination’) rather than of its people – let alone the rights of the Chagossians.

Papanicolopulu and Burri’s excellent chapter is amongst those that cast the most critical eye over the opinion and its failure to depart from its ‘Westphalian comfort zone’ and extend ‘the fundamental relevance of human rights – all human rights – for all international disputes, even those related to sovereignty’ (at 260). The remainder of the chapters variously take up the issues of the UK’s continuing assertion of sovereignty over the Chagos Archipelago (Chapter 8), the significance of the advisory opinion for the marine protected area that the UK established around the Chagos Archipelago (Chapter 9) and the impact of the decision on the law of treaties (Chapter 12). The decision to focus on the legal aspects of the decision is not in itself problematic; however, it does leave many of the broader aspects of the decision unexamined. For example, the question of self-determination and the decolonization process is the legal elephant in the reasoning with which none of the chapters provides deep engagement.

The Court’s perfunctory and somewhat unconvincing account of self-determination’s crystallization into custom glosses over the protracted and lengthy battle to create a legal basis for decolonization that played out in the two decades following the consecration of the UN Charter. The reality is that the UK’s actions were largely in step with the intransigence of the vast majority of colonial powers that consistently opposed the creation of a colonial right to self-determination during debates in the Third Committee and that often made the transition to independence a difficult and protracted process, bound up in efforts to preserve economic and political influence in their former colonies. The legacy of colonialism, and its ongoing material effects, was left largely untouched by the Court, which had been presented with a golden opportunity to provide commentary on the legal implications of decolonization some 60 years after its peak as well as elevating the rights of those who have suffered from its effects but have chosen to adopt a narrow, territory-based approach, which will ultimately serve to reinforce the statist paradigm of the international legal system. As Sebastian Schnitzenbaumer reflects in his final chapter, ‘the deportation of the Chagossians is an extremely concrete example of real colonialism, Western imperialism and white supremacy in modern times with physical violence in addition to the

cultural marginalisation of an entire nation’ (at 358). Unfortunately, the editors skirt around these issues as much as the Court itself has done.

The book raises an interesting conundrum about international law’s ongoing engagement with its imperial past in both a disciplinary and academic sense. The traditional legal perspectives offered are all extremely interesting and worthwhile, but one gets the sense of not quite seeing the legal forest for the doctrinal trees. Issues such as the historic role of customary international law – which, as B.S. Chimini has illustrated, has often operated to flesh out critical gaps in the international legal system relating to either the short-term interests of the major powers or the imperial interests of the global capitalist system as a whole⁹ – or the issue of specially affected states raised by the submissions of the African Union, which the opinion does little to advance, are overlooked. From a European perspective (all of the contributors are from the global North), the decision may well seem to affirm that the arc of international law bends towards decolonial justice. However, widening the lens to incorporate the Third World approaches to international law and Marxist perspectives, which should surely be central, rather than peripheral, to any contemporary discussion of the international law of decolonization, the opinion takes on a more hollow tenor, not least given that the actual prospect of the Chagossians returning to their formerly pristine islands, now a heavily militarized US army base, is virtually slim to none. Indeed, while the desperate need for some disciplinary soul-searching was briefly touched upon in the separate opinion of Judge Robinson, who raised the idea that ‘the plight of the Chagossians, ... would appear to bely the greatest advance in international law since 1945: ... the development of a body of law based on respect for the inherent dignity and worth of the human person’,¹⁰ one would be largely disappointed in trying to locate the titular ‘new directions’ of the ICJ and decolonization promised by the editors.

The project of considering how international law might understand its relationship to colonialism and how the law has been used to contain the irregularities and injustices of the post-colonial period remains a fundamental one for present-day international law and scholarship. The *Chagos* opinion is an excellent reminder not only of international law’s complicity in the erasure of peoples and cultures but also of its imperative ability to redress these injustices. The starting point – particularly, in legal scholarship – must be the adoption of perspectives that can aptly illuminate the ongoing practical and theoretical challenges of redressing the legacy of colonialism, not least by involving the perspectives of those who have largely been marginalized from its institutions and processes. The editors of *The International Court of Justice and Decolonisation* are to be commended for providing a thorough and in-depth examination of a judgment, which, despite its flaws, is a critical testament to a broader shift in North/South relations, where formerly dominant powers are confronted with their

⁹ Bagchi, ‘Imperialism, International Law and the Chagos Islands: Reflections on Legal Consequences of the Separation of the Chagos Islands’, *Volkerrechtsblog*, 1 March 2019.

¹⁰ *Chagos*, *supra* note 1, para. 101, Separate Opinion of Judge Robinson.

waning influence and where formerly colonized peoples are transforming the institutional and normative landscape.

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Sondre Torp Helmersen. ***The Application of Teachings by the International Court of Justice***. Cambridge: Cambridge University Press, 2021. Pp. 232. £85. ISBN: 9781108844147.

Sondre Torp Helmersen's book is part of the most recent crop of socio-empirical legal studies on international law, its lawyers and its institutions; it is a product of the recent focus on the workings of international courts and tribunals. Originally written as a doctoral dissertation at one of the premier research centres in that field – PluriCourts in Oslo – the book analyses how 'teachings' – the exact term used in Article 38(1)(d) of the Statute of the International Court of Justice – are 'applied' by and in the International Court of Justice (ICJ), with an emphasis on the question of how much 'influence' teachings have on the Court's decision-making – that is, how much 'weight' the Court's judges accord to teachings in their individual opinions (at 16).¹ This book partakes of the earnestness and precision of the new wave of international socio-legal scholarship and is a welcome change from the traditional approach to the question of how the Court actually operates, an approach which has tended to lean heavily on anecdotal reports and hearsay. As a contribution to legal sociology based on consistent methodological decisions, it makes for valuable reading and will significantly enhance our knowledge of how the Court actually works.

In a nutshell, the book's research question is this: how does the ICJ apply the 'teachings of the most highly qualified publicists' and what role and how much of a role do these texts play in the Court's decision-making? As a first step, Helmersen defines 'teachings' (at 18–42); this is achieved by way of a rather formalist legal-doctrinal interpretation of Article 38(1)(d) of the ICJ Statute, which serves to exclude certain texts, such as those produced by the International Law Commission (ILC), and defines the data set for his later empirical work. His next central step, comprising Chapters 3–5 (at 43–156), is an attempt to measure the 'weight' or influence of teachings in the Court's decision-making. Here, Helmersen is forced to use a double proxy: as is discussed below, he relies on citations to writings in individual opinions rather than on any direct statements by the Court. The result, unsurprisingly, is that the weight of 'teachings' is limited, but that there are significant variations between cited works and citing judges. The conclusion (at 157–184) contains interesting comparisons to other international tribunals and some non-threatening advice on diversity and

¹ Statute of the International Court of Justice, 1945, 33 UNTS 993.