

A STUDY OF INSTITUTIONAL DETERMINATION AND CONSOLIDATION IN PUBLIC INTERNATIONAL LAW - THE CHAGOS CASE^(*)

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Abstract

Located in the middle of the Indian Ocean, the Chagos Archipelago has been subject to a sovereignty dispute between the United Kingdom and its former colony, Mauritius. Before Mauritius gained independence in 1968, the Chagos Archipelago was separated to establish the British Indian Ocean Territory. The main island in the archipelago, Diego Garcia, was leased to the United States and is home to a military base with 3.000 personnel. Mauritius has been challenging the detachment of the Chagos Archipelago, which it claims to be unlawful, by using international legal mechanisms available before it. After a journey that involved the International Court of Justice (ICJ), the United Nations General Assembly (UNGA), and the International Tribunal for the Law of the Sea (ITLOS), Mauritius has achieved legal victory.

The ICJ's Advisory Opinion determined that Mauritius's right to self-determination within the context of decolonization was violated and the ITLOS Special Chamber consolidated this finding by acknowledging Mauritius as the sovereign of the Chagos Archipelago. While these decisions are admirable for upholding the right to self-determination, they have stretched the jurisdictional limits of each respective institution by ruling on a sovereignty dispute.

Keywords

Right to Self-Determination, Decolonization, Marine Protected Area, International Court of Justice, International Tribunal for the Law of the Sea.

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ULUSLARARASI KAMU HUKUKUNDA KURUMSAL TESPİT VE PEKİŞTİRME ÜZERİNE BİR ÇALIŞMA - CHAGOS DAVASI

Öz

Hint Okyanusu'nun ortasında bulunan Chagos Takımadaları, uzun süredir Birleşik Krallık ile eski kolonisi Mauritius arasında egemenlik anlaşmazlığına konu olmuştur. Mauritius'un 1968 yılında bağımsızlığını kazanmasından evvel, İngiliz Hint Okyanusu Bölgesi'nin kurulması amacıyla Chagos Takımadaları Mauritius'dan ayrılmıştır. Ana adalardan biri olan Diego Garcia Amerika Birleşik Devletleri'ne kiralanarak 3.000 personeli olan askeri bir üsse ev sahipliği yapmaktadır. Mauritius, hukuka aykırı bir şekilde gerçekleştiğini iddia ederek, çeşitli uluslararası hukuk mekanizmaları ile Chagos Takımadalarının kendisinden ayrılmasına itiraz etmiştir. Uluslararası Adalet Divanı (UAD), Birleşmiş Milletler Genel Kurulu (BMGK) ve Uluslararası Deniz Hukuku Mahkemesi'ni (UDHM) kapsayan bir sürecin ardından Mauritius hukuki zafer elde etmiştir.

UAD'ın Danışma Görüşü'nde Mauritius'un dekolonizasyon sürecinde kendi kaderini tayin hakkının ihlal edildiğini tespit etmiş, UDHM Özel Daire ise Mauritius'un Chagos Takımadaları'na egemenliğini kabul ederek bu tespiti pekiştirmiştir. Bu iki karar özellikle kendi kaderini tayin hakkına verdikleri önem bakımından önem arz etmekle birlikte, bir egemenlik anlaşmazlığında hüküm vererek yetki sınırlarını esnetmişlerdir.

Anahtar Kelimeler

Kendi Kaderini Tayin Hakkı, Dekolonizasyon, Deniz Koruma Alanı, Uluslararası Adalet Divanı, Uluslararası Deniz Hukuku Mahkemesi.

INTRODUCTION

The notion of people's right to self-determination that originated in the 16th century gained momentum after World War I.¹ The main area of application of the right to self-determination was considered to be decolonization.² The process of decolonization is not yet finalized as there are still 17 non-self-governing territories remaining, 10 of which are under the United Kingdom's (UK) administration.³ Not listed on the UN's website is the British Indian Ocean Territory (BIOT) which consists of seven atolls of the Chagos Archipelago located in the centre of the Indian Ocean. The Chagos Archipelago is a disputed territory between the UK and Mauritius, a nation formerly under British administration until its independence in 1968.

Mauritius has been demanding the Chagos Archipelago be returned to her since the 1980s.⁴ The archipelago has been subject to numerous litigation both in the UK and in the international arena. Former inhabitants and their descendants brought cases before the UK Courts⁵ and the European Court of Human Rights (ECtHR)⁶ claiming their right to return to the islands. Mauritius started its legal quest to claim the Chagos Archipelago in 2010 and won a legal victory in 2021. The purpose of the article is to follow the institutional collaboration leading to this legal victory involving an arbitral tribunal established under Annex VII of the United Nations Convention on the Law of the Sea⁷ (UNCLOS), the International Court of Justice (ICJ), the UN General Assembly, and the International Tribunal for the Law of the Sea (ITLOS) in the Chagos story that determined and further consolidated Mauritius's sovereignty claims over the archipelago while pointing out some concerns in the conclusion. First, a short

¹ Lung-Chu Chen, "Self-Determination and World Public Order", *Notre Dame Law Review* 66 (1991) 1287, p. 1288.

² Anna Stolz, "Decolonization and Self-Determination", *Social Philosophy and Policy* 32/1 (2015) 1, p. 2.

³ "Non-Self-Governing Territories" (10 May 2022) <https://www.un.org/dppa/decolonization/en/nsgt>, accessed 27 October 2022.

⁴ Report of the Select Committee on the Excision of the Chagos Archipelago, Mauritius Legislative Assembly 1983, No 2.

⁵ *R (on the application of Bancoult (No 2)) (Appellant) v Secretary of State for Foreign and Commonwealth Affairs (Respondent)* [2016] UKSC 35.

⁶ *Chagos Islanders v the United Kingdom* App No 35622/04 (ECtHR, 11 December 2012).

⁷ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

background on the Chagos Archipelago will be provided. Afterward, the arbitral award rendered by the Arbitral Tribunal constituted under ANNEX VII of UNCLOS will be briefly examined.⁸ The main focus will be on examining the Advisory Opinion on the “Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965” of the ICJ⁹ and the judgment on preliminary objections in the “Dispute concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean” by the ITLOS Special Chamber¹⁰ in detail. Particular attention will be given to the consequences of these two decisions that have determined and subsequently consolidated Mauritius’s sovereignty claim over the Chagos Archipelago.

I. BACKGROUND

In 1814, Mauritius and its dependencies including the Chagos Archipelago were transferred from France to the UK with the Treaty of Paris.¹¹ Before Mauritius gained independence in 1968,¹² the Chagos Archipelago was detached from its territory. Due to its strategic value, the UK decided to keep the archipelago under British sovereignty and established the BIOT in 1965 consisting of the Chagos Archipelago and some other islands that were later returned to Seychelles.¹³ The establishment of the BIOT was based on a long-term plan carefully constructed together by the United States (US) and the UK for defence purposes.¹⁴ The plan included relocating the population of the largest inhabited island of the archipelago, Diego Garcia. It was agreed that the UK would be responsible for relocating the population and paying compensation,

⁸ *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* Award of 18 March 2015, PCA Case No 2011-03 (Chagos MPA Award).

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

¹⁰ *Dispute concerning Delimitation of the Marine Boundaries between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) Preliminary Objection*, Judgement of 28 January 2021, ITLOS No 28 (ITLOS Mauritius/Maldives Preliminary Objection).

¹¹ Treaties of Peace and Alliance of 30 May 1814 and 20 November 1815 art VIII (1814 Treaty of Paris).

¹² Larry Wells Bowman, ‘Mauritius’, *Britannica* (2022) <<https://www.britannica.com/place/Mauritius>> accessed 10 October 2022.

¹³ The British Indian Ocean Territory Order (8 November 1965) SI 1965/1920.

¹⁴ Written Statement of the Republic of Mauritius (1 March 2018), ‘Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion)’ §§ 3.15-3.38 <<https://www.icj-cij.org/en/case/169>> accessed 10 October 2022.

meanwhile, the US would take care of the construction and maintenance of the military facility that would be built on the island.¹⁵

There was a serious amount of pressure on Mauritius to agree to the detachment of the Chagos Archipelago.¹⁶ In a time period when decolonization was unravelling at full speed,¹⁷ the British-American plan would be jeopardized if Mauritius exercised its right to self-determination and claimed independence before detaching the archipelago. However, The UK and the US had been discussing the establishment of a military facility since 1962. Therefore, the UK presumed to present the detachment of the Chagos Archipelago as a *fait accompli*, leaving no choice to Mauritius other than consenting.¹⁸ Under these circumstances, Mauritius agreed to the detachment of the Chagos Archipelago in exchange for compensation to Mauritius and to those who would be affected by the resettlement, fishing rights among other certain benefits, and a commitment by the UK that the territory would be returned to Mauritius if there were no longer a need for the military facilities (the Lancaster House Agreement, also referred to as the Lancaster House *Undertakings*).¹⁹

The General Assembly criticized the detachment of Mauritius and the establishment of the BIOT and voiced its “deep concern” that these actions fell contrary to a previous General Assembly resolution - the Declaration on Granting of Independence to Colonial Countries and Peoples dated 14 December 1960 (hereinafter, the Colonial Declaration).²⁰ Regardless of criticisms, inhabitants of the entire Chagos Archipelago were forcibly removed by 1973 and were prevented from returning.²¹ Diego Garcia was leased to the US for 50

¹⁵ ICJ Chagos Advisory Opinion, § 94.

¹⁶ *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) Dissenting and Concurring Opinion of Judges Kateka and Wolfrum* Award of 18 March 2015, PCA Case No 2011-03 § 77 (Chagos MPA Award, Dissenting Opinion); ICJ Chagos Advisory Opinion, §§ 100-107.

¹⁷ *The General Assembly Discusses Colonialism at the 936th and 937th Plenary Meetings of the 15th Session (1960)* 01: 20 <<https://www.unmultimedia.org/avlibrary/asset/2479/2479104/>> accessed 10 October 2022.

¹⁸ Written Statement of the Republic of Mauritius (1 March 2018), § 3.19.

¹⁹ *ibid* Annex 61 UK, Record of a Meeting Held in Lancaster House at 2.30 pm on Thursday 23rd September: Mauritius Defence Matters, CO 1036/1253 (23 September 1965).

²⁰ UNGA A/RES/2066(XX); UNGA A/RES/1514(XV) (Colonial Declaration).

²¹ David Vine, *From the Birth of the Ilois to the “Footprint to Freedom”: A History of Chagos and the Chagossians* in Sandra Evers - Marry Kooy (eds), *Eviction from the Chagos Islands*, Brill Academic Publishers, 2011, p. 34.

years, which was renewed for another 20 years in 2016.²² With around 3.000 personnel,²³ the military base carries strategic importance for the American presence in the Indian Ocean.

II. UNCLOS ANNEX VII ARBITRATION

Mauritius brought its international claim before the PCA after the UK established a no-fishing protected area (Marine Protected Area, MPA) around the Chagos Archipelago, claiming that the MPA breached Mauritius's fishing rights.²⁴ In its essence, the Arbitral Tribunal analysed the legal status of an international agreement in the context of decolonization rather than an issue of the law of the sea. Mauritius argued that the UK could not establish an MPA because it was not a coastal state within the meaning of UNCLOS and that Mauritius enjoyed the rights of being the coastal state. Furthermore, Mauritius argued that the MPA was incompatible with the UK's obligations under UNCLOS.

The Tribunal declined to determine which side enjoyed the rights of a coastal state as it concerned a dispute over territorial sovereignty, which fell outside the Tribunal's jurisdiction.²⁵ In their dissenting opinion, two arbitrators were of the view that the Tribunal should have addressed the central question, which was "whether the excision of the Chagos Archipelago was contrary to the principles of decolonization (...) and/or to the principle of self-determination."²⁶ The opposing arbitrators sided with Mauritius on its claim that the Lancaster House Agreement was invalid because it violated the right to self-determination due to being imposed under duress. This position and the circumstances surrounding the Lancaster House Agreement will be analysed further under Section 3 of this article.²⁷

While maintaining this position, Mauritius argued that the Lancaster House Agreement constituted legally binding obligations if the agreement was

²² Exchange of notes constituting an agreement concerning the availability for defense purposes of the British Indian Ocean Territory (30 December 1966) 603 UNTS 273.

²³ 'British Indian Ocean Territory' (21 October 2022) <<https://www.cia.gov/the-world-factbook/countries/british-indian-ocean-territory/#people-and-society>> accessed 27 October 2022.

²⁴ Chagos MPA Award.

²⁵ *ibid* §§ 219-221, 230.

²⁶ Chagos MPA Award, Dissenting Opinion, § 70.

²⁷ *ibid* §§ 74-80.

considered to be valid.²⁸ The fact that the UK had retained and continued to administer the Chagos Archipelago including its subsequent practice in accordance with the Lancaster House Agreement was an affirmation by the UK to undertake the conditions of the detachment.²⁹ The UK, on the other hand, claimed that the Lancaster House Agreement was merely a political understanding that could not constitute a legally binding agreement under international law and the UK had never intended to be bound by it.³⁰

After examining the negotiations leading up to the Lancaster House Agreement, the Tribunal found that the UK had intended to be bound by the commitments made in exchange for detaching the Chagos Archipelago from Mauritius.³¹ Noting the UK's subsequent practice that reassured Mauritius of its commitments, the Tribunal stated that the UK could not dismiss the Lancaster House Agreement as a non-binding political understanding.³² The Tribunal examined whether the MPA breached any of the rights Mauritius enjoyed under UNCLOS and found that Mauritius's fishing rights were effectively "extinguished".³³ Based on the Lancaster House Agreement, the UK should have consulted with Mauritius before establishing the MPA, which the Tribunal found was not done properly in contrast to the consultations carried out with the US.³⁴ According to the Tribunal, the UK had violated its obligations under UNCLOS, namely Article 2(3)³⁵ to act in good faith and Article 56(2)³⁶ to give due regard to Mauritius's rights while establishing the MPA surrounding the Chagos Archipelago.³⁷ Therefore, the Tribunal concluded that the MPA was not in accordance with UNCLOS and that it was "open to the Parties to

²⁸ Chagos MPA Award, § 394.

²⁹ *ibid* §§ 394-397.

³⁰ *ibid* §§ 399-406.

³¹ *ibid* §§ 421-423.

³² *ibid* §§ 439, 448.

³³ *ibid* § 521.

³⁴ *ibid* §§ 522-534.

³⁵ "The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."

³⁶ "In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention."

³⁷ Chagos MPA Award, § 536.

enter into the negotiations that the Tribunal would have expected prior to the proclamation of the MPA".³⁸

The examination of the award was rather limited to a procedural approach. The Tribunal focused on the procedurally-flawed manner in which the MPA had been established.³⁹ While the award strengthens the claim that the UK will return the Chagos Archipelago to Mauritius once it is no longer necessary for defence purposes, it did not advance in any way Mauritius's primary claim of sovereignty.⁴⁰

III. ICJ ADVISORY OPINION

In February 2019, the ICJ issued an advisory opinion on the Chagos Archipelago.⁴¹ The ICJ stated that the detachment of the Chagos Archipelago violated rules of customary international law. The Advisory Opinion is particularly important as it provides a thorough evaluation of the right to self-determination as it expands on the development of self-determination under customary international law.

Supported by the Group of African States, Mauritius drafted a request for an advisory opinion that was adopted by the General Assembly.⁴² The ICJ was presented with two questions: (1) Was the decolonization of Mauritius completed lawfully with regards to the detachment of the Chagos Archipelago and in light of the General Assembly resolutions 1514(XV), 2066(XX), 2232(XXI), and 2357(XXII)? (2) Which consequences does the British administration of the archipelago entail, including the prevention of Mauritius nationals, especially those of Chagossian origins, from resettling?

Answering the questions laid before the ICJ was certainly not an easy task. It required consideration of several complex and disputed facts. The ICJ would also have to determine the timing of when the right to self-determination became customary international law. Interest in the dispute was great. Several

³⁸ *ibid* § 544.

³⁹ Johannes Hendrik Fahner, 'Déjà Vu in the Hague - the Relevance of the Chagos Arbitral Award to the Proceedings before the ICJ' *QIL* 55 (2018) 107, p. 110.

⁴⁰ Thomas Appleby, "The Chagos Marine Protected Area-A Battle of Four Losers?" *Journal of Environmental* 27/3 (2015) 529, p. 539.

⁴¹ ICJ Chagos Advisory Opinion.

⁴² UNGA A/RES71/292.

States filed written statements and comments and took part in the oral proceedings.

Mauritius claimed that the detachment of the Chagos Archipelago was contradictory to the right to self-determination and the principle of territorial integrity.⁴³ The basis of this claim was the argument that the right to self-determination was already established as part of customary international law prior to the detachment of the archipelago took place.⁴⁴ The Colonial Declaration stated

“2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(...)

4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.

(...)

6. 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.”

Mauritius interpreted paragraph 6 as “an obligation to respect the territorial integrity of the non-self-governing territory” and a prohibition “to undermine the process of self-determination by changing the boundaries of the territorial unit before its people had had a chance to express their wishes.”⁴⁵ However, the UK had in fact undermined this self-determination process by forcing Mauritius to “consent” to the detachment of the Chagos Archipelago in exchange for its independence. Mauritius cited a note that directed the British Prime Minister “to frighten him [the Premier of Mauritius] with hope: hope

⁴³ Oral Statements (3 September 2018) AM, CR 2018/20, ‘Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965’ p. 45 <<https://www.icj-cij.org/en/case/169/oral-proceedings>> accessed 11 October 2022.

⁴⁴ *ibid* p. 46.

⁴⁵ *ibid* p. 48.

that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago.”⁴⁶ In the meeting that took place the day after between the two, the British Prime Minister said that “[t]he 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.”⁴⁷ Moreover, an agreement with Mauritius was only sought to avoid international criticism.⁴⁸ It was under these circumstances that Mauritius had “consented” to the detachment of the Chagos Archipelago.

The UK argued that the right to self-determination had not been set in customary international law until years after the independence of Mauritius.⁴⁹ Although Mauritius based its claim on a General Assembly resolution, these resolutions were not legally binding and paragraph 6 of the Colonial Declaration did not reflect customary international law. There were divided views among States as to what paragraph 6 entailed.⁵⁰ While some perceived it as a justification for States to re-integrate decolonized territories based on pre-colonial ties, others understood it as a denial of a right to secession.⁵¹ Additionally, the UK claimed that the Chagos Archipelago was only a distant dependency attached to Mauritius due to administrative convenience and the two did not have a strong connection. Furthermore, the administration of a colony could be changed or attached to another centre based on convenience and needs, and this was not an unusual practice at the time.⁵²

⁴⁶ Written Statement of the Republic of Mauritius (1 March 2018) Annex 59, UK Colonial Office, Note for the Prime Minister’s Meeting with Sir Seewoosagur Ramgoolam, Premier of Mauritius, PREM 13/3320 (22 September 1965).

⁴⁷ *ibid* Annex 60, UK Foreign Office, Record of a Conversation between the Prime Minister and the Premier of Mauritius, Sir Seewoosagur Ramgoolam, at No 10, Downing Street, 10 AM on Thursday, September 23, 1965, FO 371/184528 (23 September 1965).

⁴⁸ *ibid* §§ 3.53-3.58.

⁴⁹ Written Comments of the United Kingdom (14 May 2018), ‘Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965’ §§ 4.18-4.50 <<https://www.icj-cij.org/en/case/169/written-proceedings>> accessed 11 October 2022.

⁵⁰ *ibid* § 4.35.

⁵¹ *ibid* §§ 4.36, 4.39.

⁵² Oral Statements (3 September 2018) AM, CR 2018/21, ‘Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965’ p. 10 <<https://www.icj-cij.org/en/case/169/oral-proceedings>> accessed 12 October 2022.

Before examining the factual circumstances and addressing the questions put forward by the General Assembly, the ICJ quickly established its jurisdiction and dismissed arguments on the appropriateness of giving an advisory opinion on this subject matter. The ICJ stated that it held the jurisdictional power to answer the questions laid before it in accordance with its Statute and the UN Charter.⁵³ It furthermore stated that there was sufficient information available before the Court and that there were no obstacles to giving an opinion.⁵⁴ With regard to the UK's objection that the issue at hand was a bilateral dispute and that it had not consented to a judicial settlement, the Court stated that the questions did not necessarily concern sovereignty. The issue at hand concerned decolonization, which inevitably contained considerations of sovereignty. Therefore, the Court was not circumventing the lack of consent on part of the UK, but merely occupying itself with a matter that has been a particular interest of the UN.⁵⁵

The ICJ limited itself to the evaluation of the right to self-determination in the context of decolonization.⁵⁶ Under the UN Charter, UN member States had the responsibility to see that the non-self-governing territories under their administration progress in development that would allow them to exercise their right to self-determination and according to the Court, the Colonial Declaration of 1960 was "a defining moment" in the State practice of decolonization.⁵⁷ Even though resolutions of the General Assembly were not legally binding, the Colonial Declaration reflected the right to self-determination as a customary norm and particularly paragraph 6 aimed to "prevent any dismemberment of non-self-governing territories".⁵⁸ This aim was reiterated in the following resolutions 2066(XX) of 16 December 1965 regarding the detachment of the Chagos Archipelago from Mauritius, 2232(XXI) of 20 December 1966, and 2357(XXII) of 19 December 1967 regarding non-self-governing terri-

⁵³ Statute of the International Court of Justice (adopted 26 July 1945, entered into force 24 October 1945) TS 993 (ICJ Statute) art 65; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945)1 UNTS XVI (UN Charter) art 96; ICJ Chagos Advisory Opinion, §§ 54-62.

⁵⁴ ICJ Chagos Advisory Opinion, §§ 63-91.

⁵⁵ Ibid §§ 88-91.

⁵⁶ Ibid § 144.

⁵⁷ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945)1 UNTS XVI (UN Charter) art 73; ICJ Chagos Advisory Opinion, §§ 146-150.

⁵⁸ ICJ Chagos Advisory Opinion, §§ 152-154.

tories in general.⁵⁹ The exercise of the right to self-determination must always be based on “the free and genuine will of the people” regardless of in which manner it was expressed.⁶⁰

Based on this background, the Court first dismissed the UK’s argument that the Chagos Archipelago was not an integral part of Mauritius. Mauritius, including the archipelago, was transferred to the UK with the 1814 Treaty of Paris and had been administered by the UK without interruption until 1965.⁶¹ Due to Mauritius’s status as a colony under the authority of the UK, and considering the circumstances of how the Lancaster House Agreement was reached, the Court did not find Mauritius’s consent to the detachment of the Chagos Archipelago to be free and genuine.⁶² Since Mauritius was not able to exercise its right to self-determination freely and genuinely, the Court found the detachment of the Chagos Archipelago unlawful and that the decolonization process of Mauritius had not been completed lawfully.⁶³

Moving on to the second question on the consequences of this outcome, the Court stated that the UK must stop its administration of the Chagos Archipelago, which constituted a “continuous wrongful act”, and let Mauritius exercise its right to self-determination properly. Classifying the right to self-determination as an obligation *erga omnes*, the Court reminded all States of their duty to cooperate with the UN in ensuring the completion of Mauritius’s decolonization process.⁶⁴

The ICJ gave its opinion 13 votes to 1. The one dissenting opinion belonged to Judge Donoghue, who thought the Court ought to use its discretion not to render an advisory opinion due to the lack of consent to adjudication on part of the UK.⁶⁵ Judge Donoghue said that although the circumstances of the detachment and the treatment of the Chagossians “[cried] out for an authoritative judicial pronouncement”,⁶⁶ the central question was a bilateral dispute

⁵⁹ *ibid* §§ 163-166.

⁶⁰ *ibid* § 157.

⁶¹ *ibid* § 170.

⁶² *ibid* § 172.

⁶³ *ibid* § 174.

⁶⁴ *ibid* §§ 178-182.

⁶⁵ *Dissenting Opinion of Judge Donoghue, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion* [2019] ICJ Reports 261 § 1 (ICJ Chagos Advisory Opinion, Judge Donoghue Dissenting Opinion).

⁶⁶ *ibid* § 3.

over sovereignty. In its declaration recognizing the Court's jurisdiction, the UK excluded "any dispute with the government of any other country which is or has been a Member of the Commonwealth".⁶⁷ Furthermore, the UK had been consistently repeating its denial to submit the dispute over the Chagos Archipelago to adjudication.⁶⁸ According to Judge Donoghue, rendering an advisory opinion under these circumstances would mean circumventing the limits of the ICJ's jurisdiction.

However, the ICJ took a broad approach and took advantage of the formulation of the questions presented before it.⁶⁹ Although the questions before the ICJ stem from a bilateral dispute between the UK and a former Commonwealth Member Mauritius on territorial sovereignty over the Chagos Archipelago, it concerns the procedure of decolonization. Decolonization, the right to self-determination, and territorial sovereignty are inextricably linked to each other. The non-consent of the UK does not hinder the Court from answering a legal question⁷⁰ regarding the status of the right to self-determination and whether this right was rightfully exercised in 1965 especially if this is in relation to decolonization, which has been a highly important subject to the General Assembly and the UN.⁷¹

Another criticism of the ICJ's examination of when the right to self-determination became part of customary international law in relation to decolonization is that it is not well-substantiated.⁷² According to Article 38(1)(b) of the ICJ Statute, the Court "shall apply (...) international custom, as evidence of a general practice accepted as law". The determination of the existence of a customary rule depends on "a very widespread and represen-

⁶⁷ The United Kingdom, 'Declarations Recognizing the Jurisdiction of the Court as Compulsory (22 February 2017)' <<https://www.icj-cij.org/en/declarations/gb>> accessed 17 October 2022.

⁶⁸ Written Statement of the United Kingdom (15 February 2018), 'Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965' § 5.19 <<https://www.icj-cij.org/en/case/169>> accessed 17 October 2022.

⁶⁹ This approach was foreseen by Fahner (2018), p. 112.

⁷⁰ ICJ Statute art 65.

⁷¹ Eden Hb Chua, "Incomplete Decolonisation without Self-Determination: The Case of the Separation of the Chagos Archipelago" *Sri Lanka Journal of International Law* 27 (2019), pp. 10-11.

⁷² Jake Christophersen, "General Assembly Resolutions in the Determination of Customary International Law: The ICJ's Advisory Opinion in Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965" *Bristol Law Review* 6 (2019) 2.

tative” practice that is based on the belief that “this practice is rendered obligatory by the existence of a rule of law requiring it.”⁷³ While decolonization has certainly gained momentum in the 60s, whether this fact is evidence of a widespread and representative practice based on *opinio juris sive necessitatis* would require further examination. The ICJ based its evaluation mostly on the Colonial Declaration, which is a non-binding General Assembly resolution, from which 9 States, including the UK, had abstained from voting. Additionally, the Court did not evaluate the practice of relevant States, meaning States that were most affected or involved in the decolonization process, such as the UK. In the North Sea Continental Shelf Case, the Court required the widespread and representative practice to include “States whose interests were specially affected.”⁷⁴ The UK had continuously voiced its objection to the recognition of the right to self-determination in relation to decolonization.⁷⁵ The Court, unfortunately, did not factor these considerations into its evaluation. Regardless of whether it would reach the same conclusion, the ICJ should have at least addressed the UK’s objections in the 50s and 60s regarding the right to self-determination.

On the other hand, one must also consider why the UK abstained from voting and how that relates to the Chagos Archipelago. The UK had claimed that the resolution was not discussed thoroughly and that an immediate declaration of independence without preparing its colonies would be detrimental to the well-being of those colonies and contrary to the aim of the right to self-determination. While these reasons might be comprehensible at first sight, it also shows that the UK’s objection was not against the existence of the right to self-determination itself but rather against the procedure - or lack thereof - of how this right would be exercised. However, Paragraph 5 of the resolution had already foreseen a preparatory period before independence.⁷⁶ Many in the General Assembly were suspicious that the UK had ot-

⁷³ *North Sea Continental Shelf, Judgment* ICJ Reports 1969 §§ 73-77.

⁷⁴ *ibid* § 73.

⁷⁵ Written Statement of the United Kingdom (15 February 2018) (n 68) §§ 8.71-8.75.

⁷⁶ “Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.” UNGA A/RES/1514(XV) § 5.

her motives than only the fear of a premature declaration of independence.⁷⁷ Indeed, documents reveal that the detachment of the Chagos Archipelago was merely motivated by the UK's self-interest with a near-complete disregard for the Chagossians' and Mauritius's wishes. The UK was indeed worried about being "accused of creating a new colony in a period of decolonisation and of establishing new military bases when [it] should [have been] getting out of the old ones."⁷⁸ The right to self-determination in the context of decolonization assumes within itself that the right is exercised on the colonial territory base.⁷⁹ Therefore, dividing a colonial territory on the eve of achieving independence is a violation of the right to self-determination. The Chagos Archipelago was a lesser dependency of Mauritius and was included within the colonial territory. The UK, together with the US, has planned to detach the Chagos Archipelago to intentionally exempt it from the inevitable independence of Mauritius. Notes to the British Prime Minister to ultimately pressure Mauritius to "give up" the archipelago in exchange for freedom and the communication between the Colonial Secretary and the British Prime Minister on how and when to present the matter to the General Assembly in order to soften the foreseeable criticism supports suspicions of other motives. In face of the inevitable independence of Mauritius,⁸⁰ the UK did not want to risk losing a strategically critical island in the middle of the Indian Ocean.

Criticisms aside, the ICJ's advisory opinion is highly important. The ICJ could have chosen to formulate its answer in more general terms, but it chose to go further than only identifying the applicable law and instructed the UK in no uncertain terms to end its unlawful administration of the Chagos Archipelago.⁸¹ Upon ICJ's advisory opinion, the General Assembly passed a resolution on 22 May 2019 demanding the UK to withdraw from the

⁷⁷ Wayne Morse, *The United States in the United Nations 1960 - A Turning Point. Supplementary Report to the Committee on Foreign Relations*, US Government Printing Office, 1961, pp. 21-24.

⁷⁸ Written Statement of the Republic of Mauritius (1 March 2018) Annex 70, UK Foreign Office, Minute from Secretary of State for the Colonies to the Prime Minister, FO 371/184529 (5 November 1965) § 6.

⁷⁹ Stephen Allen, *The Chagos Islanders and International Law*, Hart Publishing, 2004, p. 200.

⁸⁰ Adom Getachew, *Worldmaking after Empire. The Rise and Fall of Self-Determination*, Princeton University Press, 2019, p. 14.

⁸¹ ICJ Chagos Advisory Opinion, § 183(4).

Chagos Islands within 6 months.⁸² However, the UK did not abide stating that neither the advisory opinion nor the resolution had any binding effect.

IV. ITLOS JUDGEMENT ON PRELIMINARY OBJECTIONS

On 28 January 2021, the ITLOS Special Chamber gave a judgment on preliminary objections in a case between Mauritius and the Maldives regarding the delimitation of maritime boundaries.⁸³ In 2019, Mauritius initiated arbitral proceedings against the Maldives in accordance with Annex VII UNCLOS based on the Chagos Arbitral award, the ICJ Advisory Opinion, and the General Assembly resolution 73/295. Mauritius asked the Tribunal “to delimit, in accordance with the principles and rules set forth in UNCLOS, the maritime boundary between Mauritius and Maldives” and “to declare that Maldives has violated its obligation to (...) make every effort to enter into provisional arrangements” with Mauritius to negotiate the boundaries.⁸⁴

Only if Mauritius is a coastal state with regards to the Chagos Archipelago within the meaning of Article 56 UNCLOS would there be overlapping maritime entitlements between Mauritius and the Maldives and a question of maritime boundary delimitation would raise. Therefore, whether Mauritius is sovereign over the Chagos Archipelago was the essential matter.

The Maldives raised 5 preliminary objections to the proceeding brought by Mauritius. (i) The Maldives raised the issue of jurisdiction and claimed that the Special Chamber did not have jurisdiction *ratione personae* since the UK, which was an indispensable party to the proceedings, was absent.⁸⁵ ITLOS had acknowledged the ICJ’s Monetary Gold Principle, meaning that the Court could not exercise jurisdiction when the subject matter concerned the legal interests of a third State that neither party to the proceedings nor had it given its con-

⁸² UNGA A/RES/73/295.

⁸³ ITLOS Mauritius/Maldives Preliminary Objection.

⁸⁴ *ibid* § 112.

⁸⁵ Preliminary Objections of the Republic of Maldives (18 December 2019), ‘NO Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Preliminary Objections’ §§ 45ff <<https://www.itlos.org/en/main/cases/list-of-cases/dispute-concerning-delimitation-of-the-maritime-boundary-between-mauritius-and-maldives-in-the-indian-ocean-mauritius/maldives-2/>> accessed 19 October 2022.

sent.⁸⁶ (ii) Furthermore, the Maldives argued that the Special Chamber did not have jurisdiction *ratione materiae* either. Article 288(1) UNCLOS limited the Chamber's jurisdiction to "any dispute concerning the interpretation or application" of UNCLOS and a sovereignty dispute did not fall under this description.⁸⁷ (iii) Apart from jurisdictional issues, procedural preconditions set under Articles 74 and 83 UNCLOS were not fulfilled. States should resort to ITLOS only after they have tried to resolve their dispute by negotiating in good faith.⁸⁸ Due to the ongoing sovereignty dispute between the UK and Mauritius, it was not possible to hold negotiations in good faith.⁸⁹ (iv) And since the preliminary issue of sovereignty over the Chagos Archipelago had not been resolved, there could be no dispute between Mauritius and the Maldives. Even if Mauritius was sovereign over the Chagos Archipelago, there was no dispute with the Maldives regarding maritime boundaries prior to the initiation of these proceedings further weakening the Chamber's jurisdiction *ratione materiae*.⁹⁰ (v) Finally, the Maldives claimed that Mauritius's claims constituted an abuse of process and that the case should be declared inadmissible. While dismissal based on abuse of process was saved only to "the most blatant cases of abuse or harassment",⁹¹ the circumstances under which the present proceeding was initiated qualified for dismissal since Mauritius was using maritime boundary claims against the Maldives as a way to resolve the dispute over territorial sovereignty with the UK.⁹²

Finding the first and second objections inextricably linked to the legal status of the Chagos Archipelago, the Special Chamber first analysed what the legal status was in light of the Chagos Arbitral Award, ICJ Advisory Opinion, and the General Assembly resolution 73/295. According to the Special Chamber, the Arbitral Tribunal's evaluation of the UK's obligations under the Lancaster House Agreement did not mean that the UK was recognized as a coastal Sta-

⁸⁶ *ibid* §§ 47-58; *Monetary Gold Removed from Rome in 1943 (Preliminary Question)* Judgment of 15 June 1954, ICJ Reports 1954, p. 19.

⁸⁷ Preliminary Objections of the Republic of Maldives (18 December 2019) §§ 60-62.

⁸⁸ *ibid* §§ 63-68.

⁸⁹ *ibid* §§ 69-72.

⁹⁰ *ibid* §§ 73-94.

⁹¹ *The South China Sea Arbitration (The Republic of Philippines v the People's Republic of China)* Award on Jurisdiction and Admissibility, 29 October 2015 § 128.

⁹² Preliminary Objections of the Republic of Maldives (18 December 2019) §§ 95-106.

te.⁹³ Since the Arbitral Tribunal had expressly stated that the sovereignty dispute was not under its jurisdiction and had limited itself to contractual obligations, there was no *res judicata* effect preventing the Special Chamber from evaluating the subject matter. According to the Chamber, the legal status regarding the Chagos Archipelago was clarified by the ICJ's advisory opinion and the subsequent resolution of the General Assembly, which was entrusted to take appropriate steps in resolving issues of improper decolonization.⁹⁴ Though not legally binding, "an advisory opinion entails an *authoritative* statement of international law on the questions with which it deals."⁹⁵ The ICJ's assessment of the legality of Mauritius's decolonization process had "unmistakable implications" on the UK's sovereignty claim over the Chagos Archipelago, as the two concepts were inseparably related.⁹⁶ The Special Chamber found the UK's failure to end its continuous wrongful act, namely its administration over the Chagos Archipelago, was "contrary to the *authoritative* determinations made in the advisory opinion."⁹⁷

After establishing the legal status of the Chagos Archipelago, the Special Chamber rejected the argument that the UK was an indispensable party to the proceedings. As a State wrongfully continuing its administration over the Chagos Archipelago, it was "inconceivable" that the UK could have any legal interests.⁹⁸ Furthermore, the Special Chamber stated that Mauritius was the coastal State within the meaning of Articles 74(1) and 83(1) UNCLOS and party to a dispute regarding the delimitation of maritime boundaries.⁹⁹ With regards to the third objection about the failure to fulfil the negotiation precondition under Articles 74 and 83 before resorting to dispute settlement procedures, the Special Chamber found that Mauritius had tried on several occasions to discuss delimitation with the Maldives to no avail.¹⁰⁰ Both States had made overlapping claims of exclusive economic zones and since Mauritius was the coastal State, the Maldives' argument that there was not and could not be a dispute

⁹³ ITLOS Mauritius/Maldives Preliminary Objections, § 138.

⁹⁴ Ibid § 227.

⁹⁵ Ibid § 202 (emphasis added).

⁹⁶ Ibid §§ 173, 191.

⁹⁷ Ibid § 246 (emphasis added).

⁹⁸ Ibid § 247.

⁹⁹ Ibid §§ 250-251.

¹⁰⁰ Ibid §§ 288-292.

between the two was unacceptable.¹⁰¹ Based on all these findings, the Maldives' final claim that the proceedings brought by Mauritius constituted an abuse of process was rejected as well.¹⁰² The Special Chamber unanimously dismissed the first, fourth, and fifth objections, while there was one dissenting vote with regard to the second and third objections.¹⁰³

In his dissenting opinion, Judge ad hoc Oxman stated that "questions regarding the right to self-determination and decolonization (...) are beyond the scope of the substantive and dispute-settlement obligations accepted by the State Parties in consenting to be bound by the Convention".¹⁰⁴ Neither advisory opinions nor General Assembly resolutions are legally binding. In the dispute concerning coastal state rights in the Black Sea between Ukraine and Russia, the arbitral tribunal had rejected to consider the General Assembly resolution on the territorial integrity of Ukraine, and there were no reasons why the Special Chamber should treat the legal effect of a resolution or advisory opinion any different.¹⁰⁵ Furthermore, the "reasonable time period" to negotiate an agreement for maritime boundary delimitation referred to in Articles 74(2) and 83(2) had not passed since the Maldives wished to stay impartial in the dispute between Mauritius and the UK, which was a position that should have been respected in the view of Judge Oxman.¹⁰⁶

The Special Chamber has used a clear language in dismissing the preliminary objections raised by the Maldives. The most important aspect of the judgment is perhaps the Special Chamber's conclusion that the UK was not an indispensable party. The Special Chamber built up to this conclusion by examining the Chagos Arbitral Award, the ICJ Advisory Opinion, and the General Assembly resolution 73/295. Based on the close relationship between sover-

¹⁰¹ *ibid* §§ 332-336.

¹⁰² *ibid* §§ 345-350.

¹⁰³ *ibid* § 354.

¹⁰⁴ *Separate and Dissenting Opinion of Judge ad hoc Oxman, Dispute concerning Delimitation of the Marine Boundaries between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) Preliminary Objection*, Judgement of 28 January 2021, ITLOS No 28 §33 (ITLOS Mauritius/Maldives Preliminary Objections, Dissenting Opinion).

¹⁰⁵ UNGA A/RES/68/262; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v the Russian Federation)* Award of 21 February 2020, PCA Case No 2017-06 §§ 172-178 (UNCLOS Arbitral Tribunal Award Ukraine/Russia); ITLOS Mauritius/Maldives Preliminary Objections, Dissenting Opinion §§ 27-29.

¹⁰⁶ ITLOS Mauritius/Maldives Preliminary Objections, Dissenting Opinion §§ 36, 38.

ignty and decolonization and the circumstances under which the Lancaster House Agreement was negotiated, the Special Chamber demoted the bilateral dispute over the Chagos Archipelago between Mauritius and the UK to the latter's "mere assertion".¹⁰⁷ Despite their non-binding nature, the importance laid on the advisory opinion and the General Assembly resolution left no difference in their level of impact. In doing so, the Special Chamber, just like the ICJ, emphasized the special importance of the decolonisation topic in the UN and its General Assembly. As Judge Oxman has pointed out the change in the assessment of General Assembly resolutions, the Coastal State Rights Award also concerned a highly important topic to the General Assembly. Russia's unlawful annexation and continuous occupation of Crimea constitute a violation of territorial integrity and threaten the very core of the UN, which is "based on the principle of sovereign equality of all its Members" and which prohibits "the threat or use of force against the territorial integrity or political independence of any state."¹⁰⁸ Was the principle of territorial integrity and prohibition on the use of force less "special" to the General Assembly than decolonization?

In the Coastal State Rights Award, the Arbitral Tribunal had refrained from treating the General Assembly resolution as "correct" since doing so would ipso facto mean recognising Crimea as Ukrainian territory, which was outside its jurisdiction.¹⁰⁹ The Arbitral Tribunal had also noted that many States had abstained or voted against the relevant General Assembly resolution.¹¹⁰ There is not a major gap in the voting trends between the resolution on the territorial integrity of Ukraine (100 yes, 11 no, 58 abstentions) and the resolution 73/295 (116 yes, 6 no, 56 abstentions).¹¹¹ The Special Chamber should have provided a stronger basis for its divergence from the approach in the Coastal State Rights Award and the weight it attached to the ICJ advisory opinion and General Assembly resolution instead of identifying the sole reason as decolonisation.

¹⁰⁷ ITLOS Mauritius/Maldives Preliminary Objections § 243.

¹⁰⁸ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 1(1), 1(4).

¹⁰⁹ UNCLOS Arbitral Tribunal Award Ukraine/Russia § 176.

¹¹⁰ *ibid* § 175.

¹¹¹ UNGA A/RES/68/262; UNGA A/RES/73/295, voting information gathered from <<https://digitallibrary.un.org/?ln=en>> accessed 26 October 2022.

With regard to the third objection on the precondition of negotiation, one must agree with Judge Oxman that a reasonable time period has not passed. The ICJ gave its advisory opinion on 25 February 2019 and the General Assembly adopted its resolution 73/295 on 22 May 2019. After the advisory opinion, Mauritius's only attempt to negotiate the maritime boundary delimitation was a diplomatic note dated 7 March 2019 sent to the Permanent Mission of the Maldives to the UN, to which the Maldives did not respond.¹¹² On 18 June 2019, Mauritius submitted its notification of instituting arbitral proceedings against the Maldives. Whether the time period between Mauritius's diplomatic note and initiation of the proceeding of almost 3 and a half months is sufficiently "reasonable" to conclude that negotiation attempts have been unsuccessful so as to resort to dispute settlement is questionable.

CONCLUSION

The most important outcome of the Chagos proceedings is the re-evaluation of the right to self-determination and its relationship with territorial sovereignty with regard to decolonisation. According to the ICJ, the Colonial Declaration of 1960 reflected the right to self-determination as a customary norm, which created an obligation *erga omnes*. The ITLOS Special Chamber has also agreed with this approach by taking the advisory opinion as a statement of fact and allocated Mauritius rights as the coastal state. The Chagos proceedings that involved the ICJ, the General Assembly, and ITLOS have been a striking example of institutional determination (violation of Mauritius's right to self-determination with regard to the Chagos Archipelago) and consolidation (strengthening Mauritius's sovereignty claim over the Chagos Archipelago by identifying it as the coastal state).

While institutional cooperation in favour of the right to self-determination is admirable, the approach of both the ICJ and the Special Chamber effectively expands jurisdiction over a territorial sovereignty dispute. Especially the binding Special Chamber judgment is concerning in this regard since the expansion of jurisdiction might cause States to be wary of international organizations.¹¹³ It could be argued that this would not be the case since the situation of the Chagos Archipelago is unique and both the advisory opinion and the judg-

¹¹² ITLOS Mauritius/Maldives Preliminary Objections § 73.

¹¹³ ICJ Chagos Advisory Opinion, Judge Donoghue Dissenting Opinion § 23.

ment were anchored in the process of decolonisation. Although another dispute with a similar set of circumstances is unlikely to arise, challenging jurisdictional boundaries set by international treaties might undermine the integrity of the institutions established by said treaties. Furthermore, the weight given to an advisory opinion and a General Assembly resolution extends beyond these instruments' *non-binding* nature. In their respective reasoning, the ICJ has put substantial emphasis on General Assembly resolutions and the Special Chamber has done the same with regard to the ICJ advisory opinion. While this approach certainly challenges the understanding of "non-binding",¹¹⁴ it has the risk of weakening the effect of these judicial decisions.

The Special Chamber's ruling on preliminary objections has been considered a "punishment" to the UK for not complying with the advisory opinion and the General Assembly resolution.¹¹⁵ The UK maintains its sovereignty claim over the Chagos Archipelago.¹¹⁶ For Mauritius, the Special Chamber decision is a judicial victory and recognition of its sovereignty over the Chagos Archipelago. Mauritius has extended the US an offer to lease Diego Garcia for its continued use as a military base in 2020. However, the US supports the UK as their partnership is highly valuable.¹¹⁷ The faith of the Chagos Archipelago and Chagossians' right to return remains unknown. What will happen next strongly depends on international politics with many players involved.

¹¹⁴ Nilüfer Oral - Massimo Lando, 'International Procedure between Past and Future - Procedural Developments in Law of the Sea Dispute Settlement in 2021' *The Law & Practice of International Courts and Tribunals* 27(1) (2022) 198, p. 209.

¹¹⁵ Andrew Harding, 'UN Court Rules UK Has No Sovereignty over Chagos Islands' *BBC* (28 January 2021) <<https://www.bbc.com/news/world-africa-55848126>> accessed 27 October 2022.

¹¹⁶ Patrick Wintour, 'UN Court Rejects UK Claim to Chagos Islands in Favour of Mauritius' *The Guardian* (28 January 2021) <<https://www.theguardian.com/world/2021/jan/28/un-court-rejects-uk-claim-to-chagos-islands-in-favour-of-mauritius>> accessed 27 October 2022.

¹¹⁷ Karen DeYoung, 'Tiny Mauritius Learns the Limits of Biden's Invocation of the International "Rules-Based Order"' *The Washington Post* (8 August 2021) <https://www.washingtonpost.com/national-security/biden-diego-garcia-mauritius/2021/08/08/38977c3a-f497-11eb-a49b-d96f2dac0942_story.html> accessed 27 October 2022.

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