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Revisiting the Matthew and Hunter Islands Dispute in Light of the Recent Chagos Advisory Opinion and Some Other Relevant Cases: An Evaluation of Vanuatu's Claims relating to the Right to Self-determination, Territorial Integrity, Unlawful Occupation and State Responsibility under International Law

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Abstract:
This paper examines the legal implications of the Chagos Advisory Opinion and some other relevant cases on the Matthew and Hunter Islands dispute. In doing so, the piece attempts to evaluate Vanuatu's claims relating to the right to self-determination of the people of New Hebrides (Ni-Vans since 1980), the territorial integrity of New Hebrides/Vanuatu and the alleged unlawful occupation of the Matthew and Hunter Islands by France. First, the paper submits that by transferring the administration of these islands to New Caledonia in 1976 France may have violated the territorial integrity of Vanuatu and the right to self-determination of its people. The paper then considers the competing claims of sovereignty over these Islands and argues that the right to self-determination is likely to prevail over France's claims of, *inter alia*, *effectivités*. The paper submits therefore that France may be under an obligation to cease its unlawful occupation of these Islands.

Keywords: Right to self-determination; Territorial integrity; *Effectivités*; Wrongful act; State responsibility; Matthew and Hunter

1 Introduction

The Matthew and Hunter Islands (MHIs), two volcanic islands located about 300 km east of New Caledonia and southeast of Vanuatu, are subject to sovereignty claims from both Vanuatu and France.[1] The MHIs were part of the former British-French Condominium of New Hebrides which gained independence and became Vanuatu in 1980.[2] However, in 1976, during the process of the decolonization of the New Hebrides, and four years before the latter became independent, France transferred the administration of the MHIs to New Caledonia, rather than maintaining them as part of the Condominium. The Vanuatu government objected to the French take on the MHIs upon its independence in 1980.

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[1] For more on the Matthew and Hunter Islands, see Song and Mosses (2018), p. 768.
[2] Stanley (1989), p. 632; Stanley (2004), p. 933; *Vanuatu Daily Post*, 11 March 2013, at http://www.pireport.org/articles/2013/03/12/vanuatu%C3%A2%C2%80%C2%99s-custom-claim-matthew-and-hunter-islands.

This seeks to examine the MHIs dispute in light of, primarily, the Advisory Opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (the Chagos Advisory Opinion),[3] and some other relevant and/or similar cases.

Firstly, the paper argues that France's act of transferring the sovereignty of the MHIs to New Caledonia in 1976 may have violated the right to self-determination of the people of New Hebrides (Vanuatu since 1980) and the principle of the territorial integrity of New Hebrides/Vanuatu. The paper contends that the right to self-determination, as shown in the Chagos Advisory Opinion and *Western Sahara* case,[4] was already crystallized as a rule of customary international law in the 1960s. It is argued that the right to self-determination of all peoples and the principle of territorial integrity of colonised territories which were affirmed in the Chagos Advisory Opinion and also in two previous ICJ advisory opinions[5] will likely be determining factors in Vanuatu's claims of sovereignty over the MHIs.

The paper then examines the competing sovereignty claims over the MHIs and argues that although France's claims based on effective occupation are likely to override Vanuatu's claims related, among other things, to custom, culture and traditions, the right to self-determination, as a rule of customary international law, will likely prevail, in accordance with the cases examined, over the rule of *effectivités* (or the effective occupation of the MHIs by France). The paper also analyses the right to self-determination and the claims related to the principle of *uti possidetis* and argues that this principle may apply to the detriment of France's position regarding sovereignty over the MHIs. It is worth noting that although the issue of sovereignty was not discussed in the Chagos Advisory Opinion, its relevance in this paper lies in the question of whether or not France's alleged unlawful act (a violation of the right to self-determination and the principle of territorial integrity) can be legally justified under international law (in particular through French claims of sovereignty over the MHIs).

Finally, in accordance with the ruling of the Court in the Chagos Advisory Opinion, the paper argues that if it is proven that France violated the territorial integrity of New Hebrides/Vanuatu and the right to self-determination of its people, it would likely be under an obligation to cease, as soon as possible, its occupation and administration of the MHIs. The piece then analyses the practicalities of what it means for France to cease, if required, its unlawful occupation of the MHIs.

2 The MHIs: Factual Context of Excision and Occupation by France

The New Hebrides, an island group in the South Pacific, to which MHIs were connected, were discovered by Europeans in 1606 and in 1906 the United Kingdom and France agreed to jointly administer them. In 1914 the two colonial powers signed a Protocol officially establishing the Anglo-French Condominium over the New Hebrides.[6] The MHIs were not specifically named in the aforementioned Protocol. In 1929 France annexed the MHI and attached them to New

[3] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Mauritius v. United Kingdom)*, Advisory Opinion, 25 February 2019, at http://www.icj-cij.org (Chagos Advisory Opinion).
[4] *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports 1975, p. 12.
[5] *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, p. 16; *Western Sahara* case, *supra* n. 4.
[6] The protocol respecting the New Hebrides signed at London on 6 August 1914, by representatives of the British and French governments.

Caledonia, one of its South Pacific territories. In 1965 the United Kingdom occupied the two islands which were attached to the Condominium of New Hebrides. In 1976, during the process of the decolonization of the New Hebrides, and four years before the New Hebrides became independent, France transferred the administration of the MHIs to New Caledonia. However, it is important to note that during all of these different periods, the MHIs were administered from Port Vila (New Hebrides/Vanuatu) and not from Nouméa (New Caledonia) nor from Paris (France) or London (the United Kingdom).[7]

On the day of its independence in 1980, Vanuatu's government rejected the French take on the MHIs and has, since then, claimed the sovereignty of these two islands arguing that they formed part of the Southern Province of Vanuatu. Attempts by Vanuatu since 1980 to plant its flag on the islands were prevented by France whose powerful navy patrol the area. France regularly conducts sovereignty and scientific marine research missions on and around the islands. France has also maintained over the years an unmanned weather station on the islands. The islands themselves would not seem to represent much in the form of resources. However, securing rights to the territorial waters around them could offer significant potential wealth in marine resources, rare earth minerals and oil deposits.[8]

The MHIs are uninhabited and have never had a permanent population. The natural conditions on the islands are not conducive to human habitation and economic life.[9] The islands consist mainly of rocks. However, records indicated that in the past the New Hebrideans/Ni-Vans, in particular the people of the Southern parts of Vanuatu, would often travel to these islands by canoes for fishing and sacrificial purposes.[10]

In July 2009, New Caledonia's FLNKS, a pro-independence political group which represents the Kanaks and which is a member of the Melanesian Spearhead Group (MSG),[11] signed the Kéamu Declaration stating that the MHIs traditionally belong to Vanuatu, having secured the agreement of New Caledonia's Customary Senate.[12]

In 2005 and 2014, Vanuatu threatened to take the dispute over the MHIs to the United Nations.[13] In August 2017, Vanuatu complained that a New Zealand research ship asked New Caledonia, not Vanuatu, for permission to conduct marine research near the MHIs.[14]

Currently the two countries, Vanuatu and France, are undergoing a second round of negotiations in an attempt to resolve the dispute in a friendly manner. The first round of negotiations took place in February 2018.[15] The outcomes of this first round of negotiations were not disclosed. Recently, on 15 March 2019, Vanuatu's leader of the opposition has called on the government of Vanuatu to declare France's Chargé d'Affaires a *persona non-grata* after it was

[7] Stanley (1989), p. 632; Stanley (2004), p. 933; *Vanuatu Daily Post*, *supra* n. 2.
[8] *Radio New Zealand Pacific*, 27 March 2017, at https://www.rnz.co.nz/international/pacific-news/327567/signs-of-movement-in-vanuatu's-boundary-dispute-with-france; Prescott (2014), p. 292.
[9] Song and Mosses (2018), p. 768.
[10] Stanley (1989), p. 632; Stanley (2004), p. 933; *Vanuatu Daily Post*, *supra* n. 2.
[11] MSG is an intergovernmental organization composed of Melanesian states (Fiji, Papua New Guinea, Solomon Islands) and the Kanak and Socialist National Liberation Front of New Caledonia.
[12] *Flash d'Océanie*, 30 November 2010, at https://www.tahiti-infos.com/Les-iles-Matthew-et-Hunter-n-en-finissent-pas-d-empoisonner-les-relations-franco-vanuatuanes_a13518.html; Fisher (2013), p. 146.
[13] Fisher (2013), p. 146; *Vanuatu Daily Post*, 8 May 2014, at https://dailypost.vu/news/prime-minister-adamant-on-sovereignty-over-matthew-and-hunter/article_acbd76ea-0dde-5b7d-b5fb-c5602edfc357.html.
[14] *Radio New Zealand Pacific*, 5 August 2017, at https://www.rnz.co.nz/international/pacific-news/336520/nz-research-ship-flares-vanuatu-france-border-dispute.
[15] *Vanuatu Daily Post*, 15 February 2018, at https://dailypost.vu/news/matthew-and-hunter-negotiations-advance/article_05919a6a-c6d8-527b-b7f9-b8fe6366716d.html.

revealed that a French Navy vessel visited the MHIs in January 2019 and that its crew members painted a French flag on a rock.[16] The Vanuatu government has rejected the call for the expulsion of French diplomats contending that such an expulsion will delay the ongoing negotiations,[17] but has condemned France's action arguing that it disrespects the sovereignty of Vanuatu.[18]

3 The Relevant and/or Similar Cases on the Right to Self-determination, Territorial Integrity and Occupation

The *Chagos* case and a handful of disputes/cases have been identified as being relevant for discussion in this paper either because they present similar facts with the MHIs dispute with regard to the separation of parts of the colonised territory and that a number of UN General Assembly resolutions were issued to state the position of the United Nations and the status of international law on the disputes in question, or because they concerned *inter alia* the right to self-determination of peoples.

3.1 The Chagos Advisory Opinion

The Chagos Archipelago was treated as an integral part of Mauritius without interruption during the entire colonial period. It was connected to and administered in law as part of Mauritius until it was detached by the United Kingdom in 1965.[19] Mauritius repeatedly asserted that the detachment of the Chagos Archipelago and the removal of the Chagossians by the British and US governments during the 1960s and the early 1970s to transform the islands into a military base constitute a violation of international law and a number of UN resolutions.[20] The United Kingdom has argued that it has no doubt about its sovereignty over the Chagos Archipelago considering that the detachment of the islands from Mauritius was agreed by the two parties in 1965 through the Lancaster House Agreement.[21]

On 22 June 2017, the United Nations General Assembly adopted Resolution 71/292 requesting the ICJ to render an Advisory Opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. More specifically the UN General Assembly requested the ICJ to provide a legal opinion on the following questions:

[16] See *Loop Pacific*, 18 March 2019, at www.loopvanuatu.com/vanuatu-news/vanuatu-opposition-calls-expulsion-french-diplomats-over-disputed-islands-83114.
[17] *Vanuatu Daily Post*, 16 March, 2019, at https://dailypost.vu/news/call-to-expel-french-diplomat-rejected/article_e03dd150-0c10-538c-bb17-604d4872449b.html.
[18] *Radio New Zealand International*, 26 March 2019, at https://www.rnz.co.nz/international/pacific-news/385606/vanuatu-pm-hits-out-at-france-over-matthew-and-hunter-dispute.
[19] See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion) (Mauritius v. United Kingdom)*, Written Statement of the Republic of Mauritius, 1 March 2018, p. 23.
[20] GA Res. 2232 (XXI), adopted 20 December 1966; GA Res. 2357 (XXII), adopted 19 December 1967. These resolutions condemned the disruption of territorial integrity in a number of territories including Mauritius.
[21] United Kingdom, *Record of a Meeting Held in Lancaster House at 2:30 p.m. on Thursday 23rd of September: Mauritius Defence Matters*, CO 1036/1253, 23 September 1965, cited in Written Statement of the Republic of Mauritius, *supra* n. 19, p. 98.

> (a) Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?; (b) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?

From 3 to 6 September 2018, the ICJ held public hearings on this matter at the Peace Palace in The Hague. More than twenty states including the Republic of Vanuatu were invited to participate in the oral proceedings before the Court. In its oral statement before the Court, Vanuatu argued, essentially, that the right to self-determination was already a rule of customary international law by 1965 as it was crystallized in Resolution 1514 in 1960.[22] Therefore, all states including the United Kingdom were bound by it. Furthermore, Vanuatu argued that Resolution 1514 also protects the territorial integrity of colonial territories. It contended that the only exception to the principle of territorial integrity will be where the people of the colonial territory freely and genuinely consent.

On 25 February 2019, the ICJ delivered its Advisory Opinion on the above two questions. In relation to the first question, the Court found, essentially, that the separation of the Chagos Archipelago from Mauritius constitutes a violation, not only of the right to self-determination of the people of Mauritius, but also of the territorial integrity of Mauritius. As a consequence, in relation to the second question, the ICJ ruled that the United Kingdom is under an obligation to cease as soon as possible its administration of the Chagos Archipelago.

In fact, the ICJ ruled that Resolution 1514 had crystallized the right to self-determination as a rule of customary international law. Therefore, the colonial unit as a whole or the people of Mauritius, including the Chagossians, were unlawfully deprived of their right to choose whether a part of their territory (Chagos Archipelago) should have been separated from Mauritius. The Court also noted, in reference to paragraph 6 of Resolution 1514, that a corollary of the right to self-determination is the maintenance and protection of the territorial integrity of a non-self-governing territory.[23] The Court continued to observe that the separation of Chagos Island would violate the right to self-determination of the people of Mauritius 'unless it is based on the freely expressed and genuine will of the people of the territory concerned'.[24] The Court found that the Mauritian authorities were not empowered by the 1964 Constitution to decide on the Chagos Archipelago detachment and that the consent of the people of Mauritius could only have been

[22] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion) (Mauritius v. United Kingdom)*, Oral statements of Vanuatu, United Nations Web TV, 6 September 2018, at http://webtv.un.org/watch/icj-holds-hearings-in-the-advisory-proceedings-concerning-the-legal-consequences-of-the-separation-of-the-chagos-archipelago-from-mauritius-in-1965-oral-statements-of-serbia-thailand-and-vanuatu-/5831550219001.
[23] Chagos Advisory Opinion, *supra* n. 3, para. 160.
[24] Chagos Advisory Opinion, *supra* n. 3, para. 160.

obtained through a referendum held before the decision was made. The Court concluded, therefore, that the Mauritius decolonization had not been lawfully completed.[25]

3.2 *Western Sahara* Case

The territory of Western Sahara was colonized by Spain from 1886 until 1976. In 1963 it was listed as a non-self-governing territory by the United Nations. In 1966 the UN General Assembly requested Spain to organize a referendum and allow the inhabitants of the territory to exercise their right to self-determination and to decide on their own future. In 1974 Spain agreed to the request, but never carried out an act of self-determination. In the same year the UN General Assembly requested the ICJ to render an advisory opinion on the pre-colonial status of Western Sahara. Morocco supported the resolution in the hope that the ICJ might support its claim of sovereignty over the territory concerned. In 1975 the ICJ rendered its advisory opinion on the matter and found that although there had been pre-colonial ties between the territory of Western Sahara and Morocco, these ties were not 'of such a nature as might affect the application of […] the principle of self-determination through the free and genuine expression of the will of the people of the Territory'.[26] In other words, although being nomadic tribes, the Sahrawis (the indigenous people and inhabitants of the Western Sahara territory) were entitled to the right to self-determination and therefore had the right to form an independent state, if they so wished. As noted by Robert McCorquodale and Raul Pangalangan, in this case the right to self-determination was used to reject the treatment of indigenous peoples as having been of no consequence to sovereignty.[27]

3.3 Relevant Island Disputes: Scattered Islands Dispute, Mayotte Case, Falklands Islands Dispute and the Position of the UN General Assembly

The ICJ has pronounced on a number of cases concerning sovereignty over islands.[28] These cases, however, were mainly concerned with territorial claims and did not relate to the right to self-determination of the peoples. Like the above two cases, the following island disputes were chosen for discussion, not only because they present similar facts to those of the MHIs dispute with regard to the separation of parts of the colonised territory, but most importantly because they do concern claims related to the right to self-determination of the peoples. The position of the UN General Assembly on these cases is of particular interest.

3.3.1 Scattered Islands Dispute

Located in the Indian Ocean, the Scattered Islands are subject to a sovereignty dispute between Madagascar and France. On 1 April 1960, shortly before the then French colony of Madagascar gained its independence on 26 June 1960, France separated four of the five Scattered Islands (Iles Eparses) from Madagascar. These islands never had a permanent population. They had been

[25] Chagos Advisory Opinion, *supra* n. 3, paras. 172-174; Allen (2019).
[26] *Western Sahara*, *supra* n. 4, para. 162; also see Wrange (2019), pp. 5-6.
[27] McCorquodale and Pangalangan (2001), p. 874.
[28] See *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Quatar v. Bahrain)*, Judgment, ICJ Reports 2001, p. 40; *Sovereignty over Palau Litigan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment, ICJ Reports 2002, p. 625; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, ICJ Reports 2007, p. 659; also see Schrijver and Prislan (2015), p. 282.

administered as part of the French colony of Madagascar since the annexation of the latter in 1897. France has argued that it never considered these islands as part of Madagascar and that the fact that they were administered from Madagascar was merely a matter of administrative convenience.[29] These arguments did not persuade the United Nations General Assembly which adopted Resolution 34/91 in 1979, in which it affirmed 'the necessity of scrupulously respecting the national unity and territorial integrity of a colonial territory at the time of its accession to independence' and called for 'the reintegration of the […] islands, which were arbitrarily separated from Madagascar'.[30]

France ignored the UN resolutions and seems to continue to do so. Although it has showed its willingness to co-manage these islands with Madagascar,[31] no agreement has ever been reached between them. France continues to effectively display and implement its sovereignty on the islands with a small number of official personnel deployed on some of the islands and by undertaking maritime surveillance and patrols in their surrounding waters.[32] Since 2007 the Scattered Islands have been added, as the fifth district, to the French Southern and Antarctic Lands (TAAF—les Terres Australes et Antartiques Françaises).

3.3.2 Mayotte Case

The Island of Mayotte was treated as an integral part of the Comoros Archipelago during the entire colonial period. However, in 1975, nearly seven months after the 1974 referendum in the whole territory of the Comoros, France separated Mayotte from the rest of the Comoros Archipelago.[33] France justified the separation by arguing that a breakdown of the vote showed that a majority of the population of Mayotte had voted to remain with France. As noted by Jamie Trinidad, the French position in relation to Mayotte is difficult to sustain as a matter of international law.[34]

In 1973, before the independence of Comoros, the United Nations General Assembly had condemned the organization of a separate referendum on Mayotte and clearly affirmed the 'unity and territorial integrity of the Comoros'.[35] In 1975, in Resolution 3385 (XXX) pursuant to which Comoros was admitted to membership of the United Nations, the UN General Assembly clearly reaffirmed 'the necessity of respecting the unity and territorial integrity of the Comoros Archipelago'.[36] Up to 1994, further UN General Assembly Resolutions were adopted to reaffirm this same position.[37]

3.3.3 Falkland Islands Dispute

Located in the South Atlantic Ocean, the Falkland Islands are an internally self-governing overseas territory of the United Kingdom. They were subjected to sovereignty claims between Argentina

[29] Oraison (1981), p. 489; Trinidad (2018a), p. 67.
[30] GA Res. 34/91, adopted 12 December 1979.
[31] During the IOC's (International Oceanographic Commission) Second Summit of the Heads of State and Government in 1999, France proposed a co-management scheme for these islands involving itself and Madagascar. However, the islands remain outside of the IOC regional cooperation agenda and co-management is to be achieved through bilateral relations. See Bouchard and Crumplin (2011), p. 167.
[32] Buchard and Crumplin (2011), p. 167.
[33] Law of 3 July 1975, JORF 4 July 1975, Art. 2, at 6764; also see the analysis of this case by Trinidad (2018a), p. 65; Trinidad (2018b), p. 74.
[34] Trinidad (2018a), p. 65.
[35] GA Res. 3161 (XXVIII), adopted 14 December 1973.
[36] GA Res. 3385 (XXX), adopted 12 November 1975.
[37] All of the relevant resolutions are listed in GA Res. 49/18, adopted 28 November 1994.

and the United Kingdom. These Islands were listed by the United Nations as a non-self-governing territory in 1946[38] and the United Kingdom is charged to administer the Islands until they are decolonized. While Argentina contends that its historic ties to the Islands place them within its sovereign territory,[39] the United Kingdom claims that the population of the Falkland Islands has a right under international law to determine the future status of the Islands regardless of any territorial claims which may exist.[40] It is important to note that the Falkland Islands had no indigenous population prior to the immigration and settlement of Europeans in the 1760s. The current population of the Falkland Islands primarily consists of native-born Falklanders, the majority of whom are of British descent. Falklanders are British citizens.

4 The Separation of the MHIs and the Decolonisation of the New Hebrides/Vanuatu

In light of the cases mentioned above, this part of the article will argue that 'the decolonisation of New Hebrides' from France and the United Kingdom was not completed when France unilaterally transferred in 1976 the administration of the MHIs, which have always been administered from Vanuatu, to the French territory of New Caledonia. This part will focus on two fundamental principles under the law of decolonisation: right to self-determination of peoples and the territorial integrity of countries including colonised territories. In the *Chagos* case, one of the questions raised during the proceedings was whether these two principles already formed part of customary international law in the 1960s. As mentioned earlier, the Court answered this question positively. However, the Court did not explain how the two requirements of customary international law (state practice and *opinio juris*) were fulfilled in relation to the right to self-determination and the principle of territorial integrity. With reference to relevant cases, it will be shown here how these two requirements of international custom were satisfied. Such an analysis is important because, in doing so, different important aspects of the right to self-determination and the principle of territorial integrity will be addressed including relevant international instruments and cases, and also the evolution of these principles, in particular how they became binding norms or enforceable rights under international law.

Furthermore, this part of the paper will also discuss a number of legitimate questions in relation to the applicability of the right to self-determination and the principle of territorial integrity to the particular situation of the MHIs. In fact, it should be noted that the MHIs are uninhabited and the following question may be raised, for example: can the right to self-determination of the people of New Hebrides/Vanuatu and the territorial integrity of New Hebrides/Vanuatu apply to a non-inhabited island?

[38] The Islands were listed as such in a 1946 resolution, pursuant to a submission by the United Kingdom. GA Res. 66 (I), adopted 14 December 1946.
[39] GAOR (14th meeting) UN Doc. A/37/PV.14, 1982, pp. 106-107. Argentina argues that when it gained its independence from Spain in 1816 it succeeded to Spain's rights over the former colonial territory. Therefore, the United Kingdom's acquisition of the Islands by force in 1833 violated Argentina's sovereignty, and Argentina has never accepted the legality of the United Kingdom's occupation. See GAOR (2074th meeting) UN Doc. A/C.4/SR.2074, 1973, pp. 293-298. Also see the explanation by Schwed (1982), p. 444.
[40] Letter from the Permanent Representative of the United Kingdom to the United Nations, UN Doc. S/15,007, 28 April 1982, pp. 1-2. 'Self-determination is usually referred to these days […] not as a principle, but rather as an "inalienable right": in other words, it is a right which cannot be taken away. This right derives principally from the Charter and the Covenants on Human Rights […]'.

4.1 Right to Self-Determination of the People of New Hebrides/Vanuatu and the Territorial Integrity of New Hebrides/Vanuatu

As mentioned, the MHIs were part of the former British-French joint colony of the New Hebrides. However, in 1976 France transferred the administration of the MHIs to New Caledonia, rather than maintaining them as part of the Condominium. It has been recorded that the United Kingdom was content with the view expressed by France on transferring the administration of the MHIs to New Caledonia.[41] It is argued, as we will see later, that, considering the factual context of the MHIs and their separation from the New Hebrides, the United Kingdom's mere approval could not have rendered the transfer lawful under international law. As mentioned, during the entire period of colonisation, the MHIs were administered from Vanuatu. In addition, it is argued that France's act came about as a reaction to the near completion of the process of decolonisation of the New Hebrides.

Under international law, all peoples have an inalienable right to the exercise of their sovereignty and the integrity of their national territory including peoples of colonial territory. Paragraph 2 of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 (XV) of 14 December 1960) provides that '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' (Resolution 1514).[42] Paragraph 6 of the same Declaration states that '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'.[43]

In the Chagos Advisory Opinion, after noting the adoption of a series of General Assembly Resolutions prior to 1960[44] on the right to self-determination, the ICJ stated that Resolution 1514 'represents a defining moment in the consolidation of State practice on decolonization'[45]; as a result, the wording used in this resolution has a normative character, particularly when it comes to the right to self-determination of all peoples.[46] In other words, the right to self-determination was already crystallized as a norm of customary international law in the 1960s. It should also be noted that in 1966, the same right (the right to self-determination) was incorporated into Article 1 of two important binding instruments, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights.[47]

[41] Prescott (2014), p. 292.
[42] Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV), adopted 14 December 1960, para. 2.
[43] Ibid., para 6.
[44] Before 1960, the General Assembly had affirmed the right to self-determination on many occasions: GA Res. 637 (VII), adopted 16 December 1952; GA Res. 738 (VIII), adopted 28 November 1953; and GA Res. 1188 (XII), adopted 11 December 1957. The result of that was that a number of non-self-governing territories had acceded to independence (see Chagos Advisory Opinion, *supra* n. 3, para. 150).
[45] Chagos Advisory Opinion, *supra* n. 3, para. 150.
[46] Chagos Advisory Opinion, *supra* n. 3, para. 153.
[47] Art. 1 of both the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3 (ICESCR).

Two requirements must be fulfilled before any rule of custom can be regarded as part of customary international law: state practice and *opinio juris*.[48] Were these requirements met in the case before the Court (the Chagos Advisory Opinion)? The Court indicated that these conditions were met[49] although it did not provide a clear and detailed explanation as to how they had been fulfilled.[50]

However, when analysing the ruling of the Court in the present Advisory Opinion and the development of international law in the past decades, it can be said that state practice and *opinio juris* since the late 1950s have shown that the right to self-determination of all peoples, in particular colonized peoples, constitutes a rule of customary international law. Indeed, as the Court attempted to show, from the 1950s and onwards, through the General Assembly's work in the context of decolonization and the drafting of the two International Covenants on Human Rights,[51] the right to self-determination has acquired customary international law status and was confirmed by Resolution 1514.[52] The ICJ has also confirmed on a number of other occasions, as shown below, that state practice and *opinio juris* since the late 1950s have established that the right to self-determination of all peoples reflects a rule of customary international law.

In the advisory opinion on Namibia in 1971, while referring to the development of international law with regard to non-self-governing territories, the Court stated: 'A further important stage in this development was the Declaration on the Granting of Independence to Colonial Countries and Peoples, which embraces all peoples and territories which "have not yet attained independence"'.[53] The Court further declared: '[…] the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law'.[54] The Court went on to conclude:

> In the domain to which the present proceedings relate, the last fifty years […] have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore.[55]

In the advisory opinion on Western Sahara in 1975, the Court again referred to these same exact statements to reiterate that paragraph 6 of the Declaration on the Granting of Independence to Colonial Countries and Peoples which prohibits any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country or a colonial territory, reflects

[48] *Colombian-Peruvian asylum* case *(Colombia v. Peru)*, Judgment, ICJ Reports 1950, p. 50. Customary international law is formed by 'constant and uniform usage, accepted as law'; also see *North Sea Continental Shelf Cases (Germany v. Denmark; Germany v. Netherlands)*, Merits, ICJ Reports 1969, p. 3.
[49] Chagos Advisory Opinion, *supra* n. 3, paras. 150-152.
[50] Milanovic (2019).
[51] ICCPR and ICESCR, *supra* n. 47.
[52] Chagos Advisory Opinion, *supra* n. 3, paras. 146-148; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion) (Mauritius v. United Kingdom)*, Oral statements of Vanuatu, *supra* n. 22; Cassese (1995), p. 67; Summers (2014), pp. 70-86; McCorquodale (1994), p. 858.
[53] *Namibia* case, *supra* n. 5, para. 52.
[54] Ibid., para. 53.
[55] Ibid., para. 53.

customary international law. The only exception to this rule will be when the people of a colonial territory freely consent to a partial or total disruption of their territory.[56]

A number of international jurists have also come to a similar conclusion. In his book on *Statehood and the Law of Self-Determination*, David Raic observed that it 'seems tenable that Resolution 1514 reflected an existing rule of customary law as far as a right of self-determination for colonial countries and peoples is concerned'.[57] Malcom Shaw also noted that 'the large number of Assembly resolutions calling for self-determination in specific cases represents international practice regarding the existence and scope of a rule of self-determination in customary law. They also constitute subsequent practice relevant to the interpretation of particular Charter provisions'.[58]

Similarly, in his book on the *Creation of States*, James Crawford observed:

> State practice is just as much State practice when it occurs in the context of the General Assembly as in bilateral forms. The practice of States in assenting to and acting upon law-declaring resolutions may be of probative importance, in particular where that practice achieves reasonable consistency over a period of time. In Judge Petren's words, where a resolution is passed by 'a large majority of States with the intention of creating a new binding rule of law […]' and is acted upon as such by States generally, their action will have quasi-legislative effect.[59]

Accordingly, it is clear that the right to self-determination was already a rule of customary international law in the 1960s and that all UN Member States are bound by it. Therefore, in relation to the MHIs, if it is proven that the people of New Hebrides/Vanuatu were entitled to this right (an attempt will be made to prove this further below), it can be argued that France should have allowed the people of New Hebrides/Vanuatu to decide on the future of these islands.

In the same way, as we will see, the principle of territorial integrity of non-self-governing countries or colonised territories can also be invoked in support of Vanuatu's position. This principle applies not only to independent states, but also to colonised territories. Indeed, the terminology of 'territorial integrity' used in Resolution 1514 is completely distinct from the one used in 1970 in Resolution 2625 which concerns the existing independent states.[60] The 'territorial integrity' used in Resolution 1514 is solely about the territorial integrity of a non-self-governing territory or a colonised territory. In other words, '[…] Resolution 1514 is concerned only with the right to self-determination of colonial peoples'.[61] The title of Resolution 1514 is obvious: it focuses on the granting of independence to colonial territories and peoples. The French text of Resolution 1514 uses the word 'pays' and not 'État' when referring to the territorial integrity of countries. Accordingly, from 1960 when the Declaration on the Granting of Independence to Colonial Countries and Peoples came into force and onwards, no administering state or colonial government can dismember the colonial territory in violation of its territorial integrity.

Therefore, France's act of transferring the administration of the MHIs to New Caledonia in 1976 without consulting the people of New Hebrides may have violated the territorial integrity of the New Hebrides/Vanuatu. Resolution 1514 clearly requires all states, including France, not to

[56] *Western Sahara* case, *supra* n. 4, para. 55.
[57] Raic (2002), p. 217.
[58] Shaw (1986), p. 84.
[59] Crawford (2006), p. 114.
[60] See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Request for Advisory Opinion) (Mauritus v. United Kingdom)*, Oral statements of Vanuatu, *supra* n. 22.
[61] Quane (1998), p. 549.

dismember the territory of colonised countries in violation of their territorial integrity. France, as the administering power, should have allowed the people of New Hebrides to determine whether they want the MHIs to be part of New Caledonia rather than New Hebrides.

This analysis is in line with a number of UN resolutions concerning the Mayotte and Scattered Islands which have called on France to respect the unity and territorial integrity of the Comoros Archipelago and Madagascar respectively.[62] These resolutions imply that the separation of Mayotte Island from the Comoros and the one of the Scattered Islands from Madagascar, and the occupation of these territories by France, were unlawful as they were inconsistent with the territorial integrity of Comoros and Madagascar.

Paragraph 7 of Resolution 1514 requires all states to strictly observe the provisions of the UN Charter, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of states and respect the sovereign rights of all peoples and their territorial integrity.[63] It is important to note that Resolution 1514 was followed by Resolution 1541 which outlined three instances in which a non-self-governing territory reaches a full measure of self-government: '(a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State'.[64] Principle VII of Resolution 1541 also provides that any form of decolonisation can only become effective if it is accomplished through the 'free consultation' of the people of the non-self-governing territory.[65] It has been widely affirmed that these two resolutions state that self-determination is an enforceable present right.[66]

4.2 To Whom Does the Right to Decide the Future of the MHIs Belong?

In the MHIs dispute, one of the questions which may be raised is, considering that the MHIs are uninhabited, to whom does the right to decide the future of these islands belong? To answer this question, it is important to look at the categories of territory to which the principle of self-determination applies. Originally, the principle of self-determination applied to peoples of colonial and non-self-governing territories and those subject to alien occupation.[67] However, as a right, it cannot apply just to any group of people desiring to obtain self-governance or independence. The category of territory to which the principle of self-determination applies as a matter of right must be identified beforehand (a territorial unit).[68]

4.2.1 Determination of Territorial Unit

Two possible interpretations can be made from Resolution 1514 to determine the territorial unit. Firstly, in the scenario where Resolution 1514 affirms the territorial integrity of colonial countries (as we have argued and demonstrated earlier), the term 'peoples' will refer to the entire population of a colonial country.[69] Accordingly, the territorial unit in the case of the MHIs may have been the

[62] See above Resolutions: GA Res. 34/91, *supra* n. 30; GA Res. 3161, *supra* n. 35; GA Res. 3385, *supra* n. 36.
[63] Resolution 1514, *supra* n. 42, para. 7.
[64] GA Res. 1541, 15 UN GAOR Supp. (No. 16), UN Doc. A/4684, 1960, p. 66; Schwed (1982), p. 451.
[65] Principle VII of Resolution 1541, *supra* n. 64; also see Chagos Advisory Opinion, *supra* n. 3, para. 156.
[66] Schwed (1982), p. 451; *Western Sahara* case, *supra* n. 4, p. 33; Roth (2010), p. 11.
[67] See *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, p. 90, paras. 31-32; *Western Sahara* case, *supra* n. 4, paras. 54-55.
[68] Crawford (2006), pp. 126-128.
[69] Quane (1998), p. 550.

entire population of the New Hebrides in 1976. This echoes the idea that a corollary of the right to self-determination is that it must be exercised on the part of the entirety of the population within the limits of the territory concerned. Therefore, the entire population of the MHIs (the territorial unit) should have been entitled to the right to self-determination/the right to choose the future of the MHIs.

The second interpretation is that Resolution 1514 affirms the territorial integrity of pre-colonial entities and would therefore require the restoration of colonial territory to the unit from which it was originally separated.[70] On the basis of this interpretation, the term 'people' will refer to the entire population of the pre-colonial entity. It is unlikely that this second interpretation will apply to the MHIs case as there were no pre-colonial entities in the New Hebrides.

However, these interpretations do not answer the question of whether the population of a colonised country should be given the right to determine the future of (an) uninhabited island(s) to which there are certain connections with the colonised country concerned. The analysis of some of the above relevant or similar cases will help us in the attempt to answer this question.

4.2.2 Can the People of a Colonised Country be Given the Right to Determine the Future of Uninhabited Islands to which the Concerned Colonised Country Has Certain Connections?

In the Chagos Advisory Opinion, the Court did not directly address the question of whether only Chagossians should have the right to determine the future of the Chagos Archipelago or whether the people of Mauritius as a whole should be given this right. However, the Court did note that Mauritius, including Chagossians, should have been given the opportunity to decide whether the Chagos Archipelago should be separated from Mauritius and be part of the United Kingdom.[71] An important element to note is that the Chagos Archipelago was treated as an integral part of Mauritius during the entire period of colonisation.

It can be argued that a parallel can be drawn with the MHIs which were treated as part of New Hebrides during the colonial period. Although annexed by France in 1929 and occupied by the United Kingdom in 1965, the MHIs were administered from Port Vila, Vanuatu and not from Nouméa, nor from Paris or London. Also, as mentioned, during the occupation of these islands by the United Kingdom in 1965, these islands were attached to the Condominium of New Hebrides.

In the *Western Sahara* case, the ICJ observed: 'the information furnished to the Court shows that at the time of colonization Western Sahara was inhabited by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them'.[72] It is obvious in this case that the territorial status of peoples is an important element which will determine whether the people concerned will be entitled to the right to self-determination. In this case, for instance, although being nomadic tribes and not constituting the permanent population of Western Sahara, the Sahrawis were still entitled to the right to self-determination since they formed the indigenous population of the territory concerned and that the latter was not *terra nullus*.[73] It can be argued that this interpretation is in line with the argument according to which, although they do not live permanently on the MHIs, New Hebrideans/Ni-Vans form the indigenous population who, at times, travelled to the two islands for fishing and sacrificial purposes. In addition, the separation of the MHIs took place during a time when the New Hebrides and the two former colonial

[70] Quane (1998), p. 550.
[71] See Chagos Advisory Opinion, *supra* n. 3, p. 41.
[72] *Western Sahara* case, *supra* n. 4, para. 81.
[73] *Western Sahara* case, *supra* n. 4, para. 80.

governments had already begun the process of the decolonisation of the New Hebrides.[74] In 1975, with the agreement of the colonial governments, the first general election was held and a Government of National Unity (GNU) was elected to lead the country towards independence. In short, in 1976, the people of New Hebrides were already socially and politically organised and under a government competent to represent them. Therefore, they should have been given the right to determine the future of the MHIs.

Most importantly, in the Scattered Islands case where the facts are similar to those of the MHIs dispute, the United Nations General Assembly requested in a 1979 resolution that France must respect the national unity and territorial integrity of Madagascar as a colonised country and called upon the integration of these islands with Madagascar.[75] This legal argument also implies that the people of Madagascar should be given the right to determine the future of these islands since they were treated as part of Madagascar during the colonial period. Though they were claimed by France, these islands were administered from Antananarivo, Madagascar and not from Paris and the UN General Assembly's position implies that the indigenous people of Madagascar should be given the right to determine the future of these islands. As Jamie Trinidad noted, the fact that the Scattered Islands had been administered as one colonial unit with Madagascar since 1897 appears to have taken precedence when determining the extent of Madagascar's territorial integrity.[76] France's act in this case clearly violated the territorial integrity of Madagascar. Similarly, during the entire colonial period, the MHIs were administered from Port Vila, Vanuatu. Therefore, it can be argued that the interpretation of the above 1979 UN resolution concerning the Scattered Islands may apply to the MHIs case. Accordingly, France should have allowed the people of New Hebrides to decide on the future of the MHIs.

To the contrary, in the Falkland Islands dispute, a number of UN General Assembly resolutions requested that Argentina and the United Kingdom should negotiate and find a peaceful solution to the Falklands dispute.[77] It is obvious from these resolutions that the right to self-determination should not be given to the Falklanders as the majority of them are of British descent and they do not constitute the indigenous people of the territory concerned.

In light of the above analysis, it is submitted that by transferring the administration of the MHIs to New Caledonia in 1976, France may have violated not only the right to self-determination of the people of New Hebrides, but also the territorial integrity of the New Hebrides/Vanuatu.

The above argumentation may however be denied if France successfully proves the assertion it made that the MHIs have always been part of New Caledonia (France).[78] For instance, in a diplomatic note sent by the French Permanent Mission to the United Nations to the Secretariat of the United Nations on 6 December 2010 to dispute the new Vanuatu Maritime Zones Act[79] for including the MHIs within the sovereignty of Vanuatu, it was stated that France has sovereignty over the MHIs which have always been regarded as an integral part of the French territory of New Caledonia.[80] For this to happen, France would need to successfully challenge the fact that the MHIs

[74] Van Trease (1995), pp. 3, 29 and following.
[75] See Res. 34/91, *supra* n. 30.
[76] Trinidad (2018b), p. 82.
[77] See GA Res. 2065 (XX), adopted 16 December 1965; GA Res. 3160 (XXVIII), adopted 14 December 1973; GA Res. 31/49, adopted 1 December 1976; GA Res. 37/9, adopted 4 November 1982.
[78] Prescott (2014), p. 292.
[79] Maritime Zones Act, n° 6 of 2010.
[80] Nations Unies, Division des affaires maritimes et du droit de la mer Bureau des affaires juridiques, *Droit de la mer*, Bulletin n° 75 (2011), p. 33, at https://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinfr/bullfr75.pdf.

have always been administered from Port Vila (Vanuatu) and that from 1965 to 1976, the MHIs were under the administration of the Condominium of New Hebrides.

In relation to the claims made by Vanuatu, the question still remains, however, whether the right to self-determination and the principle of territorial integrity prevail in all circumstances. For instance, the question can be asked whether the right to self-determination trumps effective occupation in all circumstances?

5 The Right to Self-determination, the Territorial Integrity and the Competing Sovereignty Claims for Vanuatu and France over the MHIs

It is true that the Court considered the Chagos advisory proceeding to be about decolonisation, an issue in which the United Nations General Assembly has a long-standing interest, rather than about sovereignty.[81] However, as stressed by Marko Milanovic, technically, the Court was right, except that its finding on the illegality of the decolonisation process inevitably impacts on the British sovereignty over the Chagos Archipelago.[82]

As mentioned in the introduction, although the issue of sovereignty was not dealt with in the Chagos Advisory Opinion, its relevance in this article lies in the question of whether or not France's alleged unlawful act (a violation of the right to self-determination and the principle of territorial integrity of New Hebrides/Vanuatu) may be legally justified under international law (in particular through French claims of sovereignty over the MHIs). In fact, it can be said that France's responsibility can only arise if its alleged unlawful act is not legally justified under international law.

5.1 Vanuatu's and France's Competing Claims of Sovereignty over the MHIs

As mentioned in the introduction, both Vanuatu and France claim sovereignty over the MHIs. Both have declared a 12-nm territorial sea, a 24-nm contiguous zone, and a 200-nm exclusive economic zone (EEZ) around the MHIs. France also claims an extension of its continental shelf grounded in the MHIs.[83] However, Vanuatu disputes France's claims of sovereignty over the MHIs and France's submission for an extended continental shelf grounded in the MHIs.

5.1.1 Vanuatu Government Acts to Occupy/Administer the MHIs and Other Vanuatu Claims

On 9 March 1983, shortly after independence, a group of Vanuatu military personnel travelled on MV Euphrosyne to the MHIs and raised the Vanuatu flag on Matthew Island. However, a couple of weeks later a French Navy ship travelled to the island to remove the Vanuatu flag and instead planted the French Flag.

[81] Milanovic (2019).
[82] Milanovic (2019).
[83] Receipt of the submission made by France to the Commission on the Limits of the Continental Shelf, UN Doc. CLCS.08.2007.LOS, Continental Shelf Notification, 29 May 2007, at https://www.un.org/depts/los/clcs_new/submissions_files/submission_fra1.htm.

The Vanuatu government also claims the MHIs through custom and the cultural connection of the people of New Hebrides/Vanuatu to these islands.[84] The MHIs are at the centre of Vanuatu legends, whereas the Kanaks have no legend involving the MHIs. The New Hebrideans/Ni-Vans used to travel to the MHIs to perform cultural ceremonies and left custom gifts on them. The MHIs were also regularly visited, in the past, by people from Southern parts of Vanuatu for fishing and sacrificial purposes.

In addition, Article 2(a) of the Vanuatu Maritime Zones Act provides that 'the sovereignty of Vanuatu comprises of all islands within the archipelago including Mathew (Umaenupne) and Hunter (Leka) Islands'.[85] A ministerial Order of 29 July 2009 which determined the lists of geographical coordinates of points defining the normal and archipelagic baselines of Vanuatu and an accompanied illustrative map, all deposited by the Vanuatu government with the Secretary-General of the United Nations on 1 July 2010, describe the MHIs as being under the sovereignty of the Republic of Vanuatu.[86]

Vanuatu's claims over the MHIs are also based on the geology/geography of the two islands. It has been shown that the Vanuatu land mass is a narrow chain of Tertiary to Holocene volcanic islands and extends some 700 km from the Torres Islands in the North of Aneityum to Matthew and Hunter Islands in the South; together with the Santa Cruz Group of the Solomon Islands they form the New Hebrides arc which bounds the western margin of the Pacific Plate at its juncture with the Australia/India Plate.[87] Furthermore, the petrology and geochemistry of the MHIs are identical to the most recent cycle of active volcanism from centres on the islands of Vanualava, Ambae, Ambrym, Lopevi and Tanna on Vanuatu.[88]

5.1.2 French Government Acts to Administer/Occupy the MHIs

Since 1976, after transferring the administration of the MHIs to New Caledonia, France has regularly conducted *missions de souveraineté* and scientific research missions on these two islands.[89] In 2002, France deposited with the Secretary-General of the United Nations a Decree defining the straight baselines and closing lines of bays used to determine the baselines from which the breadth of French territorial waters adjacent to New Caledonia is measured, Article 2 of which refers to the MHIs.[90] In 1979 France built an automatic weather station on Matthew Island.

5.1.3 Rules of *Effectivités* (Effective Occupation)

[84] *Vanuatu Daily Post*, *supra* n. 2; *Vanuatu Daily Post*, 12 March 2015, at https://dailypost.vu/news/matthew-and-hunter-day/article_253d5ec4-47b1-5a5c-ac54-69a739cee733.html; *Vanuatu Daily Post*, 3 January 2017, at https://dailypost.vu/news/matthew-hunter-dialogue/article_74783f07-617a-5a1d-8f4c-455dcdd9f513.html.
[85] Art. 2(a), Maritime Zones Act, *supra* n. 79
[86] Circular Notes from the Division for Ocean Affairs and the Law of the Sea, UN Doc. M.Z.N.78.2010.LOS Maritime Zone Notifications, 21 July 2010, at https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn79ef.pdf.
[87] Macfarlane et al. (1988), p. 45; Robin et al. (1993), pp. 1 and 10; *Vanuatu Daily Post*, *supra* n. 2.
[88] Macfarlane et al. (1988), p. 45; Robin et al. (1993), pp. 1 and 10.
[89] See for instance, Cols Bleus Marine Nationale, Ministère de la Défense, 'Mission de souveraineté pour le Vendemiaire', 17 June 2015, at http://www.colsbleus.fr/articles/6742 (accessed 15 October 2019); Fonfreyde et al. (2013), p. 4; Borsa and Baudat-Franceschi (2009), at https://hal.ird.fr/ird-00666118/document; Condamin (1978).
[90] *Décret n° 2002-827 du 3 Mai définissant les lignes de base droites et les lignes de fermeture des baies servant à la définition des lignes de base à partir desquelles est mesurée la largeur des eaux territoriales françaises adjacentes à la Nouvelle-Calédonie, JORF n° 0105 du 5 Mai 2002*, at 8762.

The validity of the parties' sovereignty claims over territories including island territories is to be assessed in light of the general international public law, in particular the international jurisprudence. In the absence of title conferred either by treaty, arbitral awards or through original title (where the title is based on a specific act of occupation of *terra nullius* or is based, in a more general sense, on immemorial possession—possession established for so long that its origins are not only beyond question but also unknown),[91] the focus has to be on the exercise of effective occupation over the islands.[92] In relation to the MHIs dispute, the relevant rules are the ones of *effectivités*. There are no treaty or arbitral awards concerning the dispute and there are no claims, as yet, based on original title.

Effective occupation implies an exercise of a continuous and peaceful display of state authority. The responsible authority must exercise governmental functions (*effectivités* or *acts à titre de souverain*) over the territory concerned. Acts by private individuals without state authority are not sufficient.

After 'the critical date', effective occupation may enable the claiming state to acquire territory. The critical date is the date on which the dispute crystallizes (or the date on which the location of territorial sovereignty is decisive).[93] Acts undertaken after the critical date will generally not count unless they are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them.[94] International courts and tribunals decide on the establishment of the critical date. Usually, the period of effective occupation should be long enough for other claimants to have had a reasonable chance of asserting their rights.[95] In the Venezuela case,[96] it was held that a period of fifty years is sufficient to establish the critical date. In the present study, international courts or tribunals have not, as yet, had the opportunity to decide on the establishment of a critical date in relation to the effective occupation of the MHIs. However, it may be suggested that France has undertaken a number of acts which may amount to the crystallization of the dispute. The question may be asked, for example, whether the Fiji-France delimitation agreement in 1983 can be considered a critical date?[97] The Vanuatu government has not objected to this agreement according to which the MHIs were considered to be part of New Caledonia. While the critical date in this dispute is yet to be established and that this can only be decided by the international judicial or arbitral bodies, it is important to note that France has been effectively occupying the MHIs since the transfer in 1976.

5.1.4 Application of the Rules of *Effectivités*

[91] Schrijver and Prislan (2015), pp. 283 and the following.
[92] *Island of Palmas* case *(USA v. Netherlands) (Awards)* II RIAA 1928, p. 829; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, p. 624; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Judgment, ICJ Reports 2008, p. 12; *Territorial Sovereignty and Scope of the Dispute (Eritrea v. Yemen)*, Awards, XXII RIAA 1998, p. 211; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, ICJ Reports 1993, p. 38; and *Clipperton Island Case (France v. Mexico)*, Awards, 2 RIAA 1931, p. 1105; also see Smith (1977), p. 151.
[93] Abass (2014), pp. 206-207; Hall (1924), p. 167.
[94] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Merits, ICJ Reports 2002, p. 625, para. 135; Also see *Nicaragua/Honduras* case, *supra* n. 28, para. 117.
[95] *Palmas* case, *supra* n. 92, p. 867; Harris (2010), p. 166.
[96] *Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela*, XXVIII RIAA 1899, p. 335.
[97] Agreement between the Government of the Republic of France and the Government of Fiji relating to the delimitation of their economic zone (with annex and maps, adopted 19 January 1983, entered into force 21 August 1984), PITSE 4.

Accordingly, Vanuatu customs and legends do not constitute a strong sovereignty claim. France's claim of effective occupation will likely prevail over these historical and customary/cultural claims. The only exercise of sovereignty by Vanuatu was the raising of the Vanuatu flag on 9 March 1983. There is no continuous occupation of the two islands by Vanuatu. France has been effectively occupying the MHIs since 1976.

In addition, Vanuatu's argument relating to the geology of the country is weak since it is based on contiguity or geographical proximity, which has been rejected by international judicial and arbitral bodies on a number of occasions. It was for instance rejected in both the *Clipperton*[98] and *Palmas*[99] decisions, and was not a factor in the *Minquiers and Ecrehos*[100] case. France's claim of effective occupation is still likely to prevail over Vanuatu's claims based on the geology of the MHIs and their contiguity or geographical proximity to Vanuatu.

5.2 Effective Occupation vs the Right to Self-Determination of the People of New Hebrides/Vanuatu and the Territorial Integrity of New Hebrides/Vanuatu

As mentioned earlier, in the Chagos Advisory Opinion the Court ruled that in separating the Chagos Archipelago from Mauritius in 1965, the United Kingdom violated the territorial integrity of Mauritius and the right to self-determination of the people of Mauritius including the Chagossians. The Court also held that the right to self-determination was already a rule of customary international law in 1965 and that customary international law binds all states. As mentioned, it may be argued that the same analysis can be made in relation to the MHIs dispute. However, considering the fact that the MHIs have been effectively occupied by France even before the independence of Vanuatu, the question can be asked whether the right to self-determination (for New Hebrideans/Ni-Vans in this case) supersedes France's effective occupation? In other words, in which circumstances will the right to self-determination supersede effective occupation? Does the right to self-determination supersede effective occupation in all circumstances?

The analysis of the Western Sahara Advisory Opinion shows that a territorial claim including effective occupation will not supersede the right to self-determination unless it meets certain requirements.[101] The ICJ has expressly recognized the validity of territorial claims when the population of the territory is not 'a people entitled to self-determination' or when 'a consultation was totally unnecessary in view of special circumstances'.[102] The Court did not specify what it means by 'people' and 'special circumstances'.

As a number of commentators have stressed, one thing which is clear, however, is that the ICJ expressly affirmed in the *Western Sahara* case that the right to self-determination is a right of peoples.[103] Therefore, in the absence of people, there can be no 'need to pay regard to the freely expressed will' of the people.[104] The Court was probably mindful of the submissions of Spain in the *Western Sahara* case which argued that although pre-colonial ties cannot override the right to self-determination, there are circumstances in which the right to self-determination cannot apply

[98] *Clipperton Island* case, *supra* n. 92; also see Van Dyke (2009), pp. 39, 66.
[99] See *Palmas* case, *supra* n. 92.
[100] The *Minquiers and Ecrehos* case *(France v. United Kingdom)*, Judgment, ICJ Reports 1953, p. 47.
[101] A requirement in accordance with general practice is that a claimant state must not have peacefully and voluntarily surrendered its rights. See Crawford (2006), p. 383.
[102] *Western Sahara* case, *supra* n. 4, p. 33; also see Schwed (1982), p. 468.
[103] Trinidad (2018b), p. 57.
[104] Trinidad (2018b), p. 57.

because the population is artificial or a minority population.[105] As mentioned earlier, Crawford would argue that a territory without a people (or with an artificial population) is not a *prima facie* self-determination unit and the right to self-determination cannot apply as matter of right. The Falkland Islands dispute may correspond to this situation. Argentina argues, among other things, that the population of the territory concerned is not a people, but rather a settler population.

Clearly the MHIs do not fall within these 'special circumstances' (where the population is not a people entitled to self-determination) because the population of New Hebrides/Vanuatu consisted of an indigenous people and not a settler population. Therefore, they should be entitled to the right to self-determination and be given the opportunity to decide on whether the administration of the MHIs should be transferred to New Caledonia. As mentioned earlier, the Kanak people through the pro-independent movement (FLNKS) have recognised by a declaration approved by New Caledonia's Customary Senate that the MHIs have always been part of the New Hebrides/Vanuatu and not of New Caledonia.

In addition, some commentators have argued that the mention of the 'special circumstances' in which a consultation will be totally unnecessary may refer to the cases where although there is a people entitled to the right to self-determination, the consultation will be dispensed with because the people concerned desire integration with the claimant state.[106] The disputed territory of Ifni between Morocco and Spain is a clear example of this. Morocco gained its independence from France in March 1956 and from Spain a month later. On 7 April 1956, Spain and Morocco signed a joint Declaration which put an end to the Spanish Protectorate established in 1912, and recognized Morocco's independence and its territorial unity.[107] Spain however retained control over a number of territories in the region including Western Sahara, the Tarfaya region and most importantly the territory of Ifni which is a province situated on the Atlantic coast of Morocco and is surrounded by Moroccan territory. Morocco denounced Spain's continuous occupation of what it regarded as an integral part of its own territory.[108] The tension between the two countries led to the war of Ifni and later to the 1958 dispute resolution agreement according to which Spain ceded the region of Tarfaya to Morocco.[109] The territory of Ifni remained a Spanish enclave. In 1969, however, in the face of continuing resistance to Spanish rule among Ifni's 50,000 inhabitants and most importantly, given that Spain's control of the territory concerned had become economically and militarily unviable, Spain concluded a treaty with Morocco according to which Ifni was retroceded to Morocco without consultation with the inhabitants of Ifni. Being aware of the specific circumstances of the territory of Ifni, a number of United Nations General Assembly resolutions adopted in the 1960s[110] did not insist on the necessity to consult the inhabitants of the territory concerned regarding the transfer of Ifni to Morocco. They did however insist on holding a referendum in Western Sahara.

[105] This view was articulated in the Spanish pleadings before the ICJ in the Western Sahara Advisory Proceedings: *Western Sahara*, ICJ Pleadings, Vol. I 1974, p. 207, para. 359. Also see Trinidad (2018b), p. 230; UNGOR 19th Sess. Annex 8, Agenda Item 21, Chap. X, p. 296.
[106] Trinidad (2018b), p. 63; New York Bar Association, Committee on the United Nations (2012), p. 38.
[107] Declaration by the Government of Spain and Morocco on the independence of Morocco (and Protocol), 7 April 1956, Royal Institute of International Affairs Documents on International Affairs, 1956, p. 694, cited by Trinidad (2018b), p. 40.
[108] Statement of Mohammed V, 3 April 1956 cited in Gonzáles Campos (2004), p. 13. Also see Trinidad (2018b), p. 40.
[109] Treaty of Angra de Cintra, 1 April 1958; Olson (1991), p. 586.
[110] GA Res. 2072 (XX), adopted 16 December 1965; GA Res. 2229 (XXI), adopted 20 December 1966; GA Res. 2354 (XXII), adopted 19 December 1967.

It is unlikely that the MHIs fall within this second element of 'special circumstances' relating to the non-necessity of consulting the people. There is a strong resistance from the Vanuatu government and the people of Vanuatu since 1980 to the French occupation of the MHIs. It is unlikely that the people of New Hebrides/Vanuatu would want the MHIs to be integrated into France or into the French territory of New Caledonia. Therefore, should France insist on separating and maintaining control and occupation over the MHIs, there is clearly a necessity to consult the people of New Hebrides/Vanuatu regarding the separation of these islands.

Vanuatu may also rely on the case of São João Baptista de Ajudá concerning the conflict between effective occupation and the right to self-determination. Located in the port of Ouidah Benin in Africa, the former Portuguese fort of São João Baptista de Ajudá was considered in the 1960s as one of the world's smallest territorial units.[111] Erected in 1680 and covering approximately 0.045 square kilometres, it was known, for a time, for its role in the trafficking of slaves from West Africa to Brazil. Abandoned for some years in the eighteenth and nineteenth centuries, the fort remained under Portuguese occupation from 1872 until 31 July 1961 when it was annexed by Benin (then Dahomey). The fort had never had a stable civilian population. Benin's annexation occurred seven months after São João Baptista de Ajudá was listed by the General Assembly as a UN non-self-governing territory. The fort was included in UNGA Resolution 1542 (XV) which focuses on Portugal's obligation to transmit information to the General Assembly on its 'Overseas Territories' in accordance with Article 73(e) of the UN Charter. The UN listing of São João Baptista de Ajudá as a non-self-governing territory was questioned by a number of commentators because the fort was only inhabited by a small contingent of administrative personnel. In fact, Principle IV of Resolution 1541 obligates states to transmit information in relation to a territory that is distinct ethnically and/or culturally from the country that is administering it. The fort of São João Baptista de Ajudá did not correspond to this description.

However, as noted by Jamie, it can be argued that the international treatment of São João Baptista de Ajudá, where countervailing arguments based on self-determination did not arise, could be viewed as a uniquely uncontroversial example of 'statutory decolonization'.[112] He also noted that if the fort was subject to the operation of such a principle, and not merely to the vagaries of realpolitik, the 'statutory decolonization' of similarly situated territories must also be a possibility.[113] It has been suggested that the UNGA listing of São João Baptista de Ajudá as a self-governing territory came about as a result of the fact that, during that time, Portugal's overseas presence was being viewed by the growing anti-colonial majority in the UN General Assembly as a threat to international peace and security.[114] Therefore, the international community was eager to favour the 'statutory decolonization' of an uninhabited territory such as the fort of São João Baptista de Ajudá.

Accordingly, in light of the case of São João Baptista de Ajudá and considering the French overseas presence and experience in territories such as Scattered Islands and Mayotte Island, the occupation of the MHIs by France may be viewed as a threat to the peace and security imperative that underpins the United Nations Charter and much of the international law of decolonization. Although the exact terminology of 'threat to the peace and security' has not been used by the

[111] Trinidad (2012), p. 971.
[112] Trinidad (2012), p. 972.
[113] Trinidad (2012), p. 972.
[114] The then Ghanaian Ambassador to the UN explained: 'The very fact that […] all African countries are behind the nationalists […] means a threat to international peace and security': UN Doc. S/PV1042 (24 July 1963) cited by Trinidad (2012), p. 974.

Vanuatu government, a number of its public declarations seem to indicate its impression that France's acts relating to the administration of the MHIs pose a risk to the maintenance of peace in the region. For instance, a protest letter from the Vanuatu government to the French government on 2 May 2014 noted that the Vanuatu government fully objected to the decision by the government of New Caledonia to establish what it called a Natural Park of the Coral Sea that covered the French territory's entire Exclusive Economic Zone and included the Matthew and Hunter Islands.[115] The letter also noted that the decision was 'an irresponsible act' putting into doubt the role of the French government as a major player in maintaining peace in the region.

It has to be noted that the above argumentation according to which the right to self-determination of the people of New Hebrides/Vanuatu may prevail over France's argument on *effectivités* only stands true in the circumstances that during colonisation the MHIs were administered from Port Vila (Vanuatu) and that from 1965 to 1976 they were considered as being part of the Condominium of New Hebrides. As mentioned earlier, according to the facts we have gathered, the MHIs have always been administered from Port Vila, even after France had annexed them in 1929. In 1965 the two islands were re-occupied by the United Kingdom and were attached to the Condominium of New Hebrides until 1976 when they were transferred to New Caledonia. However, this argumentation may not stand if France successfully proves that the MHIs have always been treated as an integral part of the French territory of New Caledonia. As mentioned, France has made this assertion on a number of occasions.[116] In this specific scenario, the peoples of New Hebrides/Vanuatu will not be entitled to decide on the future of the MHIs.

5.3 Right to Self-Determination vs the Principle of *Uti Possidetis*

Under the principle of *uti possidetis* newly independent states inherit the pre-independence administrative boundaries set by the former colonial power.[117] These boundaries should not be changed at or after independence. The ICJ noted on a number of occasions that the principle of *uti possidetis* has kept its place among the most important legal principles regarding territorial title and boundary delimitation at the moment of decolonisation.[118]

However, a question which may arise is whether this principle also applies to maritime boundaries. It should be mentioned that in accordance with the maxim of 'the land dominates the sea',[119] maritime boundaries follow the boundaries of the territory. In the *Qatar/Bahrain* case, the ICJ stated that:

> maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as the 'land dominates the sea' […] It is thus the terrestrial territorial situation that must be taken as starting point for the determination of the maritime rights of a coastal State. In accordance with Article 121, paragraph 2, of the

[115] *Vanuatu Daily Post*, *supra* n. 13; also see *Arrêté n° 2014-1063/GNC du 23 avril 2014 créant le Parc naturel de la mer de Corail*.
[116] Nations Unies, *Droit de la mer*, *supra* n. 80, p. 33; Prescott (2014), p. 292.
[117] Ratner (1996), p. 590; Sumner (2004), p. 1790.
[118] *Frontier Dispute (Burk Faso v. Mali)*, Judgment, ICJ Reports 1986, p. 554, para. 26; *Nicaragua/Honduras* case, *supra* n. 28, para. 151.
[119] See *North Sea Continental Shelf* Cases, *supra* n. 48, where the ICJ noted that 'the land is the legal source of the power which a State may exercise over the territorial extensions to seaward', para. 96.

> 1982 Convention on the Law of the Sea, […] islands, regardless of their size in this respect enjoy the same status […].[120]

Therefore, it can be said that the principle of *uti possidetis* applies to maritime boundaries. In the *Nicaragua/Honduras* case, the Court stated that the principle of *uti possidetis* may, in principle, apply to offshore possessions and maritime spaces.[121] The Court also noted that this principle presupposes the existence of a delimitation of territory between the colonial provinces concerned having been affected by the central colonial authorities.[122] The Court therefore concluded that, in order to apply the principle of *uti possidetis* to the islands in dispute, it must be shown that the colonial power had allocated them to one or the other of its colonial provinces.[123]

Accordingly, some may argue that since France had allocated the MHIs to its colonial territory of New Caledonia in 1976, the principle of *uti possidetis* should apply in its favour. Therefore, from the moment of independence, Vanuatu should have complied with this principle and recognised that the MHIs form part of New Caledonia and not Vanuatu. In this specific scenario, the principle of *uti possidetis* may apply to the detriment of the right to self-determination of the people of New Hebrides/Vanuatu.[124] In the *Frontier Dispute* case,[125] the ICJ explained that the principle of *uti possidetis* is of the utmost importance for African and post-colonial countries since it was established to avoid jeopardizing peace and the stability of newly independent states over boundary disputes. In relation to the right to self-determination of people, the Court stated:

> […] This principle of *uti possidetis* appears to conflict outright with the right of peoples to self-determination. In fact, however, the maintenance of the territorial *status quo* in Africa is often seen as the wisest course. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields has induced African States to consent to the maintenance of colonial boundaries or frontiers, and to take account of this when interpreting the principle of self-determination of peoples […] If the principle of *uti possidetis* has kept its place among the most important legal principles, this is by a deliberate choice on the part of African States.[126]

However, as mentioned, it has been shown that during colonisation, the two islands belonged to the Condominium of New Hebrides; they were administered from Port Vila, Vanuatu and not from Nouméa, New Caledonia.[127] All acts undertaken by France on the MHIs were done with the

[120] *Qatar/Bahrain* case, *supra* n. 28, para 185.
[121] *Nicaragua/Honduras* case, *supra* n. 28, para. 156; also see *Case Concerning Land, Island and Maritime Frontier Dispute, El Salvador/Honduras: Nicaragua Intervening (El Salvador v. Honduras)*, Judgment, ICJ Reports 1992, p. 351, para. 333.
[122] *Nicaragua/Honduras* case, *supra* n. 28, para. 158.
[123] *Nicaragua/Honduras* case, *supra* n. 28, para. 158.
[124] Emerson (1971), p. 459; Cassese (1995), p. 315.
[125] *Frontier Dispute* case, *supra* n. 118.
[126] *Frontier Dispute* case, *supra* n. 118, paras. 25-26; Ratner (1996), p. 612; Also see Naldi (1987), p. 893; Klabbers and Lefeber (1993), p. 37.
[127] Stanley (2004), p. 933; *Vanuatu Daily Post*, *supra* n. 2; *Outremers 360°*, 15 February 2018, at http://outremers360.com/politique/pacifique-la-france-et-le-vanuatu-regleront-ils-leur-differend-concernant-les-iles-matthew-et-hunter/.

permission of Great Britain. The construction of the automatic weather station on Mathew Island by the French authorities was decided from Nouméa, but with British permission.[128]

It should also be noted, as mentioned earlier, that France's act of transferring the administration of the MHIs to New Caledonia took place during the period of the decolonisation process of the New Hebrides.[129] Unlike the United Kingdom, France was reluctant to grant the country independence. However, it is likely that France knew that the march towards Vanuatu's independence could not be avoided and it therefore decided to separate the MHIs from the New Hebrides. Yet, not only newly independent states, but also colonial powers are obliged to observe the principle of *uti possidetis*. Accordingly, France may be obliged to respect the delimitation of the administrative boundaries set by the two colonial powers during the colonisation and on the day of independence. Therefore, it can be argued that the act of separating the MHIs from the New Hebrides (Vanuatu) in 1976 may have violated the principle of *uti possidetis*, the right to self-determination of the people of New Hebrides and the principle of territorial integrity of the New Hebrides/Vanuatu.

However, once again, the above argumentation will not stand if France successfully proves that the MHIs have always been treated as an integral part of the French territory of New Caledonia. In this specific scenario, the principle of *uti possidetis* would apply in favour of France and would prevail over the right to self-determination of the people of New Hebrides/Vanuatu. Accordingly, the New Hebrides/Vanuatu should have inherited the pre-independence administrative boundaries set by the two colonial powers, France and the United Kingdom.

In addition, even if France argues that it had occupied the MHIs as part of New Caledonia before the independence of Vanuatu and that the latter should respect this in accordance with the principle of *uti possidetis*, Vanuatu may still have a relevant argument to make based on a number of cases related to the accepted departure from the principle of *uti possidetis*.[130] Gilbert and Ellice Islands in the South Pacific region are an example of cases which depart from the principle of *uti possidetis*. These Islands did form one territorial unit under the control of the United Kingdom during the colonisation. They emerged as two different states after the 1975 partition which took place as a result of separatist demands by Ellice Islanders. The predominantly Polynesians from Ellice Islands feared that decolonisation and the formation of a single territorial unit would condemn them to a permanent minority status alongside the predominantly Micronesians from Gilbert Islands, and that this would undermine their separate cultural identity.[131] It would appear that the British government agreed to the partition in order to preserve order and stability. The United Nations, however, strongly supported the wishes of the Ellice Islanders to form a new State. In fact, the 1974 referendum in the Ellice Islands which was overwhelmingly in support of independence, was overseen by a UN visiting mission.[132] The Ellice Islands became the independent State of Tuvalu in 1978 and the Gilbert Islands achieved independence in 1979 as the Republic of Kiribati. In short, the will of the people of the Ellice Islands and a desire by the colonial power to preserve order and stability led to the departure from the principle of *uti possidetis*. Vanuatu may invoke this case to argue the need to preserve order and stability in the region and

[128] *Vanuatu Daily Post*, *supra* n. 2.
[129] Van Trease (1995), p. 29.
[130] See, *inter alia*, the cases of British Cameroons and Ruanda-Urundi: Trinidad (2018b), pp. 92 and 93.
[131] Trinidad (2018b), p. 95; McIntyre (2012), p. 140.
[132] 'Report on UN Visiting Mission to Gilbert and Ellice Islands', FCO 32/984, Aug.-Sept. 1974, cited by McIntyre (2012), p. 143; Trinidad (2018b), p. 96. The result was 92 percent voting in favour of and 8 percent against independence.

most importantly to claim the right to self-determination of the people of New Hebrides/Vanuatu to decide on the future of the MHIs.

6 The Legal Consequences of France's Alleged Unlawful Act under International Law

Having found that the decolonisation of Mauritius was conducted in a manner contrary to the right to self-determination of the people of Mauritius including the Chagossians, the Court concluded that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act under international law, which the United Kingdom was under an obligation to bring to an end as 'rapidly as possible' and that 'all member States must co-operate with the United Nations to complete the decolonization of Mauritius'.[133]

6.1 France's Obligation to Cease its Continuing Wrongful Occupation of the MHIs?

The rules of state responsibility determine when a state will be considered responsible for wrongful acts or omissions, and the consequences that flow therefrom.[134] Two principal aspects need to be identified. Firstly, has the state breached its obligation under international law? We have demonstrated earlier that France may have breached its obligation by not allowing the people of New Hebrides to decide on the question of whether they want the MHIs to become part of New Caledonia and not Vanuatu. Secondly, what are the consequences of breaching the primary obligation? In other words, what should be done by the responsible state to redress the situation? Article 28 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that state responsibility entails legal consequences.[135] Article 30 of the same instrument states that the responsible state must cease any continuing wrongful act and offer appropriate assurances and guarantees of non-repetition if circumstances so require.[136] Similarly, the ICJ and arbitral tribunals have affirmed on many occasions that 'every international wrongful act of a State entails the international responsibility of that State'.[137] Accordingly, in the Chagos Advisory Opinion, the Court ruled that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing its international responsibility.[138]

In the MHIs dispute, like in the Chagos Advisory Opinion where it was held that the United Kingdom has an obligation to bring an end to its unlawful administration of the Chagos

[133] Chagos Advisory Opinion, *supra* n. 3, paras. 178 and 182.
[134] International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, Art. 1 (2001).
[135] Ibid., Art. 28.
[136] Ibid., Art. 30
[137] See *Corfu Channel (United Kingdom v. Albania)*, Judgment, ICJ Reports 1949, p. 4, at p. 23; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1949, p. 7, para. 47; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 174, at p. 184; *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair*, Awards, XX UNRIAA 1990, p. 215; and Draft Articles on State Responsibility, *supra* n. 134, Art. 1.
[138] Chagos Advisory Opinion, *supra* n. 3, para. 177.

Archipelago, France may be obliged to cease its continuing wrongful occupation and administration of the MHIs.

6.2 Practicalities of France's Obligation

Having shown that France may have violated the right to self-determination of the people of New Hebrides by separating the MHIs from New Hebrides without consulting New Hebrideans/Ni-Vans, it can be argued that France may be required to take immediate and appropriate measures to bring an end to its unlawful occupation of the MHIs.

As mentioned earlier, France has been effectively occupying the MHIs since 1976. The French Navy and French scientists regularly visit the MHIs for *missions de souvereineté* and marine scientific research purposes. In addition, by occupying the MHIs, France has put itself in a position where it seems as though it has sovereign rights of exploring and exploiting, conserving and managing the natural resources of the waters around the MHIs.[139] France exercises control over the two islands including its waters. It allows French vessels to freely navigate and fish in the area, but prevents or detains foreign fishing boats for illegal fishing in MHIs waters.[140]

In practical terms, France may be required to cease, immediately, all of its above activities including regular visits by the Navy, research missions, and the exploration and exploitation of the resources of the waters around these islands.

In addition, in the Chagos Advisory Opinion, the Court stated that the United Nations General Assembly, in the exercise of its functions relating to decolonisation, would determine the modalities required to ensure the completion of the decolonisation of Mauritius. The Court also ordered that 'all member States must co-operate with the United Nations to complete the decolonisation of Mauritius'.[141] It is not clear in the Advisory Opinion what modalities would be required by the General Assembly to ensure the completion of the decolonisation of Mauritius. Though it remains to be seen, one may think that the General Assembly, through the UN Decolonisation Committee, will call for a referendum in which the people of Mauritius, including Chagossians will be asked to exercise their right to self-determination and decide on the question of whether they want the Chagos Archipelago to be separated from Mauritius and be part of the United Kingdom. Similarly, in this case study, it can be argued that the people of Vanuatu should be given the opportunity to decide on the future of the MHIs: whether or not they want these islands to be separated from Vanuatu and be part of New Caledonia.

7 Conclusion

The article examines the legal implications of the Chagos Advisory Opinion and some other relevant cases on the MHIs dispute. It first submits that by transferring the administration of the MHIs to New Caledonia, France may have violated the territorial integrity of New Hebrides/Vanuatu and the right to self-determination of its people, a rule which was already crystallized as a norm of customary international law in the 1960s.

[139] United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 1 November 1994, 1833 UNTS 397, Art. 56.
[140] Fisher (2013), p. 145; for instance, in 2004, France detained a Taiwanese fishing vessel for illegal fishing in the MHIs waters.
[141] Chagos Advisory Opinion, *supra* n. 3, paras. 178 and 182.

It then considers the competing claims of sovereignty made by Vanuatu and France over the MHIs and submits that although France's claims based on effective occupation are likely to override Vanuatu's claims related, among other things, to custom, culture and traditions, the principle of the territorial integrity of colonised territories and the right to self-determination which forms part of customary international law may prevail over the rule of *effectivités* (or the effective occupation of the MHIs by France). The paper also argues that although the right to self-determination can be subject to the principle of *uti possidetis*, the latter seems to apply to the detriment of France's position regarding sovereignty over the MHIs. France may therefore be obliged to respect the delimitation of the New Hebrides boundaries set by the two colonial governments during the colonisation period.

Finally, having found that France's act of transferring the administration of the MHIs to New Caledonia without consulting the people of New Hebrides may have constituted an unlawful act under international law, which entails the responsibility of France, the article submits that, in light of the ruling in the Chagos Advisory Opinion, France may be under an obligation to cease, as soon as possible, its continued occupation and administration of the MHIs. In other words, France may be obliged to cease, immediately, all of its acts *à titre de souverain* on and around these two islands, including regular visits by its Navy, marine scientific research missions, as well as the exploration and exploitation of the resources of the waters around the islands.

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