THE CHAGOS ARCHIPELAGO BEFORE INTERNATIONAL TRIBUNALS: STRATEGIC LITIGATION AND THE PRODUCTION OF HISTORICAL KNOWLEDGE

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This article considers the role of strategic litigation in explaining why small states choose to litigate against greater powers. Strategic litigation may be thought of as the attempt to gain a political or other advantage through law that is not otherwise possible given the power imbalances involved in international relations. The case study examined in this article is the international legal proceedings initiated by Mauritius regarding the Chagos Archipelago. On 8 November 1965, the United Kingdom, as the then colonial power, formally detached the Chagos Archipelago from the colony of Mauritius. The United States then established a military base in the Indian Ocean under a sovereign lease from the UK. Mauritius became independent in 1968 but did so under the shadow of this territorial excision. Subsequently, there has been a decades-long controversy in Mauritian politics as to whether Mauritian negotiators 'gave away' the Chagos Archipelago in return for independence. This article examines both the 2015 award of the United Nations Convention on the Law of the Sea arbitral tribunal, convened under the auspices of the Permanent Court of Arbitration, and the 2019 International Court of Justice ('ICJ') advisory proceedings. It also notes recent developments in the Mauritius–Maldives maritime boundary dispute. These proceedings form a 'national encounter' with the ICJ insofar as they have provided international validation of the Mauritian interpretation of the events leading to its independence. The decisions have had a history-producing or history-confirming function for Mauritius. Mauritius is not, however, the only writer of history involved. The proceedings show the extent to which the UK treated the Chagos Archipelago as a blank space to be inscribed with meaning, even if that meant writing its inhabitants out of the picture.

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I INTRODUCTION

Why do smaller states litigate against larger powers and what can they expect to gain? The present article attempts to answer such questions in relation to legal proceedings initiated by Mauritius against the United Kingdom regarding its detachment (as the administering colonial power) of the Chagos Archipelago from Mauritius prior to Mauritian independence. In particular, it examines the arbitral

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proceedings brought under the *United Nations Convention on the Law of Sea* (‘*UNCLOS*’) in 2010 and the (Mauritian-instigated) request for an advisory opinion on the matter issued by the United Nations General Assembly in 2017.[1] It contends that these proceedings have had political and symbolic benefits for Mauritius beyond or in addition to any practical outcomes. It also notes, at the time of writing, new developments in the maritime boundary dispute being heard before the International Tribunal for the Law of the Sea (‘ITLOS’) between Mauritius and the Maldives. This article refers to such uses of international law as strategic litigation.

Smaller states can and do engage in such strategic litigation against greater powers. Historically, this has occurred not infrequently,[2] and, indeed, such cases continue.[3] Strategic litigation may be thought of as the attempt to gain an advantage through law that is not otherwise possible in the ordinary course of international relations given power imbalances involved.[4] (Or, occasionally, it may allow a national political deadlock over a question of foreign policy to be broken through using international dispute settlement as part of a ‘two-level game’.)[5] Strategic litigation thus leverages the core promise of sovereign equality: that formal equality may level the playing field (to some extent) between smaller and larger states through giving them equal juridical standing to bring claims and be heard.[6] Smaller states that resort to international litigation do not necessarily expect a decision in their favour to secure automatic compliance from the respondent. Rather, it is usually hoped that a successful judicial or arbitral outcome

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1 ‘Notification under Article 287 and Annex VII, Article 1 of UNCLOS and the Statement of the Claim and Grounds on Which It Is Based’, *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Permanent Court of Arbitration, Case No 2011-03, 20 December 2010); *Request for an Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, GA Res 71/292, 71st sess, 88th plen mtg, Agenda Item 87, UN Doc A/RES/71/292 (22 June 2017) (‘*Resolution 71/292*’).

2 Classic cases include *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 (‘*Nicaragua*’); *SS ‘Lotus’ (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10. In respect of *SS ‘Lotus’*, while Turkey is listed as the respondent, the case was brought by agreement and Turkey was a keen participant.

3 See, eg, *South China Sea Arbitration (Philippines v China) (Award)* (Permanent Court of Arbitration, Case No 2013-19, 12 July 2016); *Arctic Sunrise Arbitration (Netherlands v Russia) (Award on Merits)* (Permanent Court of Arbitration, Case No 2014-02, 14 August 2015). See also the continuing proceedings between Ukraine and Russia: ‘Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen (Ukraine v the Russian Federation)’, *Permanent Court of Arbitration* (Web Page, 12 November 2020) <https://pca-cpa.org/en/cases/229/>, archived at <https://perma.cc/QNX4-VD6X>. One might also consider the compulsory conciliation between Timor-Leste and Australia: see generally Natalie Klein, ‘The *Timor Sea Conciliation* and Lessons for Northeast Asia in Resolving Maritime Boundary Disputes’ (2019) 6(1) *Journal of Territorial and Maritime Studies* 30.

4 On the use of law to pursue political objectives, see Shirley V Scott, *International Law in World Politics: An Introduction* (Lynne Rienner Publishers, 3rd ed, 2017) ch 7; Douglas Guilfoyle, ‘The Rule of Law and Maritime Security: Understanding Lawfare in the South China Sea’ (2019) 95(5) *International Affairs* 999.

5 Benedict Kingsbury, ‘International Courts: Uneven Jurisdiction in Global Order’ in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 203, 216. On international relations as a two-level game, see generally Robert D Putnam, ‘Diplomacy and Domestic Politics: The Logic of Two-Level Games’ (1988) 42(3) *International Organization* 427.

6 James Crawford, *Chance, Order, Change: The Course of International Law* (Hague Academy of International Law, 2014) 359–60 [471].

will provide a standard around which other states may rally in order to place diplomatic pressure on a malefactor.[7] In this sense, international law and legal argument provide tools that a state may use in promoting the legitimacy of its own actions or positions, or disputing those of another.[8]

Respondent states in such cases frequently challenge jurisdiction by arguing that attempts to litigate legal questions with clear political implications are an abuse of process or that the real dispute is non-justiciable.[9] Understandably, no international court or tribunal has ever declined jurisdiction on such a basis.[10] Just as litigants before national courts often have conflicts or relationships going well beyond the case at hand, so too are all legal disputes between states embedded in a broader political context. Indeed, no state engages in litigation without it being in the national interest — a question that will always be a balance of political and legal considerations.[11] It is hard, for example, to understand the classic *SS 'Lotus'* case[12] without also understanding the history of Franco–Turkish relations at that time (including the then recent abolition of the capitulatory regime) and ongoing territorial disputes in Alexandretta between the two states.[13] *SS 'Lotus'* was never just a case about jurisdiction over a fatal collision at sea.[14] It was about the aspirations of the new ethno-nationalist Turkish republic to be recognised as a sovereign on equal footing with the European powers.[15]

Where a legal dispute also raises issues going to national self-conception, international cases may further 'impact a society's "collective memory" — how that society understands its past'.[16] This history-making function raises different questions about the relationship between history and international law than those explored, for example, in Anne Orford's work on the transformation of legal concepts over time 'in relation to changes in the social world'.[17] While this article is, in part, concerned with the law of decolonisation, and certainly pays some attention to how the parties involved 'develop[ed] arguments about contemporary political problems that draw on inherited concepts with a history of legal meaning

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7 Kingsbury (n 5) 217–18.

8 Scott (n 4) ch 7.

9 See, eg, *South China Sea Arbitration* (n 3) [61], [82], [164], [167]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction)* [1984] ICJ Rep 392, 432–6 [91]–[98] ('*Nicaragua (Jurisdiction)*').

10 *Nicaragua (Jurisdiction)* (n 9) 435 [96]. See also *South China Sea Arbitration* (n 3) [164].

11 Scott (n 4) 8–9.

12 *SS 'Lotus'* (n 2).

13 See Douglas Guilfoyle, '*SS Lotus (France v Turkey)* (1927)' in Eirik Bjorge and Cameron Miles (eds), *Landmark Cases in Public International Law* (Hart Publishing, 2017) 89, 91–2 ('*SS Lotus*'). See also Umut Özsu, 'De-Territorializing and Re-Territorializing *Lotus*: Sovereignty and Systematicity as Dialectical Nation-Building in Early Republican Turkey' (2009) 22(1) *Leiden Journal of International Law* 29.

14 States do litigate maritime incidents that seem relatively minor in the course of international relations but usually only to secure the release of their nationals, flag vessels or the crew of their vessels: see, eg, *Arctic Sunrise Arbitration* (n 3); *'Enrica Lexie' Incident (Italy v India) (Award)* (Permanent Court of Arbitration, Case No 2015-28, 2 July 2020). In *SS 'Lotus'*, the French defendant, however, had already been released, and the *SS Lotus* allowed to sail on.

15 Özsu (n 13); Guilfoyle, '*SS Lotus*' (n 13).

16 Scott (n 4) 91.

17 Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Marieke de Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press, 2017) 297, 303.

attached to them',[18] its focus is less on such arguments and more on the process: the social function of judicial decisions as a form of history-making and of international litigation as a means of challenging the 'settled script' of historical events.[19] There is already substantial literature on the role of international criminal tribunals in shaping and creating a historic record of atrocity crimes.[20] Drawing on this approach, one might look to the extent to which international litigation more broadly may serve to produce an authoritative history that is beyond dispute and that is popularly understood and accepted. However, if international criminal tribunals are the exemplar of such a history-making function, then it must be observed that proof of such effects in respect of the work of the International Criminal Tribunal for the former Yugoslavia ('ICTY') is, at best, slender.[21] Indeed, '[a]mong some national communities (particularly the Serbs and the Croats) the ICTY is widely despised'.[22] It is common to suggest that both the ICTY and International Criminal Tribunal for Rwanda have 'yet to establish their legitimacy in the states for which they were created', given that there has been a 'persistence of denial, hate, and anti-tribunal propaganda' in both the Balkan region and Rwanda.[23] As Marko Milanović explains, the failure of national communities to accept the vision of history presented through international criminal trials is the result of a variety of sociological factors, including ingroup–outgroup bias, confirmation bias and motivated reasoning.[24] That is, people are generally receptive to accounts that place their identity group on the right side of history and will not only avoid internalising contrary accounts but will also intuitively distrust the institution putting them forward. The strength of this reaction is largely a factor of 'the reaction of dominant local political, media, and intellectual elites', which can amplify and channel such tendencies.[25] As a result, the decisions of international tribunals will usually be trusted by a population only when 'the Tribunal's decisions … align with what these populations want to hear in their particular context and at that particular time'.[26] The history-making function of an international award or judgment on an historic dispute is likely,

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[18] Ibid 304.

[19] Vidya Kumar, 'On Scripts and Sensibility: Cold War International Law and Revolutionary Caribbean Subjects' (2020) 21(8) *German Law Journal* 1541, 1542.

[20] The classic article is Richard Ashby Wilson, 'Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia' (2005) 27(3) *Human Rights Quarterly* 908. For a broader survey of the literature on transitional justice mechanisms, see Audrey R Chapman, 'Truth Finding in the Transitional Justice Process' in Hugo Van Der Merwe, Victoria Baxter and Audrey R Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (United States Institute of Peace Press, 2009) 91.

[21] Martti Koskenniemi, 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook of United Nations Law* 1, 35. But see Sanja Kutnjak Ivković and John Hagan, *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts* (Oxford University Press, 2011) 160–1.

[22] Dan Saxon, 'Exporting Justice: Perceptions of the ICTY among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia' (2005) 4(4) *Journal of Human Rights* 559, 562.

[23] Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge University Press, 2008) 244.

[24] Marko Milanović, 'Courting Failure: When Are International Criminal Courts Likely to Be Believed by Local Audiences?' in Kevin Jon Heller et al (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press, 2020) 261, 262–9.

[25] Ibid 288.

[26] Ibid.

therefore, to be limited: it may be treated as largely confirmatory by one side and rejected by the other. However, it would appear to follow from Milanović's analysis that where dominant national elites are already divided on the underlying questions, the 'message' of an adverse decision may nonetheless gain some traction.

This article argues that, apart from being a contest of disputed sovereignty over the islands of the Chagos Archipelago and as to the legitimacy of the respective parties' positions, the Mauritius–UK dispute also became a struggle over the use of international legal process in producing and recording an authoritative history. The key question for the present article is thus: in pursuing its legal dispute with the UK, to what extent did Mauritius succeed in gaining any political or symbolic advantage and (at least for an internal audience) having its conception of its own past legitimated? In examining the history-producing or -confirming function of an international tribunal, there is also a question about the kinds of historical material that form part of the record, how those materials are placed before a tribunal and what use a tribunal makes of them. This article will therefore examine the 2015 *UNCLOS* arbitration award (*Chagos Marine Protected Area Arbitration*)[27] and the 2019 International Court of Justice ('ICJ') advisory opinion (*Legal Consequences of the Separation of the Chagos Archipelago*)[28] as well as aspects of the written and oral pleadings and the key historical sources upon which they draw. These two proceedings may be read, retrospectively, as part of the one contest about the historical record and the legal significance of those events. The role of the ICJ, however, was much more pronounced in that context given the greater publicity that attends ICJ proceedings.

Taken together, these decisions have had a history-producing or history-confirming function for Mauritius. While the UK maintains elements of its version of events, it has had to concede much, and there are perhaps signs of elite fracture in how to respond to the historic wrongs involved. The proceedings also show the extent to which the UK engaged in another form of history writing, fashioning its own historical account (at the expense of the Archipelago's inhabitants) to better support its policies. I note that this is an article principally about state-to-state litigation and not the litigation concerning the dispossession of the Chagossian people, though the fate of the Chagossians will be touched upon. While there is a distinct Chagossian history addressed in other legal proceedings, those are beyond the scope of this article. I also note that the reflections and analysis offered here are those of an outsider who is neither a Chagossian nor a Mauritian national.

In examining these questions, the rest of this article proceeds by first examining the chronology of events underlying the dispute before examining how that history was litigated in international proceedings. The extent to which these proceedings may cumulatively represent successful strategic litigation on the part of Mauritius is considered in the conclusion.

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[27] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (Permanent Court of Arbitration, Case No 2011-03, 18 March 2015).

[28] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95 ('*Legal Consequences of the Separation of the Chagos Archipelago*').

II Chronology

The history of Mauritius and the Chagos Archipelago is bound up, like the history of many island societies, in colonialism. Mauritius itself was first settled by the Dutch in 1638 (who named it after Prince Maurice van Nassau) before the French took control in 1715 (renaming it Ile de France).[29] According to Milan Meetarbahn, at this time, several 'small islands in the Indian Ocean, including the Chagos Archipelago, were also claimed by France and … administered from Mauritius'.[30]

In 1814, the *Definitive Treaty of Peace and Amity between Austria, Great Britain, Portugal, Prussia, Russia and Sweden, and France* ceded to the UK the Ile de France, which consisted of Mauritius and its dependencies including the Chagos Archipelago.[31] Subsequently, Mauritius was administered as a British colony until 1968.[32] Within that colony, the Chagos Archipelago was maintained as a plantation society, complete with slavery until 1835.[33] Nonetheless, even following emancipation, the inhabitants of the Chagos Islands worked as part of a plantation system. The only work available was that with the plantation companies (producing copra and coconut oil),[34] which administered local affairs 'in a somewhat feudal manner' with minimal oversight provided by infrequent visits from Mauritian officials.[35] The ICJ summarises the status of the Chagos Archipelago during this period of Mauritian history crisply:

> Between 1814 and 1965, the Chagos Archipelago was administered by the United Kingdom as a dependency of the colony of Mauritius. From as early as 1826, the islands of the Chagos Archipelago were listed by Governor Lowry-Cole as dependencies of Mauritius. The islands were also described in several ordinances, including those made by Governors of Mauritius in 1852 and 1872, as dependencies of Mauritius. The Mauritius Constitution Order of 26 February 1964 … promulgated by the United Kingdom Government, defined the colony of Mauritius in Section 90(1) as 'the island of Mauritius and the Dependencies of Mauritius'.[36]

In 1961, Sir Seewoosagur Ramgoolam was nominated the first Chief Minister of non-independent Mauritius at the head of the Labour Party.[37] He became a central figure in Mauritian history, playing a leading role in independence

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[29] Milan JN Meetarbhan, 'Re-Examining the Chagos Marine Protected Area Arbitration: The Lancaster House Undertakings' (2015) 45(6) *Environmental Policy and Law* 248, 249.

[30] Ibid.

[31] *Definitive Treaty of Peace and Amity between Austria, Great Britain, Portugal, Prussia, Russia and Sweden, and France*, signed 30 May 1814, 63 ConTS 171 (entered into force 11 June 1814) art VIII.

[32] Laura Rebecca Jeffery, 'Ecological Restoration in a Cultural Landscape: Conservationist and Chagossian Approaches to Controlling the "Coconut Chaos" on the Chagos Archipelago' (2014) 42(6) *Human Ecology* 999, 1000.

[33] In the late 18th century, slaves had been brought by French planters 'from mainland East Africa and Madagascar via Mauritius': ibid.

[34] *Chagos Islanders v Attorney-General* [2003] EWHC 2222 (QB), [3] ('*Chagos Islanders*').

[35] Ibid [4]. See also at [5]–[8]. Some employment was also available at a meteorological station on Diego Garcia or as domestic servants for plantation company staff: at [5].

[36] *Legal Consequences of the Separation of the Chagos Archipelago* (n 28) 107 [28].

[37] Lindsay Rivière, *Historical Dictionary of Mauritius* (Scarecrow Press, 1982) 105; Rani Mehta and SR Mehta, *Social Transformation of an Island Nation: Development Wonder in Mauritius* (Kalpaz Publications, 2010) 116; K Hazareesingh, *History of Indians in Mauritius* (Macmillan, 1975) 134, referring to Ramgoolam taking up the role on 1 January 1962.

negotiations at the Lancaster House conference in London in 1965.[38] Mauritian politics in the postwar period were complex and far from univocal on the issue of independence. There were divisions on communitarian lines, to some extent reflecting fears of a Creole-speaking community that Indo-Mauritians would dominate any post-independence political settlement.[39] There were also small minorities of Chinese- and Franco-Mauritians.[40] This led to there being at least four principal political parties in the early 1960s, and Ramgoolam's Labour Party governed in coalition with the Muslim Committee of Action.[41] In any event, it is Ramgoolam, a Mauritian Indian who studied medicine in London,[42] who 'stands taller than others' in the story of independence and who came to be hailed as a 'father of the nation'.[43] He had led the new Mauritian Labour Party since the 1948 elections and had been at the forefront of constitutional reform in Mauritius since at least 1952, when he had demanded the introduction of universal suffrage in the colony's Legislative Council elections.[44]

In 1964, the UK and United States governments conducted the Anglo-American Survey in the Indian Ocean.[45] The US had a strategic interest in obtaining a military base in the Indian Ocean, and its first preference was to establish it on uninhabited territory under the sovereignty of an ally.[46] In the words of a Mauritian diplomat in 2010:

> The UK/US first choice was the island of Aldabra, north of Madagascar.
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> Unfortunately, Aldabra was the breeding ground for rare giant tortoises, whose mating habits would have probably been upset by the military activity and whose cause would have been championed noisily by publicity-aware ecologists.[47]

Thus, the US and UK settled on the idea of establishing the military base on the island of Diego Garcia within the Chagos Archipelago.[48] Geographically, it is in the heart of the Indian Ocean and would give US strategic bombers unparalleled reach. The island itself is equidistant from Singapore and Mombassa (a distance

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38 *Legal Consequences of the Separation of the Chagos Archipelago* (n 28) 121–4 [102]–[112].

39 Mehta and Mehta (n 37) 116.

40 Ibid; SR Mehta, 'The Uneven "Inclusion" of Indian Immigrants in Mauritius' (1989) 38(1) *Sociological Bulletin* 141, 145.

41 Mehta and Mehta (n 37) 116.

42 Ibid.

43 Ibid 117. For a concise biography, see Rivière (n 37) 104–5.

44 Ranbir Singh, *Mauritius: The Key to the Indian Ocean* (Arnold-Heinemann, 1980) 60; Hazareesingh (n 37) 142.

45 Select Committee on the Excision of the Chagos Archipelago, Legislative Assembly (Mauritius), *Report of the Select Committee on the Excision of the Chagos Archipelago* (LC Achille, 1983) 20–2. For the original report, see Robert Newton, *Report on the Anglo–American Survey in the Indian Ocean* (Report, 1964) (The National Archives, CO 1036/1332) ('*Anglo–American Survey*'), reproduced in 'Memorial of the Republic of Mauritius: Volume II', *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Permanent Court of Arbitration, Case No 2011-03, 18 March 2015) annex 2 ('Memorial of Mauritius').

46 Mark B Salter and Can E Mutlu, 'Securitisation and Diego Garcia' (2013) 39(4) *Review of International Studies* 815, 822–3; *Chagos Islanders* (n 34) [15].

47 Foreign Affairs Committee, House of Commons (UK), *Written Evidence from HE Mr Abhimanu Kundasamy, High Commissioner of Mauritius* (Doc No OT 423, Session 2009–10, January 2010) <https://publications.Parliament.uk/pa/cm200910/cmselect/cmfaff/memo/overseas/ucm42302.htm>, archived at <https://perma.cc/L23R-UU5Q>.

48 Ibid.

of 3,600 km to each) and is easily within range of Mumbai (2,900 km) and targets as far afield as Tehran (5,200 km) or Kabul (4,700 km). Indeed, Diego Garcia has been used as a military base 'in every major US military operation in the Near East' since 1973, including the attempt to rescue the hostages at the US embassy in Tehran, both wars in Iraq and the operations in Afghanistan post-2001.[49] Tragically, however, its selection would lead to the dispossession of its inhabitants, being some 1,300 to 1,500 people by 1973.[50]

This depopulation was preceded by the UK implementing a number of administrative measures designed to create a legal fiction that the inhabitants of the Chagos Archipelago were merely temporary workers (by classifying all of them as 'belongers' of either Mauritius or Seychelles)[51] or that only a very limited number had third generation (or longer) family histories of habitation on the islands.[52] John Gillis' work suggests that such practices are part and parcel of colonialism. European thinkers have long imagined islands as empty spaces in which political experiments could be conducted: indeed, Thomas More's utopia is set in an imaginary island.[53] Such thought experiments paved the way for 18th century colonial practices, including slavery-based plantation economies such as that established on the Chagos Archipelago.[54] Refashioning the Chagos plantation experiment into a new military-strategic space required that the map first be made blank again. More prosaically, such moves were also necessary, in part, to deal with anticipated criticism at the UN. The UK ambassador to the UN, Lord Caradon, warned the UK Foreign Office in 1965 to anticipate

> charges of failure to carry out our *Charter* obligations [to facilitate self-determination] to those who are permanent inhabitants. Moreover, our counter-arguments will have to avoid giving ammunition to Argentina which is sure to perceive analogy with Falklands (ie we cannot argue that Indian Ocean Territory is not a non-self governing territory in sense of Chapter xi of [the] *Charter* merely because there were no indigenous inhabitants originally or because only a few of present inhabitants are permanent).
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[49] Salter and Mutlu (n 46) 820.

[50] The precise numbers are complicated by the freedom of movement between Mauritius and Chagos and their deliberate manipulation by British authorities: Richard Gifford and Richard P Dunne, 'A Dispossessed People: The Depopulation of the Chagos Archipelago 1965–1973' (2014) 20(1) *Population, Space and Place* 37. But the *Anglo-American Survey* put the number at 1,364 in 1964: *Anglo–American Survey* (n 45) [7].

[51] Gifford and Dunne (n 50) 40.

[52] This version of events is summarised in *Chagos Islanders* (n 34) [9]–[16], which depicts a population in decline with little trace of a distinctive community by 1964.

[53] John R Gillis, 'Taking History Offshore: Atlantic Islands in European Minds, 1400–1800' in Rod Edmond and Vanessa Smith (eds), *Islands in History and Representation* (Routledge, 2003) 19, 25.

[54] Ibid 26. Elsewhere, John Gillis suggests that the Western tradition is not one of thinking *about* islands but thinking *with* them: John Gillis, *Islands of the Mind: How the Human Imagination Created the Atlantic World* (Palgrave Macmillan, 2004). I am grateful to Umut Ozguc for drawing these arguments to my attention.

> If we could say there are (repeat are) no permanent inhabitants many of these difficulties would not arise …[55]

The effect was to write the Chagossians out of the historical picture. This conceit was given a veneer of plausibility by the fact that, in the early 1960s, there had been a very significant number of workers imported to the islands from Seychelles, which had substantially altered the archipelago's demographics.[56] In any event, a 1966 Foreign Office memorandum regarding the plan for the US military base and the likely political fallout before the UN General Assembly Special Committee on Decolonization ('Committee of 24') made the UK position clear:

> We must surely be very tough about this. The object of the exercise was to get some rocks which will remain *ours*; there will be no indigenous population except seagulls who have not yet got a Committee (the Status of Women Committee does *not* cover the rights of Birds).[57]

A hand annotation by the Permanent Under-Secretary of State at the Foreign Office and Head of the Diplomatic Service, Denis Greenhill (later Lord Greenhill of Harrow), reads: 'Unfortunately along with the Birds go some few Tarzans or Men Fridays whose origins are obscure, and who are being hopefully wished on to Mauritius etc.'[58]

Against this backdrop, the Mauritian Constitutional Conference was held at Lancaster House in London in September 1965. The colony of Mauritius was represented by a delegation including members of its four principal political parties and two independent members of the Legislative Assembly.[59] Most of these representatives were pro-independence (albeit with some concerns about minority protections in any post-independence electoral system).[60] Only the Parti Mauricien Social Democrate advocated 'close constitutional associations' with the UK instead of full independence.[61]

The name 'Lancaster House' takes on a totemic quality in the various proceedings, given the importance of the undertakings given by the UK at the close of those negotiations. Before we come to those undertakings, it is worth pausing to reflect on where and what Lancaster House is: an imposing mansion on the Mall in St James's, which has for some time been used by the Foreign Office. While no doubt a convenient facility for stately meetings with large gatherings of foreign dignitaries, its immediate neighbours include Buckingham Palace and Clarence House, and it is less than a one mile walk to Downing Street or the Palace of

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55 Telegram from UK Mission to the United Nations, New York, to the UK Foreign Office, 8 November 1965, [2], [4], reproduced in 'Memorial of Mauritius' (n 45) annex 31.

56 Gifford and Dunne (n 50) 40–1.

57 Memorandum from PRH Wright to Dennis Greenhill, 24 August 1966 (emphasis in original) <https://upload.wikimedia.org/wikipedia/commons/6/6d/Diplomatic_Cable_signed_by_D.A._Greenhill%2C_dated_August_24%2C_1966.jpg>, archived at <https://perma.cc/HU8S-LABN>. This memorandum is quoted in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin), [27]; 'Hearing on Jurisdiction and the Merits', *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Permanent Court of Arbitration, Case No 2011-03, 6 May 2014) 1128.

58 See above n 57.

59 *Report of the Select Committee on the Excision of the Chagos Archipelago* (n 45) 7 [20].

60 Ibid 7 [21].

61 Ibid.

Westminster. If any further emphasis was needed, the choice of venue made it clear where the power lay.

The conference resulted in the so-called Lancaster House Undertakings regarding the conditions of Mauritian independence, including the detachment of the Chagos Archipelago. The Lancaster House Undertakings went on to become the central legal document in the Mauritius–UK dispute. The significance of the undertakings to the Mauritians was that they contained a number of guarantees, including that

- 'the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable: … (b) Fishing Rights';
- 'if the need for the facilities on the islands disappeared the islands should be returned to Mauritius'; and
- 'the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government'.[62]

The clear point was, from the Mauritian point of view, that if something is to be returned to Mauritius or revert to Mauritius, Mauritius must have owned it in the first place. The legal status of the Lancaster House Undertakings and the conditions under which they were concluded is discussed below, involving, as it does, the difficult questions that must surround a non-international agreement concluded between a colonial power and a pre-independence government.[63]

In 1965, the detachment of the Chagos Archipelago from the rest of Mauritius was carried out by Order in Council, creating the British Indian Ocean Territory ('BIOT').[64] This was timed to present the UN with a fait accompli.[65] Criticism in the General Assembly,[66] and in the Committee of 24,[67] followed. In 1968, Mauritius became independent, and its first Prime Minister was Sir Seewoosagur Ramgoolam. In 1971, the forcible removal of the Chagossian population began, and litigation followed in the UK from 1975 onwards.[68] US military construction on Diego Garcia also began in this period.

The excision of the Chagos Archipelago from Mauritius and the conditions under which it occurred remained a source of controversy in Mauritian politics. Indeed, in 1982–83, the Mauritian Parliamentary Select Committee on the Excision of the Chagos Archipelago ('Select Committee') conducted an enquiry

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62 These are reproduced in full in *Chagos Marine Protected Area Arbitration* (n 27) [77] and in less detail in Record of a Meeting Held in Lancaster House, 23 September 1965, 2:30pm (The National Archives, CO 1036/1253), reproduced in *Legal Consequences of the Separation of the Chagos Archipelago* (n 28) 123 [110]. See also 'Memorial of Mauritius' (n 45) annex 19.

63 See *Chagos Marine Protected Area Arbitration* (n 27) [172].

64 *The British Indian Ocean Territory Order 1965* (UK) SI 1965/1920, ord 3.

65 *Chagos Islanders* (n 34) app A ('*Appendix to Judgment*') [37].

66 *Question of Mauritius*, GA Res 2066 (XX), UN GAOR, 20th sess, 1398th plen mtg, Supp No 14, UN Doc A/6014 (16 December 1965).

67 *Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN GAOR, 19th sess, Doc No A/5800/Rev.1** (22 December 1964) ch XIV ('*Mauritius, Seychelles and St Helena*') 349–50 [129]–[138], 351 [142]–[143], [146], 352 [154]–[155], [159]. The Committee of 24, or Special Committee on Decolonization, was then known as the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

68 *Chagos Islanders* (n 34) [31]–[49], [54]. See also Gifford and Dunne (n 50) 42.

into the circumstances surrounding the excision.[69] It concluded that the excision had occurred under duress, with excision being the quid pro quo for independence.[70] In the language of the Select Committee, it was an 'indisputable fact' that the 'attitude' of this choice, which 'was offered through Sir Seewoosagur to the majority of delegates supporting independence … cannot fall outside the most elementary definition of blackmailing'.[71]

The Select Committee concluded that this 'blackmail element' cast doubt on the legality of the excision, as did the incompatibility of the excision with the 1960 UN General Assembly's *Declaration on the Granting of Independence to Colonial Countries and Peoples*.[72] Thus, by 1983, this was the official account of Mauritian history, at least internally or among Mauritian political elites. In 1992, Mauritius clearly asserted its sovereignty over the Chagos Archipelago by amending its constitution to include express reference to the archipelago as part of its territory[73] (although the *Interpretation and General Clauses Act 1974* had already been amended in 1982 to include the archipelago within the definition of Mauritius).[74] This was not done any earlier, in part, due to Mauritius' substantial economic dependence on the UK in the early decades of its independence.[75]

In the period 2002–04, the US base on Diego Garcia was used in 'extraordinary rendition' torture flights.[76] Then, in 2010, the UK unilaterally declared a 'marine protected area' ('MPA') throughout the BIOT exclusive economic zone, which included a fishing ban.[77] This was done in the final days of Prime Minister Gordon

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[69] *Report of the Select Committee on the Excision of the Chagos Archipelago* (n 45); *Chagos Marine Protected Area Arbitration* (n 27) [102].

[70] The British authorities had required Sir Seewoosagur Ramgoolam to choose between 'either retaining the archipelago or obtaining independence for his country': *Report of the Select Committee on the Excision of the Chagos Archipelago* (n 45) 36.

[71] Ibid. The two dissenting arbitrators in *Chagos Marine Protected Area Arbitration* also considered that the circumstances amounted to duress: *Chagos Marine Protected Area Arbitration* (n 27) [77] (Judges Kateka and Wolfrum).

[72] *Report of the Select Committee on the Excision of the Chagos Archipelago* (n 45) 37, quoting *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 15th sess, 947th plen mtg, Supp No 16, UN Doc A/4684 (14 December 1960) para 5.

[73] *Constitution of the Republic of Mauritius (Amendment No 3) Act 1991* (Mauritius) s 19(d). This amendment was assented to on 17 December 1991 and came into force on 12 March 1992: at s 27. The UK took the view in litigation that such assertions were too late to be of any effect: 'Hearing on Jurisdiction and the Merits', *Chagos Marine Protected Area Arbitration* (Permanent Court of Arbitration, Transcript, 30 April 2014) 539–41 [62]–[69] ('Hearing Transcript 30 April 2014, *Chagos Marine Protected Area Arbitration*').

[74] *Interpretation and General Clauses (Amendment) Act 1982* (Mauritius).

[75] This is, at least, the reason given by Mauritius: 'Hearing on Jurisdiction and the Merits', *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Permanent Court of Arbitration, 23 April 2014) 136–8 [72]–[75] ('Hearing Transcript 23 April 2014, *Chagos Marine Protected Area Arbitration*').

[76] '"Extraordinary rendition" … refers to an extrajudicial procedure used to transport terrorist suspects from one country to another for the purposes of interrogation or imprisonment in circumstances where there is a real risk of torture or cruel, inhuman or degrading treatment': Suzanne Egan, *Extraordinary Rendition and Human Rights: Examining State Accountability and Complicity* (Palgrave Macmillan, 2019) 2. It is known that the Central Intelligence Agency moved suspects through the airbase at Diego Garcia and questioned some there: Peter Harris, 'America's Other Guantánamo: British Foreign Policy and the US Base on Diego Garcia' (2015) 86(4) *Political Quarterly* 507, 509.

[77] *Legal Consequences of the Separation of the Chagos Archipelago* (n 28) 110 [48]; Meetarbhan (n 29) 250–1.

Brown's Labour government in the lead-up to an election. It took Mauritius by surprise, there having been personal assurances in 2009 by Prime Minister Brown to Mauritian Prime Minister Dr Navin Ramgoolam (the son of the first post-independence Prime Minister) that plans for an MPA would be put on hold.[78] One UK official noted in this context that the environmental lobby was significantly more powerful than the Chagossian lobby.[79]

Prime Minister Ramgoolam recruited UK- and US-based international lawyers to contest the MPA declaration.[80] Subsequently, *UNCLOS* Part XV arbitration proceedings, which ran throughout 2010–15, were arbitrated under the auspices of the Permanent Court of Arbitration ('PCA'). Mauritius took the view that 'the UK was not the coastal State entitled to declare a Marine Protected Area around the Chagos and that, [in addition] by declaring an MPA, the UK had acted in breach of its obligations under the Lancaster House Undertakings'.[81] In 2015, the award in the *Chagos Marine Protected Area Arbitration* was handed down. It found that the UK's declaration of the MPA had breached its international obligations, principally through the UK's failure to consult adequately with Mauritius regarding affected Mauritian interests.[82] Critically, this outcome required an express finding that the Lancaster House Undertakings were legally binding unilateral undertakings that conferred upon (or recognised the continued existence of) legal interests held by Mauritius in respect of the archipelago.[83] More radically, two arbitrators, Judges Kateka and Wolfrum, would have found, on the basis of the violation of the law of decolonisation, that the UK was in fact not the relevant 'coastal state' entitled to proclaim an MPA within the meaning of *UNCLOS*.[84]

This outcome, including the bold minority view, put diplomatic wind in Mauritius' sails. Mauritius lobbied the UN General Assembly to refer the issue to the ICJ.[85] In 2017, the General Assembly *Resolution 71/292* requested an advisory opinion from the ICJ, asking the question: 'Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968,

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78 *Chagos Marine Protected Area Arbitration* (n 27) [88] (Judges Kateka and Wolfrum).

79 Meetarbhan (n 29) 251, citing a US Government cable of 15 May 2009: Telegram from United Kingdom to British Indian Ocean Territory Diego Garcia et al, 15 May 2009 <https://wikileaks.org/plusd/cables/09LONDON1156_a.html>, archived at <https://perma.cc/E5Q4-ECBC>.

80 Led by Professor Philippe Sands QC of University College London and also including Professor James Crawford SC of the University of Cambridge, Paul Reichler and Andrew Loewenstein of the law firm Foley Hoag LLP (Reichler being best known for being lead counsel for Nicaragua in the *Nicaragua* case) and Elizabeth Wilmshurst of Chatham House (who had been the only UK Foreign and Commonwealth Office lawyer to resign over the illegality of the 2003 invasion of Iraq).

81 Meetarbhan (n 29) 250. See also 'Notification under Article 287 and Annex VII, Article 1 of UNCLOS and the Statement of the Claim and Grounds on Which It Is Based' (n 1); 'Memorial of the Republic of Mauritius: Volume II', *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Permanent Court of Arbitration, Case No 2011-03, 1 August 2012) [1.23]–[1.25].

82 *Chagos Marine Protected Area Arbitration* (n 27) [520]–[541].

83 See ibid [446]–[448].

84 Ibid [67]–[77], [80] (Judges Kateka and Wolfrum).

85 *Request for the Inclusion of an Item in the Provisional Agenda of the Seventy-First Session: Request for an Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 71st sess, UN Doc A/71/142 (14 July 2016).

following the separation of the Chagos Archipelago from Mauritius and having regard to international law … ?'[86]

III INTERNATIONAL LEGAL PROCEEDINGS AND THE MAURITIAN ACCOUNT OF HISTORY

The principal focus of this article is the struggle of the government of Mauritius to recover its own history of the events surrounding Mauritian independence and the excision. This, in turn, required unpicking acts of history-making by the UK. Support for the idea of an insular US military base in the heart of the Indian Ocean required UK officials to change populated islands into empty spaces. These were acts of both policy and imagination. This overwriting of an ideal, uninhabited island onto the reality of post-plantation settlements required not only the excision of the Chagos Archipelago from Mauritius but also, as noted, the forcible depopulation of the archipelago. The Chagossians were thus written out of the story and have been struggling ever since to be written back in.[87] The extent to which this has occurred as an incidence of the proceedings considered in this Part will be touched on, though not in depth.

In sum, the account of history that Mauritius succeeded in placing on the legal record had two critical elements. First, it established that, to the extent that the Mauritian pre-independence representatives acquiesced in the excision of the Chagos Archipelago, they were coerced. Secondly, Mauritius succeeded in obtaining international acknowledgement that the UK had given undertakings that: were legally binding, acknowledged certain Mauritian rights and, arguably at least, implicitly acknowledged Mauritian sovereignty. Additionally, insofar as this was a contest of legitimacy, Mauritius politically or symbolically benefitted from an authoritative determination that the excision was both unlawful and carried out in bad faith.[88]

On the second element, the critical document in this history is the 1965 Lancaster House Undertakings. It contains relevant undertakings given by the UK to Mauritius and was central to the reasoning underpinning the 2015 *UNCLOS* arbitration award. As noted above, the key undertakings regarded fishing rights, mineral and oil resource management, and the return of the islands to Mauritius 'if the need for the facilities on the islands disappeared'.[89] The status of this document was contested in the arbitration proceedings. The UK position was that the undertakings were freely negotiated but not legally binding, while the Mauritian position was that the Mauritian Ministers had consented to the detachment of the Chagos Archipelago under duress and therefore that the

[86] *Resolution 71/292*, UN Doc A/RES/71/292 (n 1) para (a).

[87] See Kinnari Bhatt, 'Chagos: A Chance for the ICJ to Do More for Advancing Human Rights through the Rule of Law?' (2018) 55 *Questions of International Law: Zoom-Out* 85.

[88] See *Chagos Marine Protected Area Arbitration* (n 27) [77] (Judges Kateka and Wolfrum). On the role of international law in contests of legitimacy, see Ian Hurd, *How to Do Things with International Law* (Princeton University Press, 2017) 12, 48. Cf Neta C Crawford, *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention* (Cambridge University Press, 2002) ch 1.

[89] The undertakings are reproduced in full in *Chagos Marine Protected Area Arbitration* (n 27) [77]. They are also reproduced as excerpts in *Legal Consequences of the Separation of the Chagos Archipelago* (n 28) 123 [110].

undertakings did not bind Mauritius but were nonetheless binding upon the UK.[90] Having noted that Mauritius and the UK could not conclude an international agreement while Mauritius remained a colony,[91] the tribunal went on to reason:

> The independence of Mauritius in 1968, however, had the effect of elevating the package deal reached [by the UK] with the Mauritian Ministers to the international plane and of transforming the commitments made in 1965 into an international agreement. In return for the detachment of the Chagos Archipelago, the United Kingdom made a series of commitments regarding its future relations with Mauritius. When Mauritius became independent and the United Kingdom retained the Chagos Archipelago, the Parties fulfilled the conditions … [of] the 1965 Agreement and, by their conduct, reaffirmed its application … Moreover, since independence the United Kingdom has repeated and reaffirmed the Lancaster House Undertakings on multiple occasions. This repetition continued … [notwithstanding Mauritius asserting] its sovereignty claim in the 1980s, and even after such a claim was enshrined in the Constitution of Mauritius in 1991.[92]

Such a finding was sufficient to resolve the law of the sea question before the *UNCLOS* arbitration tribunal, which was whether Mauritius had rights such that the UK was obliged to consult Mauritius before implementing an MPA. It was also significant to Mauritius as an affirmation that the undertakings were legally binding. If this was so, then undertaking (vii) (that 'if the need for the facilities on the islands disappeared the islands should be returned to Mauritius') was also binding. The use of 'returned' strongly implied Mauritius held underlying sovereignty and that the UK was (in language used by some UK officials) in the position of a 'temporary freeholder'.[93]

However, of more significance to the Mauritian account of history was one particular moment leading up to the understandings being 'agreed': a meeting between Sir Seewoosagur Ramgoolam and UK Prime Minister Harold Wilson on 23 September 1965 during the course of the Mauritian constitutional conference at Lancaster House. The day before the meeting, Wilson was briefed by his Private Secretary, Sir Oliver Wright, in the following terms:

> Sir Seewoosagur Ramgoolam is coming to see you at 10.00 tomorrow morning. The object is to frighten him with hope: hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago. I attach a brief prepared by the Colonial Office, with which the Ministry of Defence and the Foreign Office are on the whole content. The key sentence in the brief is the last sentence of it on page three.[94]

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90 This became a significant point of analysis and debate in the arbitration hearings: *Chagos Marine Protected Area Arbitration* (n 27) [390]–[406], [417]–[428].

91 Ibid [424].

92 Ibid [425], [428].

93 'Hearing Transcript 23 April 2014, *Chagos Marine Protected Area Arbitration*' (n 75) 159.

94 Colonial Office (UK), 'Note for the Prime Minister's Meeting with Sir Seewoosagur Ramgoolam, Premier of Mauritius' (Note, 22 September 1965) (The National Archives, PREM 13/3320) 1, reproduced in 'Memorial of Mauritius' (n 45) annex 17, quoted in *Legal Consequences of the Separation of the Chagos Archipelago* (n 28) 122 [105].

The sentence referred to in the Colonial Office brief read: 'The Prime Minister may therefore wish to make some oblique reference to the fact that [Her Majesty's Government has] the legal right to detach Chagos by Order in Council, *without* Mauritius consent, but this would be a grave step.'[95]

On the morning of 23 September 1965, Prime Minister Wilson and Premier Ramgoolam met as planned. Wright's report of the meeting recorded that Wilson told Ramgoolam that,

> in theory, there were a number of possibilities. The Premier and his colleagues could return to Mauritius either with Independence or without it. On the Defence point, Diego Garcia could either be detached by order in Council or with the agreement of the Premier and his colleagues. The best solution of all might be Independence and detachment by agreement, although he could not of course commit the Colonial Secretary at this point.[96]

The consequences of this meeting were plain. Ramgoolam was sent back to Lancaster House with a clear understanding of where things stood. The conference convened at 2:30pm under the chairmanship of Colonial Secretary Anthony Greenwood, who opened by stating 'that he was required to inform his colleagues of the outcome of his talks with Mauritian Ministers about the detachment of the Chagos Archipelago at 4pm' the same day.[97] Unsurprisingly, given the enormous pressure brought to bear, this was the meeting at which the Mauritian delegates conceded the question of excision and the Lancaster House Undertakings crystallised.[98] The undertakings were formalised on 5 November 1965 and assented to by the Mauritian Ministers.[99] The high-handed condescension exhibited throughout towards Premier Ramgoolam and the Mauritian delegation is breathtaking, if perhaps unsurprising.

The detail of this sequence of events was led in evidence before the PCA arbitral tribunal but was not referred to in the award.[100] (Presumably because it was more relevant to questions of sovereignty, which the tribunal found to be beyond the scope of arbitral proceedings brought under *UNCLOS*.)[101] However, as noted, Judges Kateka and Wolfrum were prepared to consider the sovereignty question in light of the law of decolonisation and would have ruled in favour of Mauritius. In doing so, they concluded that the record of the conversation between Prime Minister Wilson and Premier Ramgoolam discussed above was evidence of duress.[102]

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95 Colonial Office (UK) (n 94) (The National Archives, PREM 13/3320) 5 (emphasis in original), reproduced in 'Memorial of Mauritius' (n 45) annex 17, quoted in *Legal Consequences of the Separation of the Chagos Archipelago* (n 28) 122 [106].

96 'Record of a Conversation between the Prime Minister and the Premier of Mauritius, Sir Seewoosagur Ramgoolam, No 10 Downing Street, 23 September 1965, 10am' (The National Archives, FO 371/184528) 3, reproduced in 'Memorial of Mauritius' (n 45) annex 18, quoted in *Legal Consequences of the Separation of the Chagos Archipelago* (n 28) 122 [107].

97 'Record of a Meeting Held in Lancaster House, 23 September 1965, 2:30pm' (The National Archives, CO 1036/1253) [1], reproduced in 'Memorial of Mauritius' (n 45) annex 19.

98 See 'Record of a Meeting held in Lancaster House, 23 September 1965, 2:30pm' (n 97) [22].

99 See Telegram from Mauritius to the Colonial Office, 5 November 1965 (The National Archives, FO 371/184529), reproduced in 'Memorial of Mauritius' (n 45) annex 25, [1].

100 'Hearing Transcript 23 April 2014, *Chagos Marine Protected Area Arbitration*' (n 75) 119–24 [24]–[38] (James Crawford).

101 *Chagos Marine Protected Area Arbitration* (n 27) [213]–[230].

102 Ibid [77] (Judges Kateka and Wolfrum).

Nonetheless, it was through the arbitration proceedings, and more specifically through the annexes to the Mauritian memorial, that these documents entered the international record. These annexes run to several hundred pages and constitute a capsule archive of relevant historical material. How were these documents obtained? Most were available from The National Archives in Kew, west of Westminster. The National Archives are the central repository for a wide variety of government documents ranging from 12th century court records through to Cabinet papers and the records of the Foreign and Colonial Office.[103] Other documents reproduced in the Mauritian arbitration memorials included more recent material discovered and put into the public domain by the UK government in the course of the *Bancoult* litigation, in which a group of Chagossians claimed a right of return to the archipelago,[104] as well as a quantity of WikiLeaks material, the authenticity of which was not contested. The critical point being that it is the UK's own declassified documents from The National Archives that were used to challenge the UK's conduct in arbitration proceedings.

The UK did not take well to this use of the historic record. As one of the UK's counsel put it during the arbitration hearings:

> I will now conclude with some remarks on Mauritius's reliance on the United Kingdom internal documents. As already noted, of course we don't have the benefit of seeing a similar array of Mauritius's internal documents showing how the 1965 understandings were discussed by Mauritius internally over the years.[105]

Several replies could be made to this statement, carrying, as it does, an intimation of the UK being placed at a deliberate disadvantage. At the least, it is somewhat unrealistic to expect parity in the documentary and record-keeping practices of a long-established and large bureaucratic state like the UK and those of a much less well-resourced country.

The UK's public position on the arbitration was, in effect, to declare that it changed nothing of substance: the only question was 'to explore how [Mauritian] fishing ambitions are compatible with conservation' measures in the archipelago.[106] Nonetheless, as Michael Waibel noted at the time, the award had several effects. First, it served to keep the question of the lease of Diego Garcia to the US, and the question of the dispossessed Chagossians, high on the international agenda.[107] Secondly, the simple fact of the arbitration had put 'the UK in the awkward position of having to defend a colonial legacy in the Indian Ocean whose establishment is at least in tension with the legal principles applicable to

103 See 'What We Have', *The National Archives* <https://www.nationalarchives.gov.uk/help-with-your-research/start-here/what-we-have/>, archived at <https://perma.cc/F5TX-P8FW>.

104 See *R v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin).

105 'Hearing Transcript 30 April 2014, *Chagos Marine Protected Area Arbitration*' (n 73) 623 [132] (Amy Sander) (emphasis omitted).

106 Owen Bowcott and Sam Jones, 'UN Ruling Raises Hope of Return for Exiled Chagos Islanders', *The Guardian* (online, 19 March 2015) <https://www.theguardian.com/world/2015/mar/19/un-ruling-raises-hope-of-return-for-exiled-chagos-islanders>, archived at <https://perma.cc/6ZEH-NWWE>.

107 Michael Waibel, 'Mauritius v UK: Chagos Marine Protected Area Unlawful', *EJIL:Talk!* (Blog Post, 17 April 2015) <https://www.ejiltalk.org/mauritius-v-uk-chagos-marine-protected-area-unlawful/>, archived at <https://perma.cc/6KFC-ZP89>.

decolonization'.[108] Further, as Waibel put it, '[t]he detailed submissions by both parties (including many original documents) will allow students and others to judge for themselves whether the UK's actions in 1965 conformed to these principles'.[109] And an authoritative determination on that evidence followed relatively quickly thereafter.

As noted, the arbitration award gave diplomatic momentum to Mauritius. It also proved that the decolonisation question was worth exploring: the evidence was, on its merits, not good for the UK, and Mauritius had come within a single vote of winning on that point in the arbitration. In 2017, the UN General Assembly referred to the ICJ the question of whether Mauritian decolonisation was lawfully completed in light of the detachment of the Chagos Archipelago in 1965.[110] The referral was supported overwhelmingly by African Union states, small island and archipelagic states, and India, but was notable for a high rate of abstentions.[111] Nonetheless, the simple fact of losing the vote on the referral to the ICJ has been described by one UK newspaper as a 'humiliating loss' for British diplomacy.[112]

Before the ICJ, the same historical material was led. The passages quoted above from the briefing note for Prime Minister Wilson, the Colonial Office brief and Wright's record of the 23 September 1965 meeting between Wilson and Ramgoolam were all quoted in the course of the ICJ's advisory opinion.[113] Indeed, what is striking is that these very same documents were avoided entirely in the arbitral award and mentioned only fleetingly in the partially dissenting opinion of Judges Kateka and Wolfrum.[114] The ICJ quoted them at the same length that I have set them out above, giving them much greater visibility and status — at least in the world of international diplomacy and law. There was another important feature of the ICJ case: the prominence given to the fate of the Chagossians themselves, a tragedy all too often subsumed in other accounts. Notably, the ICJ proceedings saw the innovative use of a recorded video statement by one of those displaced Chagossians, Marie Liseby Elysé, which was put as showing 'what the continuation of colonialism really means for real people'.[115]

The key legal point was, of course, the argument to be made on decolonisation. The position adopted by the UK was that there was not a relevant law of decolonisation as at 1965 or 1968 that was binding upon the UK. This was put by Professor Philippa Webb in the following terms:

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108 Ibid.

109 Ibid.

110 *Resolution 71/292*, UN Doc A/RES/71/292 (n 1).

111 It was adopted with a vote of 94 in favour to 15 against, with 65 abstentions: UN GAOR, 71st sess, 88th plen mtg, UN Doc A/71/PV.88 (22 June 2017) 17–18 ('*Request Meeting Record*'). Other General Assembly requests to the ICJ for advisory opinions have featured high numbers of abstentions, such as the request for an advisory opinion on the legal consequences arising from Israel's construction of a wall in the occupied Palestinian territories, with a vote of 90 in favour to 8 against, with 74 abstentions: UN GAOR, 10th emergency special sess, 23rd plen mtg, UN Doc A/ES-10/PV.23 (8 December 2003) 20.

112 Joseph Cotterill, 'British Rule over Chagos Islands Declared Illegal by UN Court', *Financial Times* (online, 26 February 2019) <https://www.ft.com/content/4932d0c4-391b-11e9-b856-5404d3811663>, archived at <https://perma.cc/EJ5V-U5HQ>.

113 See *Legal Consequences of the Separation of the Chagos Archipelago* (n 28) 122 [105]–[107].

114 See *Chagos Marine Protected Area Arbitration* (n 27) [77].

115 'Verbatim Record 2018/20', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 3 September 2018) 72 (Philippe Sands).

> [T]here was no legal right to self-determination binding on the United Kingdom in 1965 or in 1968. But even if there had been such a right, it was satisfied by the freely expressed will of the people of Mauritius through the consent of their representatives and a general election. … [In addition], as at 1965 (or 1968), there was no 'associated right' under general international law to the totality of the territory of a non-self-governing territory prior to independence.[116]

This line had its precursor in the *UNCLOS* arbitration, where Sir Michael Wood had argued for the UK:

> As to the law: First, there was no legal right of self-determination in 1965. Second, there was no such right accepted by and binding on the United Kingdom at that time. … Even on its own interpretation of the documents and developments, Mauritius can show no more than that in the 1960s the potent (but far from clearly defined) political principle that was self-determination was on its way to becoming a legal principle or rule, that it was — perhaps — emerging as *lex ferenda*.[117]

A powerful riposte to these highly formalist propositions was put in the *UNCLOS* arbitration by Professor James Crawford for Mauritius:

> Sir Michael adopted 24 October 1970 as the date on which self-determination emerged, like Athena, fully formed and fully-armed into the world. The implication is that it only became a legal right applicable in the colonial context once decolonization was more or less over and the international community had little need for it — like an exhausted marathon runner arriving at the stadium to find only the cleaners cleaning it up. The creation of dozens of newly independent States through decolonization in the 1960s apparently had nothing to do with the law of self-determination. Indeed, he might add, the colonial powers — which he cutely reclassifies as 'specially affected States' — only recognised the right to independence of peoples under their domination applies *ex post facto*. According to Sir Michael, independence was granted ex gratia — there speaks the colonial voice — because the right that everyone recognises today did not form part of the actual process of granting of independence to the great majority of non-self-governing territories. It was as if the non-self-governing territories gate-crashed a diplomatic reception, to which, it was afterwards conceded, they *should* have been invited![118]

The critical paragraph in the ICJ advisory opinion in this respect is para 150:

> The adoption of resolution 1514 (XV) of 14 December 1960 represents a defining moment in the consolidation of State practice on decolonization. Prior to that resolution, the General Assembly had affirmed on several occasions the right to self-determination (resolutions 637 (VII) of 16 December 1952, 738 (VIII) of 28 November 1953 and 1188 (XII) of 11 December 1957) and a number of non-self-governing territories had acceded to independence. General Assembly resolution 1514 (XV) clarifies the content and scope of the right to self-determination. The Court notes that the decolonization process accelerated in 1960,

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[116] 'Verbatim Record 2018/21', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 3 September 2018) 42 (Philippa Webb).

[117] 'Hearing on Jurisdiction and the Merits', *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Permanent Court of Arbitration, 1 May 2014) 702, 704.

[118] 'Hearing on Jurisdiction and the Merits', *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* (Permanent Court of Arbitration, 5 May 2014) 957 (James Crawford) (emphasis in original).

> with 18 countries, including 17 in Africa, gaining independence. During the 1960s, the peoples of an additional 28 non-self-governing-territories exercised their right to self-determination and achieved independence. In the Court's view, there is a clear relationship between resolution 1514 (XV) and the process of decolonization following its adoption.[119]

The ineluctable consequence was a finding that the prohibition on 'dismemberment of non-self-governing territories' in para 6 of *Resolution 1514 (XV)* applied during Mauritian independence and rendered the excision of the Chagos Archipelago unlawful.[120] Indeed, that the UK had to argue — and in highly formalist terms — that there was simply no governing law at the moment of Mauritian decolonisation speaks strongly to how few arguments were available to the UK on the facts or the law (other than to contest jurisdiction).

In one sense, the arbitration and advisory opinion taken together may be read as a cumulative argument put forward over consecutive legal proceedings, using the same lead counsel.[121] That argument was that the law of decolonisation applied to the detachment of the Chagos Archipelago and that law was breached; that undertakings given unilaterally in the Lancaster House Undertakings by the UK were then, and remain now, legally binding; and that the detachment occurred in bad faith and the Mauritian Ministers were coerced. So much was, in effect, upheld: the Mauritian interpretation of the events of 23 September 1965 was inscribed on the judicial record first by the *UNCLOS* arbitrators and then in even more emphatic terms by the ICJ. Further, the ICJ held that the UK is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible in order to complete decolonisation.[122]

In May 2019, the UN General Assembly gave the UK six months to make arrangements to end its administration of the Chagos Archipelago by a vote of 116 in favour to six against, with 56 abstentions.[123]

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119 *Legal Consequences of the Separation of the Chagos Archipelago* (n 28) 132 [150].

120 Ibid 132–3 [153], 134–5 [160]–[161], 136–7 [170], 137 [172], 137–8 [174].

121 That is, Professor Philippe Sands QC (for Mauritius) and Sir Michael Wood (for the UK). The line-up of counsel on each side had strong continuity, although there were some significant differences. Notably, Professor Philippa Webb joined the UK team, not having been involved in the arbitration. Judge James Crawford had by this time been appointed to the ICJ and had to recuse himself from the case, having previously acted for Mauritius. Judge Christopher Greenwood, formerly of the ICJ, had sat on the PCA *UNCLOS* arbitration in 2015 but lost his bid for re-election to the ICJ in 2017 before the request for an advisory opinion was heard.

122 *Legal Consequences of the Separation of the Chagos Archipelago* (n 28) 139 [178].

123 *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, GA Res 73/295, UN GAOR, 73rd sess, 83rd plen mtg, Agenda Item 88, Supp No 49, UN Doc A/RES/73/295 (24 May 2019, adopted 22 May 2019); UN GAOR, 73rd sess, 83rd plen mtg, UN Doc A/73/PV.83 (22 May 2019) 24–5.

IV THE MAURITIUS–MALDIVES MARITIME BOUNDARY DISPUTE

At the time of writing, Mauritius had secured a fresh juridical victory. In its maritime delimitation dispute with Maldives, heard before a special chamber of the ITLOS, Mauritius successfully argued that the question of sovereignty over the Chagos Archipelago had been disposed of by the advisory opinion in *Legal Consequences of the Separation of the Chagos Archipelago*.[124] The point arose as, unsurprisingly, Maldives argued that there were two insuperable jurisdictional hurdles involved in delimiting a maritime boundary between it and the Chagos Archipelago. First, as the UK asserts sovereignty over the archipelago, the UK was an indispensable third party to proceedings.[125] Secondly, following from this, the delimitation dispute thus involved determining which state was sovereign over the Chagos Archipelago (given that 'the land dominates the sea') and that this was beyond ITLOS's competence under *UNCLOS* Part XV dispute settlement.[126]

Space precludes a full examination of the Special Chamber's judgment on this preliminary objection. The key issue is the extent to which Mauritius' arguments as to the consequences of the advisory opinion were accepted. In its written pleadings, Mauritius contended that 'an Advisory Opinion is [not] devoid of legal effects', as, despite not being binding, it must be treated as an authoritative statement of the law.[127] In oral argument, Professor Philippe Sands put the Mauritian case thus:

> There is no 'unresolved sovereignty dispute', as the Maldives puts it, for the reason made clear by the International Court of Justice … the principal judicial organ of the United Nations, without a single dissent on the merits, not even by one judge: the Chagos Archipelago is, and has always been, an integral part of the territory of Mauritius, the Court made clear. It was an integral part of Mauritius before the British conquest of 1810, and it continued to be so through British colonial rule, until that ended in 1968, and it continued to be so at all times thereafter, as the ICJ explicitly found. It continues to be so today, as the ICJ also expressly found. This is not because Mauritius says so … this is because the International Court of Justice has said so. … The question of the territorial status of the Chagos Archipelago is not a matter that requires judicial determination. That has been done. It has been done definitively and authoritatively. It is a settled matter under international law, not as a political matter, but as a consequence of the expression of the principal judicial organ of the United Nations.[128]

This oratory is notable for its forceful repetitions and focus on the ICJ. These submissions were clearly designed to drive home two questions to the Special Chamber, as Professor Sands later did in the following terms:

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[124] *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v Maldives) (Preliminary Objections)* (International Tribunal for the Law of the Sea, Case No 28, 28 January 2021) [202]–[206], [245].

[125] Ibid [81]–[100].

[126] Ibid [101]–[251].

[127] 'Written Observations of the Republic of Mauritius on the Preliminary Objections Raised by the Republic of Maldives', *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v Maldives) (Preliminary Objections)* (International Tribunal for the Law of the Sea, Case No 28, 17 February 2020) vol 1, [3.19] ('Mauritius Written Observations, Vol 1'). See also at [3.18]–[3.21].

[128] 'Verbatim Record', *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v Maldives) (Preliminary Objections)* (International Tribunal for the Law of the Sea, Case No 28, 15 October 2020) vol 3, 6.

> Will the International Tribunal for the Law of the Sea depart from the determination of the International Court of Justice? Is the Special Chamber of the Tribunal going to give effect to the Opinion or is it going to ignore the Opinion, as the Maldives asks you to do?[129]

Pithily, the Mauritian written observations conclude that

> the Maldives invites the Special Chamber, by way of its Preliminary Objections, to disregard and effectively overrule the ICJ's authoritative determination that the United Kingdom has no lawful basis to claim sovereignty or sovereign rights in regard to the Chagos Archipelago. *Mauritius respectfully submits that there is no tenable basis for the Special Chamber to place itself in direct opposition to the ICJ and the UN General Assembly*.[130]

In sum, the advisory opinion should be taken as dispositive of the legal fact of sovereignty.

The Special Chamber held, echoing these submissions, that the ICJ's determinations in its 'advisory opinion have legal effect and clear implications for the legal status of the Chagos Archipelago'; thus, the 'United Kingdom's continued [contrary] claim to sovereignty over the Chagos Archipelago' is a 'mere assertion' without legal foundation.[131] The path to the Special Chamber reaching this conclusion was, however, somewhat contorted. It is generally accepted that advisory opinions of the ICJ are not binding.[132] This is said to follow for two principal reasons. First, formally, both the *Charter of the United Nations* and the *Statute of the International Court of Justice* distinguish between 'decisions' of the Court, with binding effect on a member state in cases to which it is a party, and advisory opinions sought by the UN General Assembly and other bodies.[133] The necessary implication being that such opinions do not fall within the category of binding 'decisions'. Second, if a state is bound only by the decisions of a dispute settlement forum where it has consented to jurisdiction, it cannot give such consent in proceedings (such as an advisory opinion) to which it cannot be a party. Put another way, as such opinions are principally sought by organs of the UN in relation to the exercise of their functions, there is no need for such intramural advice to be binding.

However, as Hugh Thirlway noted,

> [t]he distinction, clear in theory, is less so in practice: if the Court advises, for example, that a certain obligation exists, the State upon which it is said to rest has not bound itself to accept the Court's finding, but it will be in a weak position if it seeks to argue that the considered opinion of the Court does not represent a correct view of the law.[134]

Similarly, Judge Higgins has noted that 'the Court's position as the principal judicial organ of the United Nations suggests that the legal consequence for a

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[129] Ibid 10.

[130] 'Mauritius Written Observations, Vol 1' (n 127) 24 [3.28] (emphasis added).

[131] *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* (n 124) [243], [246].

[132] See, eg, *South West Africa (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 44 [81].

[133] *Charter of the United Nations* arts 94, 96; *Statute of the International Court of Justice* arts 59, 65.

[134] Hugh Thirlway, 'The International Court of Justice' in Malcolm D Evans (ed), *International Law* (Oxford University Press, 5th ed, 2018) 594.

finding that an act or situation is illegal is the same', irrespective of whether a case arrived before it in its contentious or advisory jurisdiction.[135] Thus it would have been awkward for the ITLOS Special Chamber to have held that, despite the ICJ's declaration that the decolonisation of Mauritius was not lawfully completed and 'that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State',[136] it was prevented *by the very fact of that wrongful act* from taking jurisdiction. The decision may well come to be seen as a 'blip' where the law was strained to prevent the Special Chamber falling on the wrong side of history and decolonisation. It nonetheless clearly represents 'another favourable international legal decision' in Mauritius' 'growing portfolio', which collectively delegitimises the UK's position on the Chagos Archipelago.[137]

V CONCLUSIONS

For the UK, the Chagos Archipelago was a blank space to be inscribed with meaning, even if that meant writing its inhabitants out of the picture. It has been reluctant to confront its own past on this point or to alter its conduct. So much is confirmed by the UK's continued protests that it has no doubt as to its sovereignty over the archipelago.[138]

That, however, should not detract from several clear observations and a possibility. At the legal level, it has now been repeatedly held in arbitral and judicial proceedings that the Lancaster House Undertakings are binding. The UK has even recently conceded in the UN General Assembly that, in 1965, 'we made a *binding* commitment to cede sovereignty of the Chagos archipelago to Mauritius when the archipelago is no longer needed for defence purposes'.[139] While the commitment given in 1965 was in fact that 'the islands should be *returned* to Mauritius', acknowledging that the binding nature of the Lancaster House Undertakings is no small matter.[140] As noted, these undertakings carry with them other guarantees, including that 'the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government'.[141] Moreover, the recorded vote in the General Assembly referral to the ICJ in 2017 tends to support the thesis that small states can use a successful outcome in litigation to bolster the legitimacy of their position and attract support to their cause. This appears to be precisely the effect that the *UNCLOS* arbitration had on Mauritius' ability to secure the ICJ referral.

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[135] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 6, 216–17 [38] (Judge Higgins).

[136] *Legal Consequences of the Separation of the Chagos Archipelago* (n 28) 138 [177].

[137] Sarah Thin, 'The Curious Case of the "Legal Effect" of ICJ Advisory Opinions in the Mauritius/Maldives Maritime Boundary Dispute', *EJIL:Talk!* (Blog Post, 5 February 2021) <https://www.ejiltalk.org/the-curious-case-of-the-legal-effect-of-icj-advisory-opinions-in-the-mauritius-maldives-maritime-boundary-dispute/>, archived at <https://perma.cc/72PA-2NKK>.

[138] United Kingdom, *Parliamentary Debates*, House of Commons, 30 April 2019, vol 659, col 4WS (Alan Duncan).

[139] *Request Meeting Record*, UN Doc A/71/PV.88 (n 111) 11 (emphasis added).

[140] The undertakings are reproduced in full in *Chagos Marine Protected Area Arbitration* (n 27) [77] (emphasis added).

[141] Ibid.

Most importantly, though, this strategic litigation elevated the Mauritian account of history to the international plane, clearing the names of the founding figures of Mauritian independence. This history is, perhaps, an elite one aimed at a national audience, and it is likely no coincidence that such litigation was launched by a Prime Minister who was himself the son of the central figure in the historical controversy. Nonetheless, this does not detract from the fact that this symbolic victory necessarily accompanied the legal one. There has also been some recognition granted to the plight of the Chagossians themselves through these proceedings, even if they have not necessarily been the central concern of any of them.

Can this case perhaps provide some impetus towards a shift in the UK policy position? One might think that the immediate signs are not promising. The UK continues to assert its sovereignty over the archipelago and has renewed its purported lease of the islands to the US until 2036.[142] Nonetheless, the UK has been put in the uncomfortable position of having to defend its colonial legacy. The result has been expressions of regret (though not remorse)[143] and a retreat into formalism (the case being indefensible on the facts). The UK's bureaucratic elite has at least had to confront a certain national cognitive dissonance on the issue: we must acknowledge that what we did was wrong, but we will not put it right. A critical factor in whether the historical message of court proceedings is likely to be internalised is elite opinion.[144] And small cracks are, perhaps, becoming evident in wider UK elite opinion. Newspaper coverage has often been far from favourable. The *Financial Times* described the ICJ advisory opinion as the descendants of expelled Chagossians 'deliver[ing] a moral blow to the UK on the world stage when [already] Brexit will be leaving [the UK] with a shaky diplomatic influence on institutions such as the UN general assembly'.[145] There is also a Chagos (British Indian Ocean Territory) All-Party Parliamentary Group at Westminster agitating on the question.[146] Another function of strategic litigation may thus be to maintain pressure, which may widen such cracks and shift elite opinion over time.

Legal proceedings are an imperfect mechanism for recording history. They may, however, be used to produce a form of historical knowledge and inscribe it on the public record. Strategic litigation may also allow smaller states to challenge larger powers to confront their own history or, in the case of a colonial legacy, a shared one. The history confronted here goes to the heart of Mauritius' understanding of how it achieved its independence and the UK's increasingly dissonant refusal to settle the outstanding business of its 'last colony in Africa'.[147] The proceedings discussed here, therefore, contained a quite intimate set of national encounters both with the ICJ and international adjudication more broadly.

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142 *Request Meeting Record*, UN Doc A/71/PV.88 (n 111) 11–12.

143 See Philippa Webb, 'The United Kingdom and the *Chagos Archipelago* Advisory Opinion: Engagement and Resistance' (2021) 21(3) *Melbourne Journal of International Law* 726.

144 Milanović (n 24) 288.

145 Cotterill (n 112).

146 See 'Register of All-Party Parliamentary Groups: Chagos (British Indian Ocean Territory)', *UK Parliament* (Web Page, 27 January 2021) <https://publications.parliament.uk/pa/cm/cmallparty/191105/chagos-british-indian-ocean-territory.htm>, archived at <https://perma.cc/F53K-APDT>.

147 Cotterill (n 112).