# THE MISTS OF TIME: INTERTEMPORALITY AND SELF-DETERMINATION'S TERRITORIAL INTEGRITY RULE IN THE ICJ'S *CHAGOS ADVISORY OPINION*

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*The United Kingdom's critique of the International Court of Justice's Chagos Advisory Opinion has focused upon the Court's approach to the norms of international law applicable at the time of the British Indian Ocean Territory's ('BIOT') creation, which involved the excision of territories from two of its then colonies, Mauritius and the Seychelles. The decision turned on whether norms of self-determination relating to the territorial integrity of colonised territories had crystallised as customary international law before the BIOT was created in November 1965, a proposition the UK continues to publicly reject. This is a dispute about temporality and the development of customary international law. This article interrogates the UK's claims by reviewing the holdings of the UK National Archives, which detail how Ministers, legal advisers and officials understood the norms of self-determination applicable to the BIOT. They demonstrate that the UK government was acutely aware of the implications of these rules for the new colony's creation and sought to distract United Nations organs from the relevant legal questions. They therefore provide a window into how certain voices have long been prioritised over others in the processes by which customary international law develops.*

CONTENTS



## I INTRODUCTION

During the 1960s, at the height of the Cold War, the United Kingdom sought to maintain a strategic position in the Indian Ocean in the face of the exorbitant costs of maintaining a military presence "East of Suez" and the accelerating pressure upon it to decolonise. To square this circle, it assessed which islands that formed part of its remaining colonies could support military bases and offered the United States the opportunity (and the costs) of developing these. The British Indian Ocean Territory ('BIOT') was to be created by severing a collection of island groups from the colonies of Mauritius and the Seychelles prior to their independence. In the summer of 1964, the US chose Diego Garcia as its preferred site for its base, enabling it to project its military power across the Indian Ocean. Even as the details were left to be settled, and before the new colony was even created, preparations began to expel and exclude the Chagos Archipelago's

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inhabitants. This article explores the UK government's active efforts to downplay or occlude these essential features of its BIOT policy and how they continue to influence the resultant legal disputes.[1]

In 2019, the International Court of Justice ('ICJ') accepted that it had jurisdiction to issue an advisory opinion on the legality of the BIOT's creation. The Court considered that the UK had failed to complete Mauritius' decolonisation because the BIOT's creation involved dismembering the existing colony in violation of its territorial integrity.[2] The UK has thereafter faced international pressure to return the Chagos Archipelago to Mauritius.[3] It has prevaricated over its response, highlighting the opinion's status as merely advisory and rejecting its legal premise. For all that the UK is 'generally supportive' of the ICJ, this case illustrates its resistance to the Court's advisory role when its legal interests are challenged.[4] Ministers have maintained that the UK's actions were not a breach of international law as it existed at the time the BIOT was created: 'We have concluded that the approach set out in the Advisory Opinion failed to give due regard to material facts and legal issues that the UK government explained in detail in our submissions to the ICJ'.[5] Not only have Ministers refused to accept the substance of the opinion, they allege that Mauritius had 'circumvented the principle that the ICJ should consider bilateral disputes only with the consent of the states'.[6] In summary, the UK government insists that it did not receive a fair hearing given that the 'emotive theme of decolonisation' was at issue.[7] This marks a concerted effort to paint the Court as being so eager to distance itself from a legacy of effectively sustaining colonialism that it is now willing to play fast and loose with its reasoning.

This article confronts these efforts to undermine the ICJ's advisory opinion. We begin by providing an overview of the Chagos dispute and the ICJ's advisory opinion. Much of the ICJ's jurisprudence relating to colonisation in the 1960s and 1970s, particularly the *South West Africa* cases,[8] was subject to intense criticism

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1 See, eg, Stephen Allen, *The Chagos Islanders and International Law* (Hart Publishing, 2014); David Vine, *Island of Shame: The Secret History of the US Military Base on Diego Garcia* (Princeton University Press, 2009); Philippe Sands, *The Last Colony: A Tale of Exile, Justice and Britain's Colonial Legacy* (Weidenfeld & Nicholson, 2022).

2 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95, 137 [174] ('*Chagos Advisory Opinion*').

3 For an account of some of this subsequent pressure through United Nations organs, see David Snoxell, 'Prospect of the Chagos Advisory Opinion and the Subsequent UN General Assembly Resolution Helping to Resolve the Future of the Chagos Archipelago and Its Former Inhabitants: A Political Perspective' in Thomas Burri and Jamie Trinidad (eds), *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion* (Cambridge University Press, 2021) 262, 277–9 ('*Prospect of Chagos Advisory Opinion*').

4 Philippa Webb, 'The United Kingdom and the Chagos Archipelago Advisory Opinion: Engagement and Resistance' (2021) 21(3) *Melbourne Journal of International Law* 726, 745.

5 United Kingdom, *Parliamentary Debates*, House of Commons, 3 July 2019, vol 662, col 585WH (Alan Duncan).

6 Ibid.

7 Ibid.

8 *South West Africa (Ethiopia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319; *South West Africa (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 6 (together, '*South West Africa* cases'). See John Dugard, *The South West Africa / Namibia Dispute: Documents and Scholarly Writings on the Controversy between South Africa and the United Nations* (University of California Press, 1973).

from newly independent states.[9] The subsequent development of the Court's jurisprudence on self-determination would seesaw through the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* ('*Namibia*')[10] and *Western Sahara*[11] advisory opinions.[12] It might be tempting to suggest that, having taken advantage of judgments which reflected the interests of colonial powers for so long, and through them the 'reproduction of problematic ontological assumptions', it ill befits the UK to complain that the shoe is now on the other foot.[13] After all, the identification of the relevant law at issue at the time of a dispute is particularly complicated where the contested post-1945 development of the law of self-determination as customary international law, applicable *erga omnes*, is at issue. That, however, would sidestep whether there are any merits in the UK's complaints that this dispute has seen international tribunals reach decisions upon the historic actions of the UK by judging these actions against contemporary standards.

Fundamental to the UK's critique of the ICJ, which, as we will explore, has been maintained even as the UK undertook negotiations with Mauritius over the sovereignty of the Chagos Archipelago between 2022 and 2023, is a clash between different accounts of the development of the rule of territorial integrity in the context of self-determination. Steven Wheatley has already explored the interplay between the concepts of temporality at work in the Chagos dispute.[14] The intertemporal problem overshadowing the advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* ('*Chagos Advisory Opinion*') is not resolved by the ICJ drawing together a timeline or a history of the dispute. Rather, it lies in the shifting accounts of core concepts of self-determination between the BIOT's creation and the point at which the Court came to assess these events over half a century which reshaped the law and language of decolonisation.[15] We therefore contextualise the UK's actions in the 1960s through the extensive materials held by the UK National Archives detailing the creation of the BIOT and the UK's subsequent justifications for its actions. Although many of the materials relating to the Chagossians' treatment have been discussed in cases before the UK's domestic courts, this paper addresses the neglected deliberations between UK policymakers over the legality of the dismemberment of the colony of Mauritius. These materials indicate that, although

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9 See generally Georges Abi-Saab, 'The International Court as a World Court' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996) 3, 5.

10 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16 ('*Namibia*').

11 *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 ('*Western Sahara*').

12 See Ingo Venzke, 'The International Court of Justice during the Battle for International Law (1955–1975): Colonial Imprints and Possibilities for Change' in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford University Press, 2019) 235, 253–5.

13 Katharina Hunfeld, 'The Coloniality of Time in the Global Justice Debate: De-Centring Western Linear Temporality' (2022) 18(1) *Journal of Global Ethics* 100, 101.

14 Steven Wheatley, 'Revisiting the Doctrine of Intertemporal Law' (2021) 41(2) *Oxford Journal of Legal Studies* 484.

15 See Julian Wyatt, *Intertemporal Linguistics in International Law: Beyond Contemporaneous and Evolutionary Treaty Interpretation* (Hart Publishing, 2020) 1–2.

the Court's reasoning could have been more expansive, there is no justification for efforts to present its conclusions as ahistorical.

Our approach, in historicising the development of the self-determination norms, might be thought to fit squarely within international law's "turn to history".[16] And it is, to the extent that we seek to situate these developments in time and place by using archival method to understand how the UK, as a colonial power, conceived of these norms between 1965 to 1968 in the context of the BIOT and reflected upon them in response to challenges. But we also prioritise 'a more time-sensitive point of view' towards the dispute when the UK seeks to employ intertemporal issues to delegitimate the *Chagos Advisory Opinion*.[17] This use of archival method highlights how the ICJ's approach to decolonisation in the 1960s and 1970s, and the leeway it gave to colonising states, generated a false impression of the quiescence of international tribunals in the corridors of Whitehall. We explore how that confidence gradually crumbled and how these archive sources provide no succour to the UK government's bombastic rejection of the ICJ's advisory opinion. By the early 1980s, Margaret Thatcher's Attorney-General accepted, on both the issues of 'dismemberment' of the existing colony of Mauritius and the Chagossians' 'expulsion and exclusion', 'a not implausible case could be made out against us'.[18] In the privacy of internal communications, the sanitised language of the Chagos Archipelago's separation and the relocation of the islanders is stripped away. We recount how those concerns about BIOT policy, frequently acknowledged, came to be realised, even as the UK continues to contest them.

## II THE CHAGOS DISPUTE(S)

The legal dispute over the UK's activity in the Chagos Archipelago is really two disputes, one by which the Chagos islanders have challenged their expulsion and exclusion from the islands and the other involving Mauritius challenging the UK's claims to sovereignty over the Archipelago. The Chagossians have conducted a decades-long campaign in the London courts, with judges coming to accept that 'their treatment by the [UK] Government is important and troubling'.[19] The islanders have found many of these challenges thwarted by a combination of obscure public law doctrines, limitation periods, the extent of prerogative powers, and the limitations to concepts of citizenship and belonging in what remains of the law applicable to the British Empire.[20] Mauritius' activity on the international stage has, however, dealt more significant blows to the UK's BIOT policy.

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16 See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2002); George Rodrigo Bandeira Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law' (2005) 16(3) *European Journal of International Law* 539, 540–1.

17 Frederic Bloom, 'The Law's Clock' (2015) 104(1) *Georgetown Law Journal* 1, 55.

18 Letter from Henry Steel to Arthur D Watts, 22 October 1981 (National Archives (UK), FCO 31/3057) [4] ('Letter from Henry Steel').

19 *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2019] 1 WLR 4105, 4128 [85] (Singh LJ and Carr J).

20 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453; *Chagos Islanders v A-G* [2004] EWCA Civ 997.

In 2011, Mauritius initiated arbitration proceedings under art 287 and annex VII of the *United Nations Convention on the Law of the Sea* ('*UNCLOS*')[21] challenging the UK's designation of a marine protected area ('MPA') around the Chagos Archipelago.[22] Leaked cables had indicated the UK's confidence that this scheme would 'put paid to the resettlement claims of the archipelago's former residents'.[23] This marked the point at which the two Chagos disputes became decisively intertwined; the UK's efforts to stymie the Chagossians' resettlement campaign through the establishment of the MPA impinged on the commitments the UK had made to Mauritius on the creation of the BIOT and thus precipitated the *UNCLOS* arbitration.[24] The tribunal found that existing commitments obliged the UK to return the Chagos Archipelago to Mauritius when it was no longer required for defence purposes, thereby giving Mauritius an interest in any decisions which affected the islands' future which had not been addressed in the UK's unilateral, and thus unlawful, designation of the MPA.[25] Judges Kateka and Wolfrum were prepared to go further, finding that improper motive spurred the MPA's development and that in creating the BIOT, the UK had shown 'complete disregard' for Mauritius' territorial integrity.[26]

They were referring to events surrounding the Lancaster House Conference in September 1965. Alongside the main Conference, the UK Prime Minister, Harold Wilson, met privately with the Premier of Mauritius, Sir Seewoosagur Ramgoolam, to 'frighten' him, using delays to independence, into being 'sensible' and accepting that the Chagos Archipelago would be excised from Mauritius to form part of the UK's new BIOT colony.[27] Ramgoolam was aware this ultimatum was coming; colonial officials had earlier broached the issue of the detachment and found him 'guarded'.[28] He was, however, in little position to negotiate. Faced with the difficulties of a monocrop dependent economy, a fractious independence movement and the dominant economic interests of a small minority in Mauritian society, the Chagos Archipelago did not rank amongst his immediate priorities.[29]

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21 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994) ('*UNCLOS*').

22 *Chagos Marine Protected Area (Mauritius v United Kingdom) (Award)* (2015) 31 RIAA 359 ('*Mauritius v United Kingdom*').

23 Tom Frost and CRG Murray, 'The Chagos Islands Cases: The Empire Strikes Back' (2015) 66(3) *Northern Ireland Legal Quarterly* 263, 282–3, citing 'US Embassy Cables: Foreign Office Does Not Regret Evicting Chagos Islanders' *The Guardian* (online, 15 May 2009) <https://www.theguardian.com/world/us-embassy-cables-documents/207149>, archived at <https://perma.cc/4BAX-3CFJ>.

24 For an account of these commitments, see *Mauritius v United Kingdom* (n 22) 392–8 [77].

25 Ibid 487 [298].

26 Ibid 604–5 [91] (Judge Kateka and Judge Wolfrum). See also 604 [89].

27 Colonial Office (UK), 'Note for the Prime Minister's Meeting with Sir Seewoosagur Ramgoolam, Premier of Mauritius' (Note, 22 September 1965) (National Archives (UK), PREM 13/3320).

28 Foreign Secretary and Defence Secretary (UK), 'Defence Interests in the Indian Ocean: Draft Memorandum by the Foreign Secretary and the Defence Secretary' (Draft Memorandum, 22 March 1965) (National Archives (UK), FO 371/184522) [4]. See also Telegram from Anthony Greenwood to Governors of Mauritius and Seychelles, 19 July 1965 (National Archives (UK), CO 1036/1343) [8] ('Telegram from Anthony Greenwood').

29 See Seewoosagur Ramgoolam, *Our Struggle: 20th Century Mauritius* (Vision Books, 1982). See also Jocelyn Chan Low, 'The Making of the Chagos Affair: Myths and Reality' in Sandra JTM Evers and Marry Kooy (eds), *Eviction from the Chagos Islands: Displacement and Struggle for Identity against Two World Powers* (Brill, 2011) 61, 75–9.

The UK, moreover, had considerable experience of exploiting the unequal bargaining position inherent in decolonisation talks to protect vital interests.[30] Wilson started the meeting by holding out the prize; both administrations should work towards realising Mauritius' independence 'as soon as possible'.[31] '[T]he detachment of Diego Garcia', which was not publicly 'bound up with the question of Independence', nonetheless needed to be addressed first, being 'a very important matter for the British position East of Suez'.[32]

Ramgoolam suggested the possibility of the US leasing Diego Garcia as part of an agreement to buy sugar at a guaranteed price and provide Mauritius with wheat and rice in exchange.[33] Wilson, however, would not be swayed, and that afternoon, Ramgoolam formally conceded to the demand.[34] Two months later, an Order in Council was passed establishing the BIOT,[35] with the UK thereafter agreeing to a 50-year lease with the US to enable it to establish a base on Diego Garcia.[36] The UK paid £3 million to Mauritius as compensation for the detachment and made commitments to restore the islands to Mauritius when they were no longer required for defence purposes.[37] Ramgoolam also secured fishing rights which would not only prove practically valuable to post-independence Mauritius but which would, decades later, provide a basis for the challenge to the UK's creation of an MPA.[38] For Judges Kateka and Wolfrum, the UK's 'threat that Ramgoolam could return home without independence' was nothing short of duress.[39] The concept of duress, under customary law, is not, however, necessary to challenge the UK's activity if self-determination provides the legal framework by which to assess the events of 1965.[40] Under the rubric of self-determination, the key issue is, instead, the extent to which the people of the then-colony had an effective role in the decolonisation process. As we explore below, United Nations General Assembly ('UNGA') *Resolution 1541* had, in 1960, elucidated the principles of popular authorisation for the introduction of new arrangements, short of full independence, in non-self-

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30 See D George Boyce, *Decolonisation and the British Empire, 1775–1997* (Macmillan Press, 1999); Kojo Koram, *Uncommon Wealth: Britain and the Aftermath of Empire* (John Murray, 2022).

31 'Record of a Conversation between the Prime Minister and the Premier of Mauritius, Sir Seewoosagur Ramgoolam, at No 10, Downing Street, at 10 am on Thursday, September 23, 1965' (Record, 23 September 1965) (National Archives (UK), FCO 31/3054).

32 Ibid.

33 Ibid.

34 'Record of a Meeting Held in Lancaster House at 2:30 pm on Thursday 23 September: Mauritius Defence Matters' (Record, 23 September 1965) (National Archives (UK), CO 1036/1253) [23].

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

36 *Exchange of Notes Constituting an Agreement concerning the Availability for Defense Purposes of the British Indian Ocean Territory (with Annexes)*, United Kingdom–United States of America, 603 UNTS 273 (signed and entered into force 30 December 1966) 278.

37 See SA de Smith, 'Mauritius: Constitutionalism in a Plural Society' (1968) 31(6) *Modern Law Review* 601, 609; Snoxell, *Prospect of the Chagos Advisory Opinion* (n 3) 277.

38 *Mauritius v United Kingdom* (n 22) 550–1 [453]–[455].

39 Ibid 602 [77] (Judge Kateka and Judge Wolfrum). See Douglas Guilfoyle, 'The Chagos Archipelago before International Tribunals: Strategic Litigation and the Production of Historical Knowledge' (2021) 21(3) *Melbourne Journal of International Law* 749, 763.

40 The relevant customary international law was thereafter reflected in the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 51–2.

governing territories.[41] If this Resolution, and related measures, reflected binding norms by the time of the BIOT's creation, then 'a full [sic] informed, free and genuine choice' by the people of Mauritius would have been required to legally break up the colony in advance of its independence.[42]

In 2016, the UK extended the US' lease over the Diego Garcia base for a further 20 years.[43] Mauritius thereafter tabled a resolution at the UNGA, referring the issue to the ICJ for an advisory opinion.[44] UNGA *Resolution 71/292* was adopted by 94 votes to 15, with 65 abstentions.[45] The Resolution emphasised the UNGA's role in overseeing the process of decolonisation, with the implication being that the ICJ was not being asked to resolve a bilateral territorial dispute without the consent of one of the states party.[46] Instead, the Court was asked to address two questions. First, whether the decolonisation of Mauritius had been lawfully completed when Mauritius became independent in 1968 given the prior separation of the Chagos Archipelago from Mauritius. The Chagos Archipelago's status as part of Mauritius prior to 1965 was beyond dispute.[47] States administering non-self-governing territories, moreover, are subject to an obligation under the *Charter of the United Nations* ('*Charter*') 'to promote to the utmost … the well-being of the inhabitants of these territories',[48] which was arguably engaged by the separation of the Chagos Archipelago and the displacement of its inhabitants.[49] Second, the ICJ was asked to consider the consequences of an incomplete decolonisation for the UK's ongoing administration of the Chagos Archipelago,

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41 *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73(e) of the Charter*, GA Res 1541 (XV), UN GAOR, 4th Comm, 15th sess, 948th plen mtg, UN Doc A/RES/1541(XV) (15 December 1960) annex, Principle VII.

42 Robert McCorquodale, Jennifer Robinson and Nicola Peart, 'Territorial Integrity and Consent in the Chagos Advisory Opinion' (2020) 69(1) *International and Comparative Law Quarterly* 221, 236. See also Morsen Mosses, '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' (2019) 66(3) *Netherlands International Law Review* 475, 488.

43 United Kingdom, *Parliamentary Debates*, House of Commons, 17 November 2016, vol 617, col 387–8 (Alan Duncan). See also CRG Murray and Tom Frost, 'The Chagossians' Struggle and the Last Bastions of Imperial Constitutionalism' in Stephen Allen and Chris Monaghan (eds), *Fifty Years of the British Indian Ocean Territory: Legal Perspectives* (Springer, 2018) 147, 171–2.

44 See Douglas Guilfoyle, 'Litigation as Statecraft: Small States and the Law of the Sea' [2023] *British Yearbook of International Law* 1, 27.

45 *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). See Thomas Burri and Jamie Trinidad, 'Introduction' in Thomas Burri and Jamie Trinidad (eds), *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion* (Cambridge University Press, 2021) 1, 4.

46 On the UNGA's treatment of the issue of consent to adjudication, see Zeno C Reghizzi, 'The Chagos Advisory Opinion and the Principle of Consent to Adjudication' in Thomas Burri and Jamie Trinidad (eds), *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion* (Cambridge University Press, 2021) 51, 56–9.

47 *Chagos Advisory Opinion* (n 2) 108 [29].

48 *Charter of the United Nations* art 73.

49 See *Mauritius v United Kingdom* (n 22) 601 [75] (Judge Kateka and Judge Wolfrum); Allen, *The Chagos Islanders and International Law* (n 1) 127.

which prevented Mauritian citizens, including the Chagossians, from settling on the Archipelago.

These questions are significant for the bilateral dispute regarding sovereignty over the Chagos Archipelago. The UK thus invoked the principle that bilateral disputes may only be adjudicated on the basis of consent[50] and noted that its Optional Clause Declaration[51] accepting compulsory ICJ jurisdiction included an exception applicable to disputes with current or former Commonwealth countries.[52] The Court accepted that the UNGA had granted it jurisdiction to issue its opinion as part of its role in advancing decolonisation and did not attempt to disentangle the dispute over sovereignty from questions relating to the status of customary international law of self-determination at the time of Mauritius' decolonisation.[53]

There was no effort in the advisory opinion proceedings to dispute that the right of peoples to self-determination provided some current *erga omnes* norms within international law.[54] The UK, however, insisted that the Chagos Archipelago's detachment from Mauritius in 1965 did not engage these rules because at that time self-determination was merely a general principle.[55] The focus of the substantive legal argument lay in determining the legal status of self-determination in the period 1965 to 1968, between the removal of the territories making up the BIOT from the UK's existing colonies of Mauritius and the Seychelles and the independence of Mauritius. The UK was essentially postulating that the ICJ would not, at that time, have found its actions to have breached international law.[56]

Looking to that era, it is the case that within months of the BIOT's creation, the ICJ refused to examine the legality of South Africa's extension of the policy of apartheid to the trust territory of South West Africa, which suggests the limits to self-determination's operation at the time.[57] Philippe Sands comments:

> The South West Africa judgements plunged the Court into an abyss of disrepute, from which it would not emerge for two decades. In the era of decolonisation, the judges were seen to strike a blow for colonial rule, leaving apartheid and discrimination in place. The government of South Africa celebrated as others bemoaned the Court for dispensing justice 'according to a "white man's" law'.[58]

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50 See *Western Sahara* (n 11) 24–5 [32]–[33]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 157–8 [47].

51 'Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court: United Kingdom of Great Britain and Northern Ireland', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&clang=_en>, archived at <https://perma.cc/YJQ8-Q3LQ>.

52 'Written Statement: The United Kingdom of Great Britain and Northern Ireland', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (International Court of Justice, General List No 169, 15 February 2018) 81–4 [5.19] ('Written Statement of the UK').

53 Stephen Allen, 'Introductory Note to *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (ICJ)' (2019) 58(3) *International Legal Materials* 445, 445.

54 *Chagos Advisory Opinion* (n 2) 139 [180].

55 'Written Statement of the UK' (n 52) 135–44 [8.47]–[8.77].

56 Ibid 143–4 [8.76]–[8.77].

57 *South West Africa* cases (n 8).

58 Sands (n 1) 39.

Much as it would be impolitic to directly remind the Court of these calumnies, the UK was insistent that it was only in the 1970s, relating to South Africa's continued presence in Namibia, that the ICJ recognised the right of peoples to self-determination as part of customary international law, drawing upon UNGA *Resolution 2625 (XXV)* of 1970 ('*1970 Declaration*').[59] There was thus, for the UK, nothing prior to this jurisprudence to indicate that the separation of the Chagos Archipelago breached international law. This account treats the UNGA's subsequent confirmation of the existence of the self-determination norm in 1970 as irrelevant to the question of its disputed status between 1965 and 1968. Instead, law internal to the British Empire governed independence and questions of self-government, excluding these from the ambit of UN organs.[60] This account, moreover, privileges the UK's active and protracted efforts to deny any legal status to self-determination in the 1950s and 1960s.[61]

Mauritius countered that the customary international law relating to self-determination and the dismemberment of colonies by colonising powers had coalesced prior to the BIOT's creation, placing emphasis on UNGA *Resolution 1514 (XV)* of 1960 ('*1960 Declaration*').[62] Such resolutions are non-binding, but they have played an important role in multiple ICJ decisions, including with regard to the self-determination of peoples.[63] With regard to the development of customary international law, the necessary *opinio juris* can be reflected in a UNGA resolution or a series of resolutions. The institutionalised nature of the UNGA means that resolutions tend to be passed as part of a series, and a common mechanism for enforcing significant resolutions is to establish committees whose functions include the adoption of further resolutions. The Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples ('Committee of 24') was established in 1961 to implement the *1960 Declaration*.[64] The *1960 Declaration*,

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59 'Written Statement of the UK' (n 52) 143–4 [8.75]–[8.77], citing *Namibia* (n 10) 31 [52], discussing *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 6th Comm, 25th sess, 1883rd plen mtg, UN Doc A/RES/2625(XXV) (24 October 1970) ('*1970 Declaration*').

60 See *Charter of the United Nations* art 2(7). See also Josef L Kunz, 'Chapter XI of the United Nations Charter in Action' (1954) 48(1) *American Journal of International Law* 103, 107; Inis L Claude Jr, 'Domestic Jurisdiction and Colonialism' in Martin Kilson (ed), *New States in the Modern World* (Harvard University Press, 1975) 121, 122.

61 See Robert McCorquodale, 'Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination' (1995) 66(1) *British Yearbook of International Law* 283, 284–5.

62 'Written Statement of the Republic of Mauritius', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (International Court of Justice, General List No 169, 1 March 2018) 136–7 [4.24]–[4.25], discussing *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 4th Comm, 15th sess, 947th plen mtg, UN Doc A/RES/1514(XV) (14 December 1960) ('*1960 Declaration*').

63 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 254–5 [70]. See James Summers, 'Chagos, Custom and the Interpretation of UN General Assembly Resolutions' in Thomas Burri and Jamie Trinidad (eds), *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion* (Cambridge University Press, 2021) 9.

64 *The Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1654 (XVI), UN GAOR, 1066th plen mtg, UN Doc A/RES/1654(XVI) (27 November 1961).

and its supporting UN organs, undermined assertions that the organisation of colonies was an issue purely internal to the law of the British Empire.[65] Mauritius' position was that subsequent developments, and in particular the *1970 Declaration*, were merely the confirmation of a pre-existing period of custom formation and that the self-determination norm crystallised with the adoption of the *1960 Declaration*; in short, that '[t]he [1970] Declaration *reflected* customary international law — it did not *create* it'.[66]

## III THE INTERTEMPORAL CHALLENGE IN THE *CHAGOS ADVISORY OPINION*

The intertemporal problem arises when parties to a dispute contest the date of a change in the applicable law[67] and is potentially live in circumstances in which the law has changed between the events in question and a court's deliberations.[68] As Wheatley has unpacked in the context of the *Chagos Advisory Opinion*, temporal issues can dominate territorial disputes under international law. In such cases, the relevant practice can span centuries, and tribunals are little aided by bare incantations of the general doctrine that the legality of events (like the detachment of the Chagos Archipelago) is to be judged against the rules in force when they occurred.[69] Few decisions dwell upon these challenges. In *Western Sahara*, for example, the ICJ confirmed that the validity of the acquisition of the territory was to be determined by reference to the law in force 'at the time' of its colonisation by Spain.[70] Historic assertions of this doctrine, however, recognise that international tribunals can consider changes to the applicable law in the intervening period; 'a distinction must be made between the creation of rights and the existence of rights'.[71]

The limitations of the general doctrine are, moreover, acute where an emergent norm of customary international law is at issue.[72] In such cases, the intertemporal challenge is concealed in the familiar assertion that the determination of the existence, scope and content of a customary norm requires both evidence of general practice and evidence of *opinio juris* indicating a belief that the practice is

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65 See generally Yassin El-Ayouty, *The United Nations and Decolonization: The Role of Afro-Asia* (Martinus Nijhoff, 1971) 208–15.

66 'Verbatim Record', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (International Court of Justice, General List No 169, 3 September 2018) 46–7 [8]–[10] (emphasis in original).

67 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v Singapore)* (*Judgment*) [2008] ICJ Rep 12, 128–32 (Judge Bennouna).

68 See TO Elias, 'The Doctrine of Intertemporal Law' (1980) 74(2) *American Journal of International Law* 285, 293.

69 Wheatley (n 14) 487–9.

70 *Western Sahara* (n 11) 39 [79].

71 *Island of Palmas (Netherlands v United States of America) (Award)* (1928) 2 RIAA 829, 845. See Rosalyn Higgins, 'Time and the Law: International Perspectives on an Old Problem' (1997) 46(3) *International and Comparative Law Quarterly* 501, 516.

72 See, eg, Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press, 2009) ch 8; Paola Gaeta, Jorge E Viñuales and Salvatore Zappalà, *Cassese's International Law* (Oxford University Press, 3rd ed, 2020) 187–8.

required by international law.[73] This mantra is hardly 'open and attentive' to the temporal challenges involved in the task of establishing, with sufficient certainty, whether applicable norms have developed.[74] Wheatley, however, teases out two approaches to establishing state practice and *opinio juris* at the relevant juncture.[75] A court can treat events as moving through time, from the past, through the present and on to the future (which Wheatley, drawing on the work of John McTaggart,[76] labels the 'A-series' conception of time).[77] The ICJ's task is to establish, 'from the privileged position of "now"', the juncture at which there is sufficient evidence that change has occurred, and it must apply the new rule to any acts occurring after the moment of crystallisation.[78] Such linear narratives of time are, however, increasingly critiqued as being intertwined with Western conceptions of progress.[79] Alternately, judges could reject any reliance on the concept of the passage of time as an objective reality and instead focus on the timeline of events, which can be described in terms of being 'later than', 'earlier than' or 'simultaneous with' each other (which Wheatley labels the 'B-series' of time).[80] Under B-series reasoning, when the law has changed from an old rule to a new rule, the judicial function 'is to determine which iteration [was] "simultaneous with" the relevant facts'.[81] Later developments are irrelevant to understanding the law at that juncture. Notwithstanding the critique of A-series reasoning as involving the imposition of a Western conception of time, the *Chagos Advisory Opinion* saw the UK arguing for a B-series account of the state of the norms of self-determination in the mid-1960s, unmoored from their development in the interim and any consequent allusions to historical progress.[82]

The outcome of the *Chagos Advisory Opinion* thus turned upon how the ICJ applied intertemporal doctrine to the question of whether the right to self-determination had crystallised as a customary norm in the years 1965 to 1968.[83] The Court's analysis proceeded from art 1(2) of the *Charter* which emphasises, as

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73 See *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3, 44 [77]; *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland) (Merits)* [1974] ICJ Rep 3, 19–20 [40]. See also Frederic L Kirgis Jr, 'Custom on a Sliding Scale' (1987) 81(1) *American Journal of International Law* 146.

74 Christos Marneros, 'Against the Eternal Law(s) of Human Rights: Towards a Becoming-Chaotic of Time' in Kathryn McNeilly and Ben Warwick (eds), *The Times and Temporalities of International Human Rights Law* (Hart Publishing, 2022) 179, 193.

75 For an expansive account of the 'adjudicative temporalities' involved in such judicial fact construction, see Tanzil Chowdhury, *Time, Temporality and Legal Judgment* (Routledge, 2020) ch 2.

76 See J Ellis McTaggart, 'The Unreality of Time' (1908) 17(68) *Mind* 457, 458.

77 Wheatley (n 14) 493.

78 Ibid 505.

79 See Tommaso Soave, 'The Politics of Time in Domestic and International Lawmaking' in Klara Polackova Van der Ploeg, Luca Pasquet and León Castellanos-Jankiewicz (eds), *International Law and Time: Narratives and Techniques* (Springer, 2022) 153, 165–6.

80 Wheatley (n 14) 495–7.

81 Ibid 496.

82 Ibid 500.

83 *Chagos Advisory Opinion* (n 2) 131 [148]. See Stephen Allen, 'Self-Determination, the Chagos Advisory Opinion and the Chagossians' (2020) 69(1) *International and Comparative Law Quarterly* 203, 208; Victor Kattan, 'Self-Determination as Ideology: The Cold War, the End of Empire, and the Making of UN General Assembly Resolution 1514 (14 December 1960)' in Klara Polackova Van der Ploeg, Luca Pasquet and León Castellanos-Jankiewicz (eds), *International Law and Time: Narratives and Techniques* (Springer, 2022) 441.

one of the UN's purposes, 'respect for the principle of equal rights and self-determination of peoples'.[84] Article 1(2) relates to non-state actors, the right of self-determination being held by peoples. The purposes of the *Charter* provide the basis for the organisation's legal powers under the principle of speciality.[85] The Court has accepted, from *Namibia* onwards, that self-determination is a 'principle' which generates a range of binding *erga omnes* obligations in the context of decolonisation.[86] Article 1(2) and ch XI of the *Charter*, however, have generally been recognised as being insufficient in and of themselves to establish a legal right to self-determination in 1945.[87] Wheatley reflected that it was significant for the UK's case that, at the time of the events at issue in the *Chagos Advisory Opinion*, 'international lawyers, with the notable, but solitary, exception of Rosalyn Higgins, did not accept the customary status of the right of peoples to self-determination'.[88] This observation only holds true, however, if it excludes a range of scholarship by the intellectual forebears to TWAIL scholarship,[89] which had emphatically asserted the existence of a right by the start of the 1960s.[90] It nonetheless remains the case that, before the *Chagos Advisory Opinion* was issued, other scholars continued to doubt whether binding norms of customary international law had developed by the mid-1960s.[91]

The Court therefore repeated the established formulation in the *North Sea Continental Shelf* cases that the existence of customary international law depended upon the interlinked elements of 'a settled practice' and 'evidence of a belief that this practice is … obligatory', and set about applying these elements to legal developments after 1945.[92] It cited three instruments that contributed to the development of a right of self-determination in the 1950s: UNGA *Resolution 637 (VII)* of 1952, UNGA *Resolution 738 (VIII)* of 1953 and UNGA *Resolution 1188 (XII)* of 1957.[93] These Resolutions were presented as evidence that the 'General

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84 *Chagos Advisory Opinion* (n 2) 131 [146].

85 Summers (n 63) 36.

86 See *Namibia* (n 10) 31 [52]; *Frontier Dispute (Burkina Faso v Republic of Mali) (Judgment)* [1986] ICJ Rep 554, 567 [25]. See Allen, *The Chagos Islanders and International Law* (n 1) 133.

87 See James R Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2007) 108–12; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, 1995) 111–12.

88 Wheatley (n 14) 499. See Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, 1963) 100–4.

89 See Obiora Chinedu Okafor, 'Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective' (2005) 43(1/2) *Osgoode Hall Law Journal* 171, 177.

90 Georges M Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8(2) *Howard Law Journal* 95; Jorge Castañeda, 'The Underdeveloped Nations and the Development of International Law' (1961) 15(1) *International Organization* 38. In later scholarship, see also R P Anand, *New States and International Law* (Vikas Publishing House, 1972); TO Elias, *Africa and the Development of International Law* (Martinus Nijhoff Publishers, 1988).

91 Allen, *The Chagos Islanders and International Law* (n 1) 182.

92 *Chagos Advisory Opinion* (n 2) 121–2 [149], citing *North Sea Continental Shelf* (n 73) 44 [77].

93 *The Right of Peoples and Nations to Self-Determination*, GA Res 637 (VII), UN GAOR, 7th sess, 403rd plen mtg, UN Doc A/RES/637(VII) (16 December 1952); *The Right of Peoples and Nations to Self-Determination*, GA Res 738 (VIII), UN GAOR, 8th sess, 460th plen mtg, UN Doc A/RES/738(VIII) (28 November 1953); *Recommendations concerning International Respect for the Right of Peoples and Nations to Self-Determination*, GA Res 1188 (XII), UN GAOR, 12th sess, 727th plen mtg, UN Doc A/RES/1188(XII) (11 December 1957).

Assembly had affirmed on several occasions the right to self-determination' prior to the *1960 Declaration*.[94] These were staging posts in the process by which states in the developing world, in a process which accelerated following the focal point of the Bandung Conference in 1955, had achieved considerable success in 'overcoming the ambiguities of the United Nations *Charter* to establish the principle of self-determination for colonized peoples'.[95] According to the ICJ, a right of peoples to self-determination crystallised on 14 December 1960 with the adoption of the *1960 Declaration*, which represented 'a defining moment in the consolidation of State practice on decolonization'.[96] The Court found that '[t]he wording used in resolution 1514 (XV) has a normative character, in so far as it affirms that "(a)ll peoples have the right to self-determination"'.[97] Paragraph 6 of the *1960 Declaration*, for example, stated that '[a]ny 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*'. For Summers, '[t]his was the most significant provision' for determining these questions because it addressed the extent to which 'respect for their territorial integrity' formed part of the right of the peoples of non-self-governing territories to self-determination.[98] It was because this self-determination norm applied to a non-self-governing territory in its entirety that the UK's subsequent detachment of the Chagos Archipelago from Mauritius was unlawful.[99]

Examples of subsequent practice in which territorial boundaries were redrawn as part of decolonisation processes could, moreover, be distinguished from the creation of the BIOT on the basis of the purpose of the *1960 Declaration* to advance the end of colonisation, for in no other instance were such changes effected 'for the purpose of maintaining it [the territory] under its [the administering power's] colonial rule'.[100] The *1960 Declaration*, although formally not legally binding, became a significant way marker which can only be properly understood in the context of the 'trajectory' of the concepts it contains and how they were subsequently built upon.[101] From 2019's standpoint, the ICJ was able to determine that the relevant norms had crystallised with the adoption of the *1960 Declaration*, which had made self-determination 'a realisable part of international law'.[102] The ICJ could thus be said to be judging the issue with the benefit of hindsight, secure in the knowledge that the UNGA would thereafter confirm the

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94 *Chagos Advisory Opinion* (n 2) 132 [150].

95 Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34(1) *European Journal of International Law* 7, 58. See also Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press, 2017).

96 *Chagos Advisory Opinion* (n 2) 132 [150].

97 Ibid 132 [153].

98 Summers (n 63) 20.

99 *Chagos Advisory Opinion* (n 2) 138–9 [177].

100 Ibid 134 [160]. See also Summers (n 63) 22.

101 Kathryn McNeilly, 'Documents and Time in International Human Rights Law Monitoring: Artefacts, Objects, Things' in Kathryn McNeilly and Ben Warwick (eds), *The Times and Temporalities of International Human Rights Law* (Hart Publishing, 2022) 85, 96.

102 Rita Augestad Knudsen, *The Fight Over Freedom in 20th- and 21st-Century International Discourse: Moments of 'Self-Determination'* (Palgrave Macmillan, 2020) 152. See also Victor Kattan, 'Self-Determination during the Cold War: UN General Assembly Resolution 1514 (1960), the Prohibition of Partition, and the Establishment of the British Indian Ocean Territory (1965)' (2016) 19(1) *Max Planck Yearbook of United Nations Law* 419, 468.

existence of the self-determination norm.[103] Because it could observe the trajectory of the law's development, it could be more confident than contemporary jurists in concluding that the norm had crystallised in the mid-1960s.

The Court's adoption of an A-series arc of relevant developments is further reflected in its approach to the *1970 Declaration* as recapitulating the *1960 Declaration*.[104] Principle 5(8) of the *1970 Declaration*, in particular, repeated the terms of territorial integrity stated under para 6 of the *1960 Declaration*.[105] This element of the advisory opinion could have benefitted from additional development because the proposition that the *1970 Declaration* reaffirmed customary law as expressed in the *1960 Declaration* is called into question by aspects of the *1970 Declaration*'s drafting. During that process, it was specifically proposed that the *1970 Declaration* should reaffirm the *1960 Declaration* as an authority, but this proposal was not accepted, and some states, including the UK, thereafter used this fact to downplay the legal significance of the earlier declaration.[106] To address this issue, the Court could have emphasised that the *1960 Declaration* was regarded at the time as 'a capstone to the UN's attempt to supervise colonial regimes'.[107] It noted the significance of the extension of the UNGA's 'enforcement role' in a roundabout way,[108] highlighting the three UNGA resolutions that derived authority from the *1960 Declaration* and amounted to condemnations of the separation of the Chagos Archipelago from Mauritius.[109] Wheatley therefore concludes that the ICJ was correct to premise its *Chagos Advisory Opinion* on an understanding that the passage of time was real because customary international law forms part of a complex system which has developed as a 'result of contingent decisions taken by component agents'.[110] The Court's refusal to spell out these connections directly, however, opened up a potential avenue for the UK to dispute its reasoning.

Having concluded that decolonisation was not lawfully completed in 1968, the ICJ turned to the consequences of this conclusion for the UK's activities. In response to the UNGA's second question, the Court decided that the UK's continuing administration of the Chagos Archipelago constituted an internationally wrongful act for which the UK bears responsibility.[111] The UK has the international law obligation to terminate the administration of the Chagos Archipelago as speedily as possible, and all states must cooperate with the UN to complete the decolonisation of Mauritius.[112] The ICJ thus concluded that the process of decolonisation of Mauritius had not been lawfully completed on Mauritius' independence and that the UK is therefore obliged to end its

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103 *Chagos Advisory Opinion* (n 2) 130 [142]. See also Wheatley (n 14) 500.
104 *Chagos Advisory Opinion* (n 2) 133 [155].
105 See Summers (n 63) 31.
106 Ibid 31–3.
107 Harold Karan Jacobson, 'The United Nations and Colonialism: A Tentative Appraisal' (1962) 16(1) *International Organization* 37, 47.
108 Summers (n 63) 36.
109 *Chagos Advisory Opinion* (n 2) 135 [165]–[166].
110 Wheatley (n 14) 503–4.
111 *Chagos Advisory Opinion* (n 2) 138–9 [177].
112 Ibid. See also *The Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (*Judgment*) [1970] ICJ Rep 3, 32 [33]–[34].

administration of the Chagos Archipelago as rapidly as possible.[113] It also, in a speculative element of the *Chagos Advisory Opinion*, referred the resettlement of Chagossians of Mauritian origin to the UNGA as an issue to be addressed during the process of the completion of the decolonisation of Mauritius.[114] In May 2019, three months after the advisory opinion, the UNGA endorsed it and insisted — by 116 votes to 6, with 56 abstentions — that the UK must withdraw unconditionally from the Chagos Archipelago within six months, a time frame which stretched until 22 November 2019.[115]

In his October 2019 address to the UNGA, the ICJ President, Judge Abdulqawi A Yusuf, gave an overview of the *Chagos Advisory Opinion*.[116] He concluded that '[e]ven with the most seemingly intractable disputes, a ruling of the Court can signal the starting-point for a new era in bilateral relations between disputing parties'.[117] This new era was not immediately apparent, however, given the UK's refusal to take steps in line with the advisory opinion. The UK insisted that the advisory opinion was not a binding decision[118] and reasserted its sovereignty over the Chagos Archipelago:

> The UK has no doubt as to our sovereignty over the British Indian Ocean Territory (BIOT), which has been under continuous British sovereignty since 1814. Mauritius has never held sovereignty over the BIOT and the UK does not recognise its claim.[119]

In support of its sovereignty claim, the UK maintained that the 1965 Lancaster House Agreement concerning the detachment of the Chagos Archipelago had been found to be legally binding by the *UNCLOS* arbitral tribunal in 2015, a misinterpretation of the tribunal's specific finding that it was the UK's undertakings towards Mauritius, therein and subsequent, which were binding.[120] But the most significant of its objections was that the ICJ's advisory opinion was ill-founded. In Gino Naldi's summary of its position, the UK government

> considered that *Resolution 1514 (XV)* neither reflected nor generated customary law in 1960, nor in its immediate aftermath, taking the position that it was not

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113 *Chagos Advisory Opinion* (n 2) 137 [174].

114 Ibid 139 [181].

115 *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, UN Doc A/RES/73/295 (22 May 2019) para 3; Webb (n 4) 738.

116 Abdulqawi Ahmed Yusuf, 'Speech by HE Mr Abdulqawi A Yusuf, the President of the International Court of Justice, on the Occasion of the Seventy-Fourth Session of the United Nations General Assembly' (Speech, General Assembly, 30 October 2019) 1, 3–4.

117 Ibid 10.

118 Guilfoyle, 'Litigation as Statecraft: Small States and the Law of the Sea' (n 44). This stance, as Guilfoyle notes, has 'unfortunate echoes' of apartheid-era South Africa's response to *Namibia*: at 30.

119 United Kingdom, *Parliamentary Debates*, House of Commons, 5 November 2019, vol 667, col 84WS (Christopher Pincher).

120 Richard P Dunne, 'Chagos Dispute: Is the 1965 Lancaster House Agreement Legally Binding under International Law?', *The Chagos Archipelago: Sovereignty Disputes* (Web Article, November 2019) <https://sites.google.com/site/thechagosarchipelagofacts/home/sovereignty-disputes?authuser=0>, archived at <https://perma.cc/QQG6-4XSA>.

> couched in legal terminology and that the requisite *opinio juris* was lacking as a result of the differing attitudes of States.[121]

Our account now turns to the extent to which the archival record of the UK government's deliberations on the detachment of the Chagos Archipelago sustains this position.

## IV THE CHAGOS ARCHIVES AND THE INTERTEMPORAL PROBLEM

As much of the analysis of the advisory opinion has recognised, the ICJ could have gone further in justifying its finding that self-determination had crystallised as a norm by the start of the 1960s.[122] Stephen Allen, moreover, has expressed considerable scepticism as to whether a tribunal can achieve an objective account of customary international law's crystallisation under what Wheatley termed the A-series approach to the intertemporal problem.[123] However, given Allen's doubts over the mid-1960s development of the relevant norms before the advisory opinion was issued, his scepticism over this key aspect of the Court's account is perhaps unsurprising.[124] Archival method nonetheless provides a means of addressing these concerns in a case in which the relevant facts took place many decades ago. The UK National Archives' holdings on the BIOT's formation provide a window into official thinking over public policy in the relevant period. Later materials held within the UK National Archives provide a further window onto how official thinking and justifications for BIOT policy developed, especially as Mauritius began to challenge the UK's sovereignty over the Chagos Archipelago in the early 1980s.[125] We undertook an extensive review of hundreds of archived files. Most of these provided the overarching context of the UK's BIOT policy, but the following analysis draws directly upon a dozen of these files which address the legality under international law of the detachment of the Chagos Archipelago from the colony of Mauritius.

Archived official documents, of course, do not provide a neutral record of the past but a mediated representation.[126] Where an issue is sufficiently sensitive, the documents which are retained within a state's archival record are frequently curated, providing a skewed account of policymaking.[127] Some documents can be

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121 Gino J Naldi, 'Self-Determination in Light of the International Court of Justice's Opinion in the Chagos Case' (2020) 7(2) *Groningen Journal of International Law* 216, 224.

122 Ibid 226. The weight attributed to an advisory opinion is frequently connected to the quality of the ICJ's reasoning: Michla Pomerance, 'The ICJ's Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial' (2005) 99(1) *American Journal of International Law* 26, 36.

123 See Allen, 'Self-Determination, the Chagos Advisory Opinion and the Chagossians' (n 83) 209–10.

124 Allen, *The Chagos Islanders and International Law* (n 1) 182.

125 See Snoxell, *Prospect of the Chagos Advisory Opinion* (n 3) 262. This is analogous to the ICJ's own approach to legal instruments which postdated the 1965–68 period and which it was willing to draw upon where their effect was to 'confirm or interpret pre-existing rules or principles': *Chagos Advisory Opinion* (n 2) 130 [143].

126 Thomas Skouteris, 'Engaging History in International Law' in José María Beneyto and David Kennedy (eds), *New Approaches to International Law: The European and American Experiences* (TMC Asser Press, 2012) 99, 112.

127 See Matilda Arvidsson and Miriam Bac McKenna, 'The Turn to History in International Law and the Sources Doctrine: Critical Approaches and Methodological Imaginaries' (2020) 33(1) *Leiden Journal of International Law* 37, 47–51.

withheld from the public record for extended periods, and many documents relating to the BIOT's creation have yet to be made public or have been extensively redacted because they remain sensitive for the conduct of the UK's foreign policy.[128] Alongside this challenge is the possibility that selective cherry picking of those materials which are accessible in the archives can skew the picture of official discussions of these issues.[129] Although it is impossible to exclude a level of subjectivity from our account of these sources, these dual issues with archival research can be mitigated where these sources are used to address a sufficiently specific question. The UK's central allegation against the ICJ's account of the substantive basis for Mauritius' sovereignty claim is that, at half a century's remove, the Court used an account of the law of self-determination which did not apply at the BIOT's creation. But insofar as the archived files indicate that earlier generations of UK policymakers flagged issues of self-determination, it undermines any contention that the Court was applying law out of time, in a manner that those Ministers and officials could not have foreseen.

Notwithstanding the potential shortcomings of archival method, archived sources are thus particularly useful in the context of the *Chagos Advisory Opinion* in assessing whether UK policymakers acknowledged that there was sufficient certainty around the existence of the territorial integrity rule between 1965 and 1968, either at that time or when the issue first became a live source of bilateral dispute in the early 1980s. They effectively provide a "best case" account of how UK policymakers perceived their legal obligations with regard to the BIOT's creation. These materials admittedly sit on the margins of the International Law Commission's account of the evidence for determining *opinio juris*.[130] Some of the most important available sources come within the scope of law officer opinions or relate to conduct in connection with resolutions adopted by international organisations, which are listed. This list is, however, not exhaustive, and many of the sources considered below contextualise the positions adopted by the UK's law officers or the UK's responses to UN organs. This context is essential to understanding the motivations of state actors in circumstances in which the state's activity has deliberately sought to stymie the development of obligations. If, as Stephen Allen acknowledges, a persistent problem with relying on state practice in the creation of customary international law is that states 'rarely make their intentions explicit and their decisions are usually motivated by a mixture of legal and non-legal considerations',[131] the archival record provides a means to test the basis of the UK government's claims about how its predecessors saw their legal

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128 *Freedom of Information Act 2000* (UK) s 27(1).

129 See Wendy M Duff and Catherine A Johnson, 'Accidentally Found on Purpose: Information-Seeking Behavior of Historians in Archives' (2002) 72(4) *Library Quarterly: Information, Community, Policy* 472, 494–5.

130 *Report of the International Law Commission: Sixty-Eighth Session (2 May–10 June and 4 July–12 August 2016)*, UN GAOR, 68th sess, Supp No 10, UN Doc A/71/10 (2016) 77. See Omri Sender and Michael Wood, 'A Mystery No Longer? Opinio Juris and Other Theoretical Controversies Associated with Customary International Law' (2017) 50(3) *Israel Law Review* 299, 302.

131 Allen, *The Chagos Islanders and International Law* (n 1) 172.

obligations.[132] Mauritius' written submissions before the ICJ relied extensively upon the internal discussions of UK Ministers and officials, in contrast to the limited use of such materials in the UK's own submissions.[133] This contrast is marked but, as we shall see, not entirely surprising in light of the content of the archival holdings.

The first thing to note about the UK government's internal deliberations over the BIOT's status between the 1960s and 1980s is that they are consistently grounded in an account of the weakness of legal processes in international law and a confidence in the advantages that the UK enjoyed over its former colonies within the international order. When the issue was referred to the Attorney-General, Michael Havers, for consideration in the early 1980s, when both Mauritius and the Chagossians were becoming increasingly vocal about the wrongs inflicted as part of the UK's dismemberment and depopulation policy, he foreshortened his account of the substantive legal issues because he was so confident the issues could not be adjudicated:

> The Attorney-General … sees no possible way in which the Mauritius Government could take us, against our will, before an international judicial tribunal … In these circumstances it is not strictly necessary for him to advise on our prospects before such a tribunal, if it did somehow have jurisdiction.[134]

The UK's dissatisfaction with the ICJ proceedings is less about the application of temporally appropriate law, than with its thwarted expectation that the exception to its Optional Clause Declaration with regard to former colonies would insulate it against any legal action relating to the BIOT's creation.

The archival record demonstrates that the law on self-determination did not materially change subsequent to the BIOT's creation, but rather that the UK's understandings of that law both at the time of the dismemberment of the existing colonies and after were often defective. The Foreign and Commonwealth Office's ('FCO') express position was that there was no international law constraint upon its restructuring of the territories it had colonised in 1965:

> [I]n international law we had sovereignty over Mauritius (and Seychelles) at the relevant time and accordingly, as an attribute of sovereignty, were entitled to so arrange the territorial limits of the areas under our sovereignty as we might think fit.[135]

This position was restated, in almost identical terms, by Sir Michael Wood representing the UK before the Permanent Court of Arbitration in *Mauritius v United Kingdom*.[136] This general refusal to engage with the requirements of self-

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132 As Karen Knop has highlighted, overreliance on official records, and the state-centric narrative it generates, brings with it significant blind spots in many instances: Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press, 2002) 42–4.

133 'Written Comments of the Republic of Mauritius', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (International Court of Justice, General List No 169, 15 May 2018) 14–24 [1.24]–[1.31].

134 'Letter from Henry Steel' (n 18) [2].

135 Letter from Arthur D Watts to Henry Steel, 28 August 1981 (National Archives (UK), FCO 31/3057) [9] ('Letter from Arthur D Watts').

136 'Arbitration under Annex VII of the 1982 United Nations Convention on the Law of the Sea: Hearing on Jurisdiction and the Merits', *Mauritius v United Kingdom* (Permanent Court of Arbitration, 2011-03, 30 April 2014) 537.

determination, however, rested on weak foundations. It was intertwined with the expectation that the operability of the territorial integrity rule within customary international law did not really matter because the UK was, for all practical purposes, shielded from judicial reproach. The possibility of an advisory opinion was not even entertained by successive generations of FCO legal advisers, with the greatest concern being perceived to be that 'legal arguments might be presented in some non-judicial forum'.[137]

The 1966 refusal of the ICJ to consider the merits of the *South West Africa* cases might have come as a 'shock and surprise' to many at the time,[138] but it was a most useful one for the FCO. Even as the contest over representation on the ICJ bench became more intense,[139] the outcomes of the *South West Africa* cases lulled the FCO's legal advisers into expecting the Court's continued quiescence on matters connected to decolonisation. Dame Rosalyn Higgins was sharply critical of the Judgment at the time and has since described it as an 'aberration',[140] but in the immediate aftermath she recognised that 'evangelism for use of the Court is likely to wane sharply' amongst developing countries.[141] This was the narrative that the FCO internalised. It was only with the judgment in *Military and Paramilitary Activities in and against Nicaragua*[142] that perceptions of the ICJ amongst developing countries underwent a 'significant' shift.[143] The 'rejuvenation' of the Court's advisory function was also unforeseen in discussions over the BIOT's status into the 1980s and would also take many decades to be realised.[144]

Although surveys of the UK's colonial possessions in the Indian Ocean had been conducted in the summer of 1964 with a view to the establishment of new military bases, this potential new investment sat at variance both with Harold Wilson's newly elected Labour government's plans to draw back the UK's military commitments "East of Suez" and its commitments to rapid decolonisation.[145] It was only in early January 1965, when there was finally a commitment for the US to shoulder the cost of establishing new facilities, that plans could be set in motion.[146] The outline of the plan was promptly leaked to *The Economist*, with a well-informed article noting the attendant 'political hazards' in the context of decolonisation and concluding that the selected islands 'would need to be detached [from the existing colonies] … to make the investment

137 'Letter from Arthur D Watts' (n 135) [6].

138 Kattan (n 102) 454.

139 Venzke (n 12) 251–3.

140 Rosalyn Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press, 2009) 1071.

141 Rosalyn Higgins, 'The International Court and South West Africa: The Implications of the Judgment' (1966) 42(4) *International Affairs* 573, 593.

142 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14.

143 Anghie (n 95) 22.

144 See Monique Law, 'The Chagos Request: Does It Herald a Rejuvenation of the International Court of Justice's Advisory Function?' (2018) 9 *Queen Mary Law Journal* 25; Julia Wagner, 'The Chagos Request and the Role of the Consent Principle in the ICJ's Advisory Jurisdiction, or: What to Do When Opportunity Knocks' (2018) 55 *Questions of International Law: Zoom-Out* 177.

145 See Frost and Murray, 'The Chagos Islands Cases: The Empire Strikes Back' (n 23) 266–7.

146 MR Moreland, 'Indian Ocean Bases' (Memorandum, 12 January 1965) (National Archives (UK), FO 371/184522) [1]. The US commitment would take several years to fully realise given the need to secure Congressional approval: Vine (n 1) 96–8.

of putting runways and other installations on them seem a reasonable bet'.[147] Within a few weeks, the US confirmed that its position was that 'full detachment now might more effectively assure that Mauritian political attention, including any recovery pressure, is diverted from Diego Garcia over the long run'.[148] Even at this stage in planning the new facilities, strategies for averting the UN's attention were at the forefront of US-UK discussions. Nigel Trench, of the UK Embassy in Washington, summarised US thinking in these scoping discussions. The threat posed by the UN was downplayed on the dubious basis that there was a possibility that renewal of the Committee of 24's mandate could be delayed, creating a window of time when it would be in 'suspended animation'.[149] The US State Department's Jeff Kitchen also suggested emphasising the value of Indian Ocean installations as a support to UN peacekeeping operations 'to soothe any savage beasts'.[150] Amid the ongoing suspicions and strains generated by UN Secretary-General Dag Hammarskjöld's plane crash a few years earlier, the meeting concluded that such claims would likely be met by scepticism.[151] If the problem with UN opposition to the BIOT's creation had readily been identified, these efforts to find a solution would have been utterly speculative. Shortly after these discussions, the UK's Colonial Secretary, Anthony Greenwood, sent a lengthy note explicitly warning the Foreign Secretary 'of the difficulties inherent in this project (particularly in the United Nations)'.[152]

From the outset of the plan to establish military facilities on Diego Garcia, the UK and the US were acutely aware that UN organs would not regard this as a matter purely internal to the law of the British Empire. There were subsequent official efforts to reorganise this secret history of the colonies' dismemberment into something more acceptable by presenting Mauritius as having consented to the carve out of the islands:

> Because it [Mauritius] was not fully self-governing, there was no constitutional requirement on the part of HMG to obtain the consent of the Mauritius Council of Ministers to the proposed detachment. This was sought for essentially political reasons, and only at the insistence of the then Colonial Secretary, Mr Greenwood.[153]

Under this account of the law in effect within the British Empire, all that was legally required to effect the separation of the Chagos Archipelago from Mauritius was the modification of the statutory instrument listing its dependencies.[154] It

147 'Strategies West and East', *The Economist* (Washington DC, 16 January 1965).

148 Letter from the US Embassy in London to Sir Geoffrey G Arthur, 10 February 1965 (National Archives (UK), FO 371/184522).

149 Ibid.

150 Ibid.

151 Letter from Nigel CC Trench to EH Peck, 15 January 1965 (National Archives (UK), FO 371/184522) [6]. On the impact of Hammarskjöld's death on the UN's approach to peacekeeping and engagement with decolonisation, see generally Paul B Rich, 'The Death of Dag Hammarskjöld, the Congolese Civil War, and Decolonisation in Africa, 1960–65' (2012) 23(2) *Small Wars and Insurgencies* 352.

152 Letter from Anthony Greenwood to Michael Stewart, 30 January 1965 (National Archives (UK), FO 371/184522) [7].

153 Margaret Walawalkar, 'The Background to the BIOT' (Research Department, 3 December 1982) (National Archives (UK), FCO 31/3464) [3].

154 *Mauritius (Constitution) Order in Council 1968* (UK) s 90.

remained commonplace, in this period, for the most prominent scholars of the British Empire to continue to present decolonisation processes as entirely a matter for the Empire's own legal order.[155] This explanation of the BIOT's detachment sought to downplay Greenwood's preoccupation with providing a basis for separating territories from existing colonies which would bind Mauritian Ministers into the dismemberment and thereby fend off criticisms at the UN by creating a veneer of consent.[156] This, by the early 1980s, had become an inconvenient element in the process of creating the BIOT because it contained within it a recognition that such consent was necessary, and a subsequent generation of Mauritian leaders now actively denied that the consent which had been given was valid.[157] The UK, in short, sought to slip between alternative narratives about the break-up of the existing colony depending on how they played at particular times and with particular audiences.

Even before the fateful Lancaster House Conference in September 1965, Ramgoolam's political opponents in Mauritius had been swift to turn to the UN as part of their opposition to the nascent UK and US plans. And this ability to turn to UN organs, including those operative under the *1960 Declaration*, illustrated the extent to which the territorial integrity of existing colonies was no longer, as Greenwood had appreciated, a matter purely internal to imperial law. From 1964 onwards, soon after word of the surveys for island bases began to circulate, the Mauritius People's Progressive Party ('MPPP') lobbied the UN Committee of 24. In August 1965, it presented an extensive memorandum to the Committee of 24 detailing its concerns that:

> The Anglo-American plan is to buy the islands from the relevant authorities, remove the indigenous inhabitants, transfer the administrative [sic] of these islands to the Americans and then construct the claim of Anglo-American military facilities.[158]

Although senior UK Ministers remained confident that '[w]ith the full support of the United States Government, we should be able to withstand this criticism',[159] these efforts fed into UNGA *Resolution 2066* of December 1965, which asserted that the UK should 'take no action which would … violate [Mauritius'] territorial integrity'.[160]

The prospective language of *Resolution 2066*, notwithstanding that it was issued a month after the BIOT's creation, reflected the UK's efforts to obscure the changes affecting Mauritius' territory; UN organs and delegations belatedly 'tumbled to the *fait accompli* of separation'.[161] A year later UK officials continued

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155 See, eg, KC Wheare, 'Great Britain: First among Equals' (1953) 25(148) *Current History* 325, 326.

156 See also 'Telegram from Anthony Greenwood' (n 28) [5].

157 See 'Written Statement of the Republic of Mauritius' (n 62) 123–4 [4.9].

158 T Sibsurun, *Petition from Mr T Sibsurun, Secretary General of the Mauritius People's Progressive Party, concerning Mauritius*, UN GAOR, UN Doc A/AC.109/PET.378/Add.1 (15 September 1965) 3.

159 Foreign Secretary and Defence Secretary (UK) (n 28) [9].

160 *Question of Mauritius*, GA Res 2066, UN GAOR, 4th Comm, 20th sess, 1398th plen mtg, UN Doc A/RES/2066 (16 December 1965) para 4.

161 Foreign Office Steering Committee on International Organisations (UK), 'Presentation of British Indian Ocean Territory in the United Nations' (Presentation, 8 September 1966) (National Archives (UK), FCO 141/1415) [13] (emphasis in original).

to note how effectively this tactic was working given that *Resolution 2066* had 'dealt with B.I.O.T. *en passant* in the general context of Mauritius'.[162] The UK's UN delegation did everything it could to keep the issue off the table, including not submitting any return for the BIOT under art 73(e) of the *Charter* regarding the governance of populated colonies which are not self-governing, even at the risk of attracting censure.[163] Efforts by Mauritian politicians to keep the issue live within UN organs nonetheless continued, with the MPPP sending a representative, AH Dorghoty, to the 1967 meeting of the Committee of 24 in Dar es Salaam.[164] A resolution was agreed objecting to the colony's dismemberment, with the Committee Chair accepting that the official position of the UN was that 'the Chagos Archipelago was still part of Mauritius'.[165] UK diplomats appeared satisfied that these observations were buried in the weeds of the Committee of 24 discussions and that much of the discussion was in 'critical but not extreme terms'.[166]

All of these endeavours to disguise the UK's BIOT policy are difficult to explain if those involved were indeed confident that the concept of territorial integrity as part of self-determination had no legal weight. UK officials would subsequently struggle to explain the basis of the pledge to return the Chagos Archipelago to Mauritius once it no longer served defence purposes in a way which did not also recognise the absence of the all-important 'informed, free and voluntary' decision to break up the colony on behalf of the people of Mauritius.[167] The denial of Mauritius' underlying legal claim to the territory became even more difficult to sustain after parts of the BIOT were returned to the Seychelles in the 1970s. The US position was that the disconnect between these positions could not be wished away:

> The Americans' main fear is that the return of the three islands to the Seychelles would stimulate a Mauritian desire to get back the Chagos Archipelago … they wonder if he [Ramgoolam] could maintain the line that Mauritius has no claim to sovereignty in the Chagos if an Independent Seychelles got back Desroches, Farquhar and Aldabra. They also point out that Sir S Ramgoolam will not live for ever [sic] and are considering whether it is possible to forecast the attitude of a successor government.[168]

Notwithstanding the inaccurate expectation, which apparently underpins this statement, that Ramgoolam would be Prime Minister for life, he would remain in

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162 Ibid (emphasis in original).

163 Ibid [14].

164 Letter from BL Barder to EG Donohoe, 8 August 1967 (National Archives (UK), FCO 141/1428) [3] ('Letter from BL Barder').

165 Ibid [4]. See *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, 22nd sess, Agenda Item 23, UN Doc A/6700/Rev.1 (5 December 1967) 37 [322].

166 'Letter from BL Barder' (n 164) [4].

167 'Mechanisms of the Exercise of the Right of Self-Determination by the Non-Self-Governing Territories: Letter to the Chairman 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' [1997] *United Nations Juridical Yearbook* 448, 449. See also McCorquodale, Robinson and Peart (n 42).

168 Telegram from P Ramsbotham to Foreign and Commonwealth Office (UK), 15 October 1974 (National Archives (UK), FCO 141/1405) [2] ('Telegram from P Ramsbotham').

office until June 1982. This was long enough to circumvent any immediate response from Mauritius to the return of some of the BIOT islands to the Seychelles, and Ramgoolam would only succumb to increasing domestic pressure to challenge the detachment of the Chagos Archipelago towards the end of his premiership.[169]

When Michael Havers reviewed the case as Attorney-General in response to this change in the Mauritian government's position, Ramgoolam's agreement to the BIOT's creation was all he considered to be necessary as a basis for the UK's response to the substantive legal issue:

> [E]stoppel … might also be available in reply to a complaint based on the alleged wrongful dismemberment of the territory of Mauritius, since that, too, was something to which the Mauritius Government agreed in advance and for which it was compensated.[170]

The ill-considered nature of this response is evident in its throw-away reliance upon the equitable concept of estoppel, rather than any effort to apply the rules of self-determination under international law. Much as the principle exists within international law[171] and would indeed play a role in Mauritius' litigation over the MPA,[172] here it was acting to displace any detailed analysis of the requirements of self-determination. And it was not simply that the nuances of the relevant international law were beyond the competence of a generalist Attorney-General. Not long after this statement, an official at the FCO's UN Department chuntered that '[s]elf-determination is one of those issues where UN lawyers can find merit or fault in any case'.[173] In fact, diplomats within the UK's Mission to the UN were warning, within weeks of the BIOT's creation, that 'it would not be difficult for our critics to develop the arguable thesis that detachment by itself was a breach'.[174] But even they were predisposed against probing potential weaknesses in the UK's claim over the BIOT too vigorously; the deed was done and the consequences of the detachment and the fate of the Chagossians becoming a *cause célèbre* were simply too 'bleak' to contemplate.[175] Once again, these records undercut the UK's contention that there was not sufficient certainty around the norms of self-determination in the 1960s. Moreover, even under a B-series account of time, these records indicate that there was internal recognition of the implications of self-determination norms within the UK government prior to Mauritius' independence.

A further problem for UK policy was that, years after the BIOT was established, the Chagos Archipelago remained populated. As such, even though the BIOT fell squarely within the Committee of 24's remit,[176] the Foreign Office's Steering

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169 See 'Written Statement of the Republic of Mauritius' (n 62) 121–2 [4.5]. See also Snoxell, *Prospect of the Chagos Advisory Opinion* (n 3) 262.

170 'Letter from Henry Steel' (n 18) [2].

171 See *Temple of Preah Vihear (Cambodia v Thailand) (Merits)* [1962] ICJ Rep 6, 143–4 (Judge Spender).

172 *Mauritius v United Kingdom* (n 22) 178 [447].

173 Letter from PJ Roberts to WN Wenban-Smith, 29 September 1982 (National Archives (UK), FCO 31/3464) [2].

174 Letter from Brian Barder to Christopher G Eastwood, 2 February 1966 (National Archives (UK), FCO 31/3057) [11] ('Letter from Brian Barder'). See also ibid [3]–[4].

175 'Letter from Brian Barder' (n 174) [12].

176 *Charter of the United Nations* art 73(e); Foreign Office Steering Committee on International Organisations (UK) (n 161) [14].

Committee on International Organisations, which was responsible for formulating the presentation of UK policy at the UN, acknowledged that 'we could not accept that the interests of the inhabitants were paramount and that we should develop self-government there'.[177] Officials nonetheless became increasingly aware that the islanders' 'eventual departure — not to say removal — … may well attract considerable attention'.[178] The euphemistic use of the language of evacuation or departure[179] became an important part of UK efforts to disguise the forced removals of the Chagossians.[180]

In this context, the ongoing UN objections to the detachment of islands from Mauritius and the Seychelles to enable the BIOT's creation began to serve as a useful distraction from these forced removals. As officials briefed Ministers on ongoing legal disputes over the Chagos Archipelago in 1982, the UN's focus on the dismemberment of the existing colonial territories had been preferable to the alternative of the UN organs having addressed the UK's treatment of the Chagossians in greater depth. Their language is so revelatory of the deficiencies in the UK's position on self-determination that the final version of this memorandum remains redacted on the grounds of the risk it poses to the UK's international relations.[181] These efforts at concealment were, however, clumsy; those responsible for the redaction missed the draft text held in other records, enabling this excerpt to be reconstructed:[182]

> Fortunately for the UK attention in the UN focussed not on the inhabitants of BIOT but on its detachment from Mauritius, with the result that the UN has refused to recognise its existence as a separate territory. This fact, together with the government's undertaking to return BIOT to Mauritius when it is no longer required for defence purposes, could yet prove useful in the UN context.[183]

The UN organs' consistent refusal to accept the detachment of the BIOT islands because of the self-determination issues that it raised was thus acknowledged by the UK into the 1980s. Far from being immediately problematic for UK policy at the time, however, it was regarded as advantageous. It had distracted the UN from the UK's depopulation of the islands and was not thought to provide Mauritius with an immediate outlet for legal pressure.

Between the 1960s and the 1980s, successive UK governments' internal deliberations over the Chagos Archipelago had thus recognised that there were costs inherent in the UNGA's and the Committee of 24's denunciation of the BIOT's creation. Ministers and officials nonetheless remained confident that in the Cold War context there was little that these bodies could or would do to push the matter towards legal determination. In short, the dismemberment and

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177 Foreign Office Steering Committee on International Organisations (UK) (n 161) [11].

178 Letter from AS Papadopoulos to JDB Shaw, 28 August 1970 (National Archives (UK), FCO 141/1428) [2].

179 See, eg, Foreign Office Steering Committee on International Organisations (UK) (n 161) [8].

180 See Tom Frost and CRG Murray, 'Homeland: Reconceptualising the Chagossians' Litigation' (2020) 40(4) *Oxford Journal of Legal Studies* 764.

181 See Letter from WN Wenban-Smith, 11 October 1982 (National Archives (UK), FCO 31/3464) [6(i)].

182 This failure to redact the documents thoroughly is reflected in other incriminating revelations from the Chagos archives: see Murray and Frost (n 43) 153.

183 Letter from WN Wenban-Smith, 29 September 1982 (National Archives (UK), FCO 31/3462) [6(i)] ('Letter from WN Wenban-Smith').

depopulation of the colony were thought to allow the UK and the US a freer hand with regard to the management of the BIOT than the colony having non-military inhabitants and therefore coming under the auspices of the Committee of 24 on a continuing basis. Such oversight would have created 'opportunities for UN intervention and mischief-making by member states'.[184] This approach was also regarded by the UK as far preferable to the Chagos Archipelago remaining part of Mauritius and the circumstances of the base lease having to be managed between Mauritius and the US. In such a scenario, Mauritius' decolonisation would cut the UK out of the equation, and the UK government firmly intended to remain indispensable to defence 'cooperation'.[185]

Even after all of the refinements to the UK government's internal position between the 1960s and the 1980s, the only plausible response it makes to the charge that Mauritius had not been fully decolonised is that the BIOT was created as a non-self-governing colony in 1965 by 'agreement' with Mauritius' pre-independence administration.[186] This, however, would mean that the Chagossians, as the BIOT's people, enjoyed their own right to self-determination. This outcome was, of course, so unacceptable for BIOT policy that the UK had sought to avoid it by the enforced expulsion and exclusion of the Chagossians. It would take decades for UK legislation to recognise some Chagossians' citizenship entitlements in 2002, and still they remained excluded from the Chagos Archipelago.[187] The archives nonetheless demonstrate successive UK governments' efforts to play off these threats to the BIOT, from Mauritius and the Chagossians, against one another.

These efforts were only ever partially successful because, as we discussed above, the Committee of 24 did consider the 1965 dismemberment of the existing colonies and subsequent depopulation of the BIOT islands. It repeatedly refused to recognise the legality of the BIOT's creation and would continue to censure the UK in the context of its reporting on the Seychelles, which remained a colony until 1976. The following Committee of 24 statement was issued in 1972, following campaigning by Matthew Servina of the Seychelles People's Party:

> The Special Committee reiterates its concern over the continued refusal of the administering Power to restore the territorial integrity of the Seychelles which was violated by the detachment, in 1965, of three islands from the Seychelles to form, together with islands detached from Mauritius, the so-called "British Indian Ocean Territory" without prior consultation with the people of the Territory.[188]

The BIOT islands which had been detached from the Seychelles were ultimately restored to the colony alongside its independence.[189] Still populated,

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184 'Letter from WN Wenban-Smith' (n 183) [6(i)].

185 Foreign Office Steering Committee on International Organisations (UK) (n 161) [12].

186 United Kingdom, *Parliamentary Debates*, House of Commons, 10 November 1965, vol 720, col 2W (Anthony Greenwood). See 'Written Statement of the UK' (n 52) 126–7 [8.22]–[8.23].

187 See Frost and Murray, 'Homeland: Reconceptualising the Chagossians' Litigation' (n 180) 773–4. After decades of campaigning, the UK government recognised not only the Chagossians' general right to claim British citizenship but also British overseas territory citizenship: *Nationality and Borders Act 2022* (UK) s 4.

188 Special Committee on Decolonisation, *Conclusions and Recommendations Adopted by the Special Committee at Its 876th Meeting, on 1 August 1972*, 876th mtg (1 August 1972) [6].

189 See David Snoxell, 'Expulsion from Chagos: Regaining Paradise' (2008) 36(1) *Journal of Imperial and Commonwealth History* 119, 121.

they had become surplus to military requirements as a result of the expansion of the Diego Garcia base.[190] UK officials characterised the return of these islands as 'a sop to the UN Committee of 24'.[191] This conclusion acknowledges the effectiveness of this UN organ as a pressure point for as long as a territory remained a populated colony. The UK's eagerness to circumvent the Committee of 24's oversight exposes the deep lack of confidence in the legality of the dismemberments involved in the BIOT's creation. The lack of consideration of the implications of this development for Mauritius' territorial claims to the Chagos Archipelago, however, also demonstrates the level of disconnect which came into the UK government's BIOT policy through its attempts to firefight challenges as they emerged.

As a result of these interventions by the Committee of 24, UK officials were obliged to accept, at the point that Mauritius was becoming more assertive of its claims to the Chagos Archipelago in the early 1980s, that 'the UN has refused to recognise its [the BIOT's] existence as a separate territory'.[192] Far from being chastened by this repeated censure, FCO officials maintained that the Committee of 24's refusal to accept the legality of the separation of the Chagos Archipelago from Mauritius 'was lucky for HMG for we wished above all to avoid BIOT being classified as a non-self-governing territory falling within the scope of Chapter XI of the UN *Charter*'.[193] This was less luck than sheer great-power grift; the UK repeatedly played off the wrongs it had committed against Mauritius and the Chagossians to achieve the outcomes least damaging to its interests in the circumstances.

The UK's success with this ploy would have a devastating impact upon the Chagossians for it shielded the ongoing removals from the islands from international attention:

> Until completion of the evacuation of the inhabitants of the islands, however, we realised that … any argument we might put forward in the UN denying the applicability to the BIOT of Chapter XI on the grounds that it had no permanent population would be flawed: we knew that some of the population were at least second-generation inhabitants.[194]

In terms of the BIOT's future, these memoranda essentially regarded the inherent acknowledgement of Mauritius' claims as being less of a risk than any intervention which would recognise the rights of the Chagossians. The ICJ's advisory opinion thus appeared to mark the point at which, after so long, the UK government's efforts to use its dismemberment of Mauritius to deflect attention from its forced expulsion of the Chagossians ran out of road. It remained to be seen, however, if the recognition that the detachment of the Chagos Archipelago

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190 'Telegram from P Ramsbotham' (n 168) [1].

191 Hong Kong and Indian Ocean Department, 'The Implications of Seychelles Independence for BIOT' (25 June 1974) (National Archives (UK), FCO 141/1405) [9].

192 'Letter from WN Wenban-Smith' (n 183) [6(i)].

193 M Walawalkar, 'Question of the British Indian Ocean Territory at the UN, 1964–1976' (9 October 1981) (National Archives (UK), FCO 31/3057) [4].

194 Ibid.

in 1965 breached norms of self-determination would have any substantive impact on the de facto control over the islands or the position of the islanders.[195]

## V IMPLICATIONS AND AFTERMATH

The archival record presents a stark reality for the underpinnings of the UK's BIOT policy. The situation is not one in which the international law applicable to self-determination underwent a materially significant shift a decade after the *1960 Declaration*, meaning that the UK's activities between 1965 and 1968 in dismembering existing colonies and establishing the BIOT came to be adjudged against ahistorical standards in the *Chagos Advisory Opinion*. Instead, UK policymakers in the 1960s could not countenance the implications of customary international law regarding self-determination for UK policy in the Indian Ocean. They therefore assuaged themselves with the repeated insistence that the security demands of the Cold War justified the means, supported by an unshakable confidence that the question would never be formally adjudicated and simultaneously took active steps to prevent the application of international law to their activities. Ministers, law officers and officials made such extensive efforts to deflect UN organs from engaging with the BIOT that some of them might even have come to believe that international law was on their side, but if they did, this position was bound up in a belief that the structures of international law operated primarily for the benefit of the UK in a dispute such as this. The *Chagos Advisory Opinion* is thus the confutation of an ongoing manifestation of great-power hubris; the expectation that these rules would not, or at least could not effectively, be applied to the UK's conduct regarding the BIOT.

Much as the UK vociferously complained in the wake of the advisory opinion and denied that the legal position with regard to the Chagos Archipelago had changed as a result of it, its entry into talks with Mauritius over the sovereignty of the Archipelago in late 2022 appeared to indicate the degree to which the geopolitics of the Indian Ocean has changed in recent years.[196] The Mauritian dependency of Agaléga, once ironically considered for inclusion in the BIOT and briefly the focus of a UK government plan to resettle the Chagossians after Mauritius' independence,[197] is now being used for Indian facilities,[198] when India had been one of the loudest objectors to the militarisation of the region in the 1960s.[199] In 2021, an International Tribunal for the Law of the Sea ('ITLOS') Special Chamber heaped pressure on the UK when it recognised that the ICJ's *Chagos Advisory Opinion* rendered UK sovereignty claims over the BIOT a 'mere

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195 See Gail Lythgoe, 'Asymmetrical International Law and Its Role in Constituting Empires: The ICJ Chagos Advisory Opinion' (2020) 71(2) *Northern Ireland Legal Quarterly* 305, 315.

196 United Kingdom, *Parliamentary Debates*, House of Commons, 7 December 2022, vol 724, col 164WH (Anne-Marie Trevelyan).

197 Letter from B Greatbatch to Foreign and Commonwealth Office, 25 November 1971 (National Archive (UK), FCO 141/1417) [1].

198 See Samuel Bashfield and Alexander Lee, 'Biting the "Cherry of Detachment": Agaléga's Cold War Decolonisation' (2023) 45(3) *International History Review* 535, 546–7.

199 Telegram from New Delhi, 24 August 1965 (National Archive (UK), FCO 141/1406) [1].

assertion'.[200] In November 2022 the UK Foreign Secretary, James Cleverly, informed the House of Commons that the UK's negotiations with Mauritius sought to 'resolve all outstanding issues, including those relating to the former inhabitants of the Chagos Archipelago'.[201] Returning the remaining BIOT islands to Mauritius, on the basis that the joint UK-US facilities on Diego Garcia are maintained, appeared to have become the preferable route out of this persistent foreign policy headache for the UK.[202]

These talks, however, faltered over how any arrangement between the UK and Mauritius would accommodate the Chagossians. Their distinct status and rights have posed a running challenge for the UK government since the creation of the BIOT, with their forcible removal being in part undertaken to exclude oversight of the new colony by the Committee of 24. For long periods, however, Mauritius was diffident towards the Chagossian position. As the British High Commission in Mauritius reported as the expulsions gained pace, 'the Mauritius Government … has so far made no distinction between Mono Mauritians and Ilois, and of course we are most anxious to maintain this position'.[203] More recently, Mauritius has sought to harness the wrongs done to the Chagossians, and the islanders' protracted campaign to draw attention to those wrongs, to strengthen its own claims. The testimony of Liseby Elysé, as a Chagossian woman, before the ICJ during the advisory opinion proceedings, and her conveyance of the Chagossians' fury at what was inflicted upon them to the judges, were significant elements of Philippe Sands' litigation strategy on behalf of Mauritius.[204]

Even in Judge Yusuf's 'new era',[205] however, the ICJ did not have a compelling answer to the Chagossians' claims; it merely suggested that the UNGA should investigate their resettlement as a matter of human rights protection.[206] This judicial reticence might have been thought to create a space for the dispute to be resolved as a purely interstate matter, but any such hopes appear to have been thwarted. Following multiple inconclusive rounds of negotiations, the UK government maintained that 'we are very conscious of the Chagossian communities and will keep them in the forefront of our minds throughout this negotiating process',[207] an almost incredible position given decades of UK government stonewalling over the Chagossian claims. Asked directly about the resettlement of the Chagossians on the islands while the UK remained in control

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200 *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) [243]. See Guilfoyle, 'Litigation as Statecraft: Small States and the Law of the Sea' (n 44) 30–1.

201 United Kingdom, *Parliamentary Debates*, House of Commons, 3 November 2022, vol 721, col 27WS (James Cleverly).

202 United Kingdom, *Parliamentary Debates*, House of Commons, 13 June 2023, vol 734, col 150 (James Cleverly).

203 Letter from Keith R Whitnall to John R Todd, 8 August 1969 (National Archives (UK), FCO 141/1416) [3]. See Laura Jeffery, *Chagos Islanders in Mauritius and the UK: Forced Displacement and Onward Migration* (Manchester University Press, 2011) ch 1.

204 Sands (n 1) ch 5.

205 Yusuf (n 116) 10.

206 *Chagos Advisory Opinion* (n 2) 139 [181]. See also Allen, 'Self-Determination, the Chagos Advisory Opinion and the Chagossians' (n 83) 215.

207 United Kingdom, *Parliamentary Debates*, House of Commons, 13 June 2023, vol 734, col 151 (James Cleverly).

of them, Lord Cameron declared that it was 'not possible'.[208] This very much suggests that history is repeating itself, with the UK pursuing yet another effort to play the interests of the Chagossians off against those of Mauritius.[209]

## VI CONCLUSION

An analysis of the archival record transforms the nature of the dispute both within and about the ICJ's *Chagos Advisory Opinion*. The ICJ's construction of the norms of self-determination as they existed in the mid-1960s was based on a narrow range of sources, taking little cognisance of how UK decision-makers understood their obligations at the time. This approach likely stems from significant concerns that any such analysis of curated archival holdings would necessarily privilege the colonising state's account of international law; judicial fact construction must guard against the false impressions generated by carefully curated archives. In this instance, however, the archival record undermines the UK's accusations that the Court was applying legal rules in a manner unforeseeable at the time of the BIOT's creation and its subsequent refusal to recognise Mauritius' claims. The repeated refrain that 'Mauritius has never held sovereignty over the territory'[210] is little more than an obfuscation when the precise issue is the dismemberment of a colony prior to decolonisation. Those archived deliberations, moreover, reveal the profound misunderstandings of international law which dogged UK policy towards its remaining colonies in the latter part of the twentieth century. The UK maintained a misplaced confidence in the firewalls that it had erected against legal recourse by former colonies before international tribunals. It was willing to brazen out whatever censure that its policies of dismemberment of existing colonies and depopulation of the Chagos Archipelago managed to bypass its concerted efforts to thwart scrutiny in other international fora.

The law of self-determination did not change in such a way as to alter the legality of the events in question during the relevant time period; instead, the change was to the UNGA's willingness to seek an advisory opinion and the ICJ's willingness to accept such proceedings in relation to events relating to a previous period of colonisation. For all of the breezy confidence of successive UK legal advisers that no claim would ever be entertained by the ICJ, this account reveals that officials were frequently much more circumspect around the substance of the UK position. Arthur Watts, FCO legal adviser, fully appreciated the weakness of the UK's account of self-determination in the early 1980s: '[T]here must be a serious risk that a tribunal such as the International Court would (in view of its composition) be inclined to give greater legal significance to … *Resolutions 1514* and *2625*, than we would concede to them'.[211] The ICJ's position in the *Chagos Advisory Opinion* did not come as a bolt out of the blue; it was a "serious risk" to

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208 Foreign Affairs Committee (UK), *Oral Evidence: Work of the Foreign, Commonwealth and Development Office* (HC 325, 9 January 2024) [Q694].

209 This approach, of course, allows the UK to remain part of the security relationships centred upon Diego Garcia: Samuel Bashfield and Elena Katselli Proukaki, 'The Rules-Based Order, International Law and the British Indian Ocean Territory: Do as I Say, Not as I Do' (2022) 23(5) *German Law Journal* 713, 734.

210 See United Kingdom, *Parliamentary Debates*, House of Commons, 5 November 2019, vol 667, col 642 (Dominic Raab).

211 'Letter from Arthur D Watts' (n 135) [9].

the UK's claims over the BIOT that generations of UK policymakers had acknowledged but long sought to downplay or avoid.