THE UNITED KINGDOM AND THE *CHAGOS ARCHIPELAGO* ADVISORY OPINION: ENGAGEMENT AND RESISTANCE

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The United Kingdom has long been an active contributor and supporter of the International Court of Justice ('ICJ'): as a United Nations member state, as an applicant and respondent, through interventions in advisory proceedings and through the participation of its judges and counsel. This article examines the fallout from the UN General Assembly's request for an advisory opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965. Although the UK expressed regret for its past treatment of the inhabitants of the Chagos Archipelago, it argued that the Court should exercise its discretion not to provide an advisory opinion. In its view, the dispute was bilateral in nature and had been resolved by, inter alia, an arbitral tribunal in interstate proceedings pursuant to the United Nations Convention on the Law of the Sea, domestic proceedings, and political settlements and undertakings between the UK, Mauritius and the Chagossians. Despite its resistance to the Court's exercise of its advisory function, the UK fully engaged in the ICJ proceedings. When the opinion was issued, the UK again adopted a posture of resistance. This creates an interesting case study of a national encounter with the ICJ, including the influence of domestic and non-ICJ litigation, the reception of ICJ opinions in national contexts and perceptions of national executives and legislative branches with respect to the ICJ.

CONTENTS

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I INTRODUCTION

Sir Michael Wood, former United Kingdom Foreign and Commonwealth Office Legal Adviser and counsel in numerous International Court of Justice ('ICJ') cases on behalf of the UK and other states, has described the approach of the UK to interstate dispute settlement, including before the ICJ, as one that 'seems to be suspended between idealism and realism'.[1]

Idealism as regards interstate dispute settlement may be characterised by active use of the ICJ; strong support for, and cooperation with, the Court's work in political, financial and other practical ways; immediate and unquestioning acceptance of its judgments; and treatment of its advisory opinions as binding statements of law. On the other hand, realism may be manifested by selective use of the Court as an applicant, taking into account the prospects for success; avoidance of the Court as a respondent through jurisdictional challenges or even non-appearance; weighing support for and cooperation with the Court against the national interest; assessing its judgments with a sceptical eye; and treating advisory opinions as advisory only.

Since Wood published those words in 2014, the ICJ has issued its advisory opinion in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* ('*Chagos Archipelago*') proceedings.[2] The UK's approach to the proceedings and the reception of the opinion has emphasised realism, echoing the UK's attitude to certain advisory opinions issued in the past. This article examines two normative attitudes: engagement and resistance. Whereas idealism would lead to positive engagement in ICJ proceedings and the ready reception of its opinions, realism may involve both engagement *and* resistance depending on the perceived benefits to the state.

By way of background, the Chagos Archipelago is a number of islands and atolls, with the largest island, Diego Garcia, having an area of 27 sq km.[3] It is approximately 2,200 km from Mauritius and 9,600 km from the UK. From 1814 to 1965, the Chagos Archipelago was administered by the UK as a dependency of the British colony of Mauritius.[4] In the period 1964–65, in the lead up to Mauritius' independence, two sets of critical discussions on the future of the Chagos Archipelago took place. The first was the United States' expression of interest to the UK in establishing a military facility on Diego Garcia.[5] The UK appreciated the value of a strategic base with access to the Middle East, Asia and Africa, and raised the plans with Mauritius in July 1965 before concluding a

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1 Michael Wood, 'European Perspectives on Inter-State Litigation' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Balance* (Cambridge University Press, 2014) 130, 131. See also at 141.

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

3 Ibid 107 [26].

4 Ibid 107 [28]. Prior to that, it had been subject to European occupation, with the arrival of the Dutch in 1638 and a period of French colonial administration from 1715 until France ceded control in the 1814 *Treaty of Paris*: see at 107 [27].

5 Ibid 108 [31].

bilateral agreement with the US in December 1966.[6] The second was negotiations between the UK and Mauritius over the detachment of the Chagos Archipelago from Mauritius, leading to the conclusion of the Lancaster House agreement on 23 September 1965.[7] On 8 November 1965, the UK established a new colony known as the British Indian Ocean Territory ('BIOT'), consisting of the Chagos Archipelago, detached from Mauritius.[8] Between 1967 and 1973, the entire population of the Chagos Archipelago was removed by the British government in anticipation of the US military base on Diego Garcia.[9]

These events gave rise to two principal disputes. First, one between the UK and Mauritius over sovereignty over the Chagos Archipelago. Second, a dispute between the Chagossians and the British government over the legality of their removal and whether they have a right to return and resettlement.[10] The first dispute is the focus of this article, but it is inevitably intertwined with the domestic and international litigation regarding the second dispute.

This article explores the UK's encounter with the ICJ and argues that the *Chagos Archipelago* advisory proceedings reflect an attitude of realism in the UK's relationship with the Court. I contend that the UK displayed resistance to the use of the advisory function in this case, engagement in the proceedings and resistance to the opinion of the Court and subsequent action in the UN General Assembly.

Part II sets out the UK's engagement with the ICJ prior to the *Chagos Archipelago* proceedings. Part III considers the UK's resistance to the request made to the ICJ followed by its engagement during the proceedings. Part IV sets out the key points from the advisory opinion. Part V addresses the resistance of the UK in domestic and international fora. Part VI concludes with reflections on the roles of engagement, resistance and regret in this encounter, as well as some comparative considerations.

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6 'Written Statement: The United Kingdom of Great Britain and Northern Ireland', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 15 February 2018) 37–8 [3.10] ('UK Written Statement'). According to the UK, the Mauritian representatives communicated that they were 'not ill-disposed' to the military facility: at 36 [3.8(a)]. See *Exchange of Notes Constituting an Agreement concerning the Availability for Defense Purposes of the British Indian Ocean Territory*, United Kingdom–United States, 603 UNTS 273 (signed and entered into force 30 December 1966).

7 *Chagos Archipelago* (*Advisory Opinion)* (n 2) 108 [32].

8 *The British Indian Ocean Territory Order 1965* (UK) SI 1965/1920. It also included the Aldabra, Farquhar and Desroches Islands, detached from Seychelles: ibid 108 [33].

9 *Chagos Archipelago* (*Advisory Opinion)* (n 2) 110 [43]; Jon Lunn, 'Disputes over the British Indian Ocean Territory: December 2019 Update' (Briefing Paper No 6908, House of Commons Library, Parliament of the United Kingdom, 17 December 2019) 3.

10 Lunn (n 9) 3. Some Chagossians were taken to Mauritius via Seychelles; others were taken to other islands within the Archipelago: 'UK Written Statement' (n 6) 56 [4.4(c)].

II THE UNITED KINGDOM'S ENGAGEMENT WITH THE ICJ PRIOR TO THE *CHAGOS ARCHIPELAGO* ADVISORY PROCEEDINGS

The UK's involvement with the ICJ has largely been characterised by engagement, with moments of resistance. The UK has engaged in its capacity as a participant in cases and through its nationals who have contributed to the establishment of the Court, its decision-making and its leadership, and as counsel in cases. From Lord Phillimore, who was involved in drafting the *Statute of the Permanent Court of International Justice*,[11] to the British Presidents of the ICJ (Arnold McNair, Humphrey Waldock, Robert Jennings and Rosalyn Higgins) and the other British judges (Hersch Lauterpacht, Gerald Fitzmaurice and Christopher Greenwood),[12] to the British nationals working in the registry and representing parties appearing before the Court, the UK's influence on and involvement with the Court has been significant.[13]

The UK is, along with the US and France, one of the three most regular litigants before the ICJ.[14] It accepted the compulsory jurisdiction of the Permanent Court of International Justice and then the ICJ almost continuously, albeit with reservations, from 1929 onwards.[15] It is the only Permanent Member of the United Nations Security Council with an optional clause declaration in force. The UK has appeared as applicant in seven contentious cases and respondent in seven contentious cases.[16] It was the applicant in the very first case before the ICJ, the *Corfu Channel* case against Albania.[17]

The UK has participated in 14 advisory proceedings, including the *Chagos Archipelago* proceedings.[18] As Wood observes, a state's participation in advisory opinion proceedings 'may indicate the seriousness with which a state takes judicial settlement, and on that score the United Kingdom has a reasonable record'.[19] In 10 cases, it has both submitted written statements and participated in the oral proceedings. Statements on behalf of the UK have generally been positive about the advisory function of the ICJ. For example, in 2010, David Lidington, Minister for Europe, told the UK Parliament that the government

> welcome[s] the delivery of the International Court of Justice's (ICJ) Advisory Opinion [on Kosovo] on 22 July … The Government will continue to lobby for

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11 He was the British member of the Advisory Committee of Jurists: Wood (n 1) 143.

12 Until 2018, there had always been a British judge on the Court's Bench. For profiles of the British judges at the Permanent Court of International Justice and ICJ, see Philippe Sands and Arman Sarvarian, 'The Contribution of the UK Bar to International Law' in Robert McCorquodale and Jean-Pierre Gauci (eds), *British Influences on International Law, 1915–2015* (Brill Nijhoff, 2016) 497.

13 Wood (n 1) 145; Margaret A Young, Emma Nyhan and Hilary Charlesworth, 'Studying Country-Specific Engagements with the International Court of Justice' (2019) 10(4) *Journal of International Dispute Settlement* 582, 594. Philippe Sands and Arman Sarvarian have observed that the 'hallmarks of British international lawyers' are 'pragmatism, practicality and interest in procedure': ibid 509.

14 Young, Nyhan and Charlesworth (n 13) 584.

15 There was a short break from 14 to 18 April 1957: Wood (n 1) 142–3.

16 Young, Nyhan and Charlesworth (n 13) 588 (Table 1).

17 *Corfu Channel (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 4. On the lasting impact of this case, see ibid 593–4.

18 Young, Nyhan and Charlesworth (n 13) 588 (Table 1).

19 Wood (n 1) 145.

> further recognitions for Kosovo. We believe that the ICJ Opinion will encourage those states who have not yet done so to recognise Kosovo.[20]

Six decades earlier, before voting in favour of the UN General Assembly resolution on the *Reparation for Injuries Suffered in the Service of the United Nations* advisory opinion,[21] Gerald Fitzmaurice, then a UK diplomat, praised the ICJ's opinion as a 'valuable contribution to the elucidation of the constitutional and legal position of the United Nations as an organization and as an international entity'.[22] Fitzmaurice described the opinion as 'pav[ing] the way towards a very necessary protection for the servants and agents of the United Nations in the performance of their functions'.[23] The UK was more circumspect in relation to the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ('*Wall*') advisory opinion.[24] The Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs, Bill Rammell, noted that 'the ICJ conclusions in law are broadly in line with our own, but we do not agree with all the legal analysis'.[25] The UK voted in favour of the General Assembly resolution that endorsed the advisory opinion.[26]

The UK displayed more resistance than engagement in response to the *Legality of the Threat or Use of Nuclear Weapons* ('*Nuclear Weapons*') advisory opinion.[27] It voted against the UN General Assembly resolution that endorsed the advisory opinion.[28] In Parliament, the Secretary of State for Foreign and Commonwealth Affairs, Tony Lloyd, explained the negative vote as being motivated by the resolution's 'selective quotation of the Advisory Opinion and its unrealistic call for time-bound multilateral negotiations';[29] he noted, '[t]he Court's Advisory Opinion does not require a change in the United Kingdom's entirely defensive nuclear deterrence policy'.[30]

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20 United Kingdom, *Parliamentary Debates*, House of Commons, 27 July 2010, vol 514, cols 85–86WS.

21 *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.

22 UN GAOR, 4th sess, 262nd plen mtg, UN Doc A/PV.262 (1 December 1949) [85].

23 Ibid.

24 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136 ('*Wall (Advisory Opinion)*').

25 United Kingdom, *Parliamentary Debates*, House of Commons, 20 July 2004, vol 424, col 60WH.

26 *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem*, GA Res ES-10/15, UN GAOR, 10th emergency special sess, 27th plen mtg, Agenda Item 5, UN Doc A/RES/ES-10/15 (2 August 2004, adopted 20 July 2004); UN GAOR, 10th emergency special sess, 27th mtg, Agenda Item 5, UN Doc A/ES-10/PV.27 (20 July 2004) 5–6.

27 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

28 *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, GA Res 51/45 M, UN GAOR, 51st sess, 79th plen mtg, Agenda Item 71, Supp No 49, UN Doc A/RES/51/45 (10 January 1997, adopted 10 December 1996); UN GAOR, 51st sess, 79th plen mtg, UN Doc A/51/PV.9 (10 December 1996) 20–2.

29 United Kingdom, *Parliamentary Debates*, House of Commons, 24 November 1997, vol 301, col 398W.

30 United Kingdom, *Parliamentary Debates*, House of Commons, 22 May 1997, vol 294, col 135W.

The UK was also critical of the ICJ's role in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* ('*Namibia*') advisory opinion in 1971 and displayed resistance by emphasising its non-binding nature.[31] Explaining the opinion to Parliament, Anthony Kershaw, Under-Secretary of State for Foreign and Commonwealth Affairs, stated:

> [F]or us to be able to agree that there was a power of termination of the mandate [that South Africa asserted in relation to Namibia], certain propositions of law would have to be established. It is our considered view that these propositions have not been established either in relation to the League or in relation to the General Assembly. Since we have reached the conclusion that the mandate has not been validly terminated, we cannot accept the legal consequences deduced by the court from different premises, and accordingly we cannot accept the conclusions of the court set out in paragraph 133 of its advisory opinion.
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> …
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> We attach the greatest importance to the rule of law and also, therefore, to the institutions, such as the International Court of Justice, which uphold that law. And we have given the most careful consideration to this advisory opinion.
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> As an advisory opinion only, it is not, as the hon Member for Aberdeen, North conceded, I think, binding, but it is of course entitled to the very closest consideration and respect. After giving it that consideration, we have concluded that, on the basis of the law as we understand it in this country, we must reject the Court's opinion.[32]

The UK has generally been a strong and active supporter of the ICJ through its engagement in proceedings and the contribution of its nationals to the work of the Court, but resistance has been shown in relation to the *Wall*, *Nuclear Weapons* and, especially, *Namibia* advisory opinions.

III The United Kingdom's Resistance to the Advisory Function and Engagement during the *Chagos Archipelago* Advisory Proceedings

On 22 June 2017, the UN General Assembly adopted *Resolution 71/292* by 94 votes to 15, 65 members abstaining.[33] The resolution asked the ICJ to address two questions:

> (a) 'Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV)

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31 *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.

32 United Kingdom, *Parliamentary Debates*, House of Commons, 19 October 1971, vol 823, col 681.

33 *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, UN GAOR, 71st sess, 88th plen mtg, Agenda Item 89, Supp No 49, UN Doc A/RES/71/292 (22 June 2017) ('*Resolution 71/292*').

> of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?';
>
> (b) 'What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?'.[34]

The UK's initial reaction was resistance to the ICJ's advisory function. Sir Alan Duncan, Minister of State in the Foreign and Commonwealth Office, told Parliament:

> This is an inappropriate use of the ICJ advisory mechanism because it is an attempt to circumvent the principle that no state should be compelled to have its bilateral disputes submitted for judicial settlement without its consent, not least on matters of sovereignty. This is a matter for the UK and Mauritius to resolve bilaterally.[35]

There was speculation on whether the UK would participate in the written and/or oral phases of the advisory proceedings. The UK's traditional engagement with the ICJ over many decades and on multiple levels was no doubt a key factor that encouraged its active participation in the *Chagos Archipelago* advisory proceedings. This participation — evidenced in its written and oral interventions — revealed that the UK's position was one of realism, with no traces of the idealism that had been present in the UK's usual response to the Court in prior advisory proceedings, with the exception of the *Namibia*, *Wall* and *Nuclear Weapons* cases.

Resistance was manifested along two main lines. First, the UK argued that the ICJ should exercise its discretion to decline to answer the request for an advisory opinion because it concerned a longstanding bilateral dispute between the UK and Mauritius.[36] Second, the UK considered that the legal consequences of the continued administration of the Chagos Archipelago had been 'largely determined, with binding force as between the Parties'[37] in other proceedings.[38]

On the first line of resistance, the UK explained that, despite the careful phrasing of the UN General Assembly's request (with its emphasis on the 'process of decolonization' and reference to General Assembly resolutions), the central issue was in fact the longstanding sovereignty dispute between the UK and Mauritius over the Chagos Archipelago.[39] The UK urged the ICJ to use its discretion to decline the request for an advisory opinion, but it did not challenge the Court's jurisdiction to issue the opinion.[40] It argued that 'to give a reply would have the effect of circumventing the principle that a State is not obliged to allow

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34 Ibid paras (a)–(b).

35 United Kingdom, *Parliamentary Debates*, House of Commons, 26 June 2017, vol 626, col 12WS.

36 'UK Written Statement' (n 6) 1 [1.2].

37 Ibid 154 [9.21].

38 The UK also made other arguments to resist the substantive questions before the Court, such as the contention that the process of decolonisation of Mauritius had been lawfully completed in 1968: see, eg, ibid ch 8.

39 Ibid 1 [1.2].

40 Australia was the only participant in the case to challenge the Court's jurisdiction: see *Chagos Archipelago (Advisory Opinion)* (n 2) 112 [60].

its disputes to be submitted to judicial settlement without its consent'.[41] Related to this, the UK observed that Mauritius had tried to bring the sovereignty dispute with the UK as a contentious dispute before a *United Nations Convention on the Law of the Sea* ('*UNCLOS*') Annex VII arbitral tribunal but had failed to establish jurisdiction, causing it now to repackage the dispute as 'a matter of decolonization'.[42] And even if it were proper for the ICJ to determine the dispute, it would entail a fact-intensive process that could only be achieved through the procedure of a contentious case, not an advisory proceeding.[43] The UK pointed in particular to the 'due process protections' of a contentious case, such as having a full written phase and a right of reply in the oral phase, which were absent from the advisory proceedings.[44]

The second line of resistance emphasised the impact of domestic and non-ICJ litigation on the ICJ proceedings.[45] The UK drew on the 2015 arbitral award in the case that Mauritius had brought against the UK under pt XV and annex VII of *UNCLOS* with respect to the UK's establishment of a 200 nautical mile marine protected area ('MPA') around the Chagos Archipelago.[46] In particular, the UK pointed out that it had objected to any assertion by the tribunal of jurisdiction over the sovereignty dispute between the UK and Mauritius, and that their objection had been upheld in the award by a majority.[47] Moreover, the UK claimed, the award had contained certain factual and legal determinations that were binding on both parties.[48] Although the tribunal did not have jurisdiction to rule on the sovereignty issues, it did rule on the meaning and effect of the 1965 Lancaster House agreement in the context of Mauritius' other claims. It found that,

> from Mauritius' independence, the 1965 Agreement became a matter of international law between the Parties. By reference to the undertakings contained in the 1965 Agreement and since reaffirmed, it ruled that the United Kingdom is

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41 'UK Written Statement' (n 6) 1 [1.3], quoting *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 25 [33] ('*Western Sahara (Advisory Opinion)*').

42 'UK Written Statement' (n 6) 1 [1.2]. It also noted that Mauritius had previously tried to bring the dispute before the ICJ under its contentious jurisdiction in the early 2000s: at 81–4 [5.19].

43 'Verbatim Record 2018/21', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 3 September 2018) 6 [2] (Robert Buckland QC).

44 Ibid 36 [19(b)] (Sam Wordsworth QC); 'Written Comments of the United Kingdom of Great Britain and Northern Ireland', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 14 May 2018) 54 [3.24]–[3.25] ('UK Written Comments'). On rare occasions, second rounds in the oral hearing in advisory proceedings have been permitted: see, eg, *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion)* [1960] ICJ Rep 150; 'Oral Statements', *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion)* [1960] ICJ Pleadings 261.

45 This is, of course, not limited to the *Chagos Archipelago (Advisory Opinion)*. See also the *Wall (Advisory Opinion)*'s reception in Israel: *Beit Sourik Village Council v Government of Israel* [2004] HCJ 2056/04; *Mara'abe v The Prime Minister of Israel* [2005] HCJ 7957/04. See also the impact of ICJ case law on domestic litigation in consideration of *Western Sahara (Advisory Opinion)* by the High Court of Australia in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 40–1 (Brennan J).

46 *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (UNCLOS Arbitral Tribunal, Case No 2011-03, 18 March 2015).

47 'UK Written Statement' (n 6) 88 [6.2(b)].

48 Ibid 88 [6.4].

> obliged as a matter of international law to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes.[49]

In other words, any response by the ICJ to question (b) of the request would have to be based on the 2015 award.[50] In the UK's view, matters regarding resettlement and other legal consequences had also been raised before, and answered by, the European Court of Human Rights and English courts.[51]

Alongside this resistance to the ICJ pronouncing on the questions put to it by the UN General Assembly, there was a sense of regret in the UK's pleadings. Regret may be understood as a form of engagement mitigating (or aiming to mitigate) a position of resistance. This expression of regret was related to the treatment of the Chagossians, including the incomplete information provided to the UN regarding them:

> The Request also refers in its Question (b) to the Chagossians, albeit (notably) only those of Mauritian origin. The United Kingdom fully accepts that it treated the Chagossians very badly at and around the time of their removal and it deeply regrets that fact. The United Kingdom likewise regrets not putting before the United Nations in the 1960s a complete picture as to the number of second and third generation inhabitants of the Chagos Archipelago once the relevant facts were known to it.[52]

The UK also did not seek to justify or excuse the removal and treatment of the Chagossians in the 1960s and early 1970s:

> The United Kingdom has stated on many occasions, and hereby reiterates, its deep regret for the way that the Chagossians were treated. The manner in which the Chagossian community was removed from the Chagos Archipelago, and the way the Chagossians were treated thereafter, was wrong; it is accepted and deeply regretted that, at and around the time of the removal, there was a callous disregard of their interests.[53]

After the striking, emotional statement by Madame Marie Liseby Elysé, a representative of the Chagossian community, during the ICJ oral proceedings,[54] the Solicitor General for England and Wales reiterated that the UK

> fully accepts that the manner in which the Chagossians were removed from the Chagos Archipelago, and the way they were treated thereafter, was shameful and wrong, and it deeply regrets that fact. Like everyone present, I found very moving the statement we heard this morning from Mme Elysé, and we pay our deep respects to her and to the other Chagossians present here today.[55]

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49 Ibid 97–8 [6.21].

50 'Verbatim Record 2018/21' (n 43) 56–7 [11]–[12] (Sir Michael Wood).

51 The European Court of Human Rights held that the 1982 agreement had led to the renunciation of claims by the vast majority of Chagossians in Mauritius: ibid 31 [9] (Sam Wordsworth QC), 57 [12] (Sir Michael Wood); *Chagos Islanders v United Kingdom* (European Court of Human Rights, Chamber, Application No 35622/04, 11 December 2012) [77]–[87].

52 'UK Written Statement' (n 6) 2 [1.5].

53 Ibid 55 [4.3].

54 'Verbatim Record 2018/20', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 3 September 2018) 72–5.

55 'Verbatim Record 2018/21' (n 43) 6–7 [5] (Robert Buckland QC).

The UK also made clear its sincere regret that 'the clock cannot be turned back to the late 1960s', but it noted that 'there is a reality to this incontrovertible fact' of the infeasibility of resettlement of the Chagossians.[56]

The UK's engagement before the ICJ in the *Chagos Archipelago* advisory proceedings was comprehensive — it presented a detailed written and oral case, reflecting its enduring respect for the Court as the principal judicial organ of the UN. But this engagement did not equate to acceptance of the Court's ability to render the advisory opinion. The UK strongly resisted what it perceived to be the circumvention of its consent to the judicial settlement of a bilateral sovereignty dispute. Yet the UK's resistance was tinged with regret for its treatment of the Chagossians, while at the same time limiting that regret to past decades.

IV THE ICJ'S *CHAGOS ARCHIPELAGO* ADVISORY OPINION

In its advisory opinion of 25 February 2019, the ICJ unanimously found that it had jurisdiction to give the opinion requested and, by a vote of 12–2 (Judges Tomka and Donoghue dissenting), decided to exercise its discretion to comply with the request from the UN General Assembly.[57] By a vote of 13–1 (Judge Donoghue dissenting), it answered the two questions as follows: in response to question (a), the Court was 'of the opinion that … the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968';[58] in response to question (b), it expressed the view that 'the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing [its] international responsibility'.[59] Accordingly, the Court was 'of the opinion that' the UK is under an obligation to bring to an end its administration of the Chagos Archipelago 'as rapidly as possible' (*dans les plus brefs délais*)[60] and, moreover, that all member states are under an obligation to cooperate with the UN in order to complete the decolonisation of Mauritius.[61]

The opinion is thus very favourable for Mauritius and the states that supported its position, although, unlike in the *Wall* advisory opinion, the *reply* to the questions put to the ICJ (paras 183(3), (4) and (5) of the opinion) is not formulated as a quasi-order. Each paragraph of the *reply* is prefaced by the words '*Is of the opinion that* …'.[62] Moreover, the statement of responsibility in para 177 of the opinion is not in the *reply* in para 183. The statement is therefore not part of the *reply* to the questions put to the Court by the UN General Assembly, though the *reply* may have to be interpreted in light of the reasoning. Moreover, the looming issue of sovereignty over the Chagos Archipelago was avoided by the Court. As Judge Iwasawa observed in his declaration:

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56 'UK Written Statement' (n 6) 73 [4.41(b)].

57 *Chagos Archipelago (Advisory Opinion)* (n 2) 140 [183(1)]–[183(2)].

58 Ibid 137 [174], and in the reply: at 140 [183(3)].

59 Ibid 138 [177], but notably not in the reply: at 140 [183].

60 Ibid 139 [178], and in the reply: at 140 [183(4)].

61 Ibid 139 [180], and in the reply: at 140 [183(5)].

62 As is the usual practice in advisory opinions: see, eg, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, 453 [123(3)] ('*Kosovo (Advisory Opinion)*').

> In its Advisory Opinion, the Court states that the decolonization of Mauritius should be completed 'in a manner consistent with the right of peoples to self-determination' without elaboration (para 178). It emphasizes that '[t]he modalities necessary for ensuring the completion of the decolonization of Mauritius fall within the remit of the United Nations General Assembly, in the exercise of its functions relating to decolonization' (para 179). Thus, *the Court neither determines the eventual legal status of the Chagos Archipelago, nor indicates detailed modalities by which the right to self-determination should be implemented in respect of the Chagos Archipelago*. The Court gives an opinion on the questions requested by the General Assembly to the extent necessary to assist the General Assembly in carrying out its function concerning decolonization.[63]

The ICJ was circumspect on the question of the interaction of its advisory opinion with other past and future litigation in relation to the Chagos Archipelago. On whether it would be appropriate for the Court to re-examine a question settled by the Annex VII arbitral tribunal in 2015, the Court recalled that its opinion 'is given not to States, but to the organ which is entitled to request it'.[64] The Court simply stated that 'the issues that were determined' in the arbitral award 'are not the same as those that are before the Court in these proceedings'.[65] The Court recast the litigation of the dispute in the Annex VII arbitration and before the European Court of Human Rights and English courts as 'divergent views', saying that 'the fact that the Court may have to pronounce on legal issues on which divergent views have been expressed by Mauritius and the United Kingdom does not mean that, by replying to the request, the Court is dealing with a bilateral dispute'.[66]

On the situation of the Chagossians, the ICJ noted the UK's expression of regret:

> In the oral proceedings, the United Kingdom reiterated that it 'fully accepts that the manner in which the Chagossians were removed from the Chagos Archipelago, and the way they were treated thereafter, was shameful and wrong, and it deeply regrets that fact'.[67]

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63 *Chagos Archipelago (Advisory Opinion)* (n 2) 342 [10] (Judge Iwasawa) (emphasis added).

64 Ibid 116 [81], quoting *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)* [1950] ICJ Rep 65, 71. Contrast with the tone of the Court's assessment of the UK's conduct:

> [t]he Court having found that the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State … It is an unlawful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius.

Chagos Archipelago (Advisory Opinion) (n 2) 138–9 [177]. See also Judge Gevorgian referring to the unnecessary statement of responsibility (see at 138–9 [177]) that blurs the distinction between the advisory and the contentious jurisdiction of the Court: at 336 [5] (Judge Gevorgian).

65 *Chagos Archipelago (Advisory Opinion)* (n 2) 116 [81].

66 Ibid 118 [89]. Cf 'Verbatim Record 2018/21' (n 43) 27–33 [5]–[14], 35–6 [19], 37–9 [23]–[27], 40 [29] (Sam Wordsworth QC).

67 *Chagos Archipelago (Advisory Opinion)* (n 2) 124 [116], citing 'Verbatim Record 2018/21' (n 43) 6 [5] (Robert Buckland QC).

Although the ICJ noted that the Chagossians are dispersed in several countries, it did not engage with the potentially limiting reference to 'Mauritian nationals' in question (b) of the request.[68] The Court stuck to the language of question (b), stating that as to

> the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, this is an issue relating to the protection of the human rights of those concerned, which should be addressed by the General Assembly during the completion of the decolonization of Mauritius.[69]

Stephen Allen has observed that the ICJ's position 'is entirely consistent with the statist character of the international legal order' but found it 'disappointing that the Court declined to provide more guidance on how the human rights of the Chagossians might be protected', especially given 'the pivotal role the suffering of the Chagossians played in the narratives weaved by the participants in the advisory proceedings'.[70]

Overall, the ICJ answered the questions posed by the General Assembly to the extent that it found necessary, leaving other issues in dispute between Mauritius and the UK, and between the Chagossians and the UK, to be pursued in other fora.

V THE UNITED KINGDOM'S RESPONSES TO THE ADVISORY OPINION

The reception of the Advisory Opinion by the UK has been characterised by hard-edged realism manifesting as an attitude of resistance. The resistance is, at the same time, tempered by regret. The UK has reacted to the Advisory Opinion in a number of fora, as different parties test the relevance and application of the opinion to their disputes with the UK. These legal battles are being fought in the domestic courts and, indirectly, before the International Tribunal for the Law of the Sea ('ITLOS').

A *United Kingdom Parliament*

The day after the Advisory Opinion was issued, the issue was raised in the House of Commons:

> Helen Goodman (Bishop Auckland) (Lab): Yesterday, the International Court of Justice found that the UK's control of the Chagos islands is illegal and wrong. This damning verdict deals a huge blow to the UK's global reputation. Will the Government therefore heed the call of the ICJ to hand back the islands to Mauritius, or will they continue to pander to the United States military?
>
> Sir Alan Duncan [Minister of State for Europe and the Americas]: The hon Lady is labouring under a serious misapprehension: yesterday's hearing provided an advisory opinion, not a judgment. We will of course consider the detail of the opinion carefully, but this is a bilateral dispute, and for the General Assembly to

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68 *Chagos Archipelago (Advisory Opinion)* (n 2) 128 [131]. Cf 'Comment of the United Kingdom of Great Britain and Northern Ireland on the Written Reply of Mauritius', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 12 September 2018) [7], noting significant Chagossian communities in the UK and Seychelles.

69 *Chagos Archipelago (Advisory Opinion)* (n 2) 139 [181].

70 Stephen Allen, 'Self-Determination, the *Chagos Advisory Opinion* and the Chagossians' (2020) 69(1) *International and Comparative Law Quarterly* 203, 215.

> seek an advisory opinion by the ICJ was therefore a misuse of powers that sets a dangerous precedent for other bilateral disputes. The defence facilities in the British Indian Ocean Territory help to keep people in Britain and around the world safe, and we will continue to seek a bilateral solution to what is a bilateral dispute with Mauritius.[71]

Sir Alan presented the UK government's formal response over two months later in a written statement to the House of Commons, which was consistent with his first reaction in emphasising the non-binding nature of the advisory opinion, the bilateral nature of the dispute and the role played by the defence facility in 'keep[ing] people in Britain and around the world safe'.[72] He added:

> As the Foreign Secretary confirmed to [Mauritian] PM Jugnauth on 27 April 2019, Mauritius is a valued friend, trading partner and member of the Commonwealth. We are fully committed to our bilateral relationship and also want to deepen and intensify engagement with Mauritius. With regard to the very important matter of the Chagossians we are continuing our work to design a support package worth approximately £40 million, to improve Chagossian livelihoods in the communities in Mauritius, the Seychelles and the UK where they now live.[73]

The UK's reaction was consistent — and consistently resistant to treating the advisory opinion as having any legally binding effect — in international fora as well.

B *United Nations General Assembly*

On 22 May 2019, Mauritius and other states put a resolution to the General Assembly on the advisory opinion (*Resolution 73/295*).[74] In particular, the resolution

> [*d*]*emands* that the United Kingdom of Great Britain and Northern Ireland withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months from the adoption of the present resolution, thereby enabling Mauritius to complete the decolonization of its territory as rapidly as possible …[75]

The resolution was adopted by 116 states in favour, six against (Australia, Hungary, Israel, Maldives, the UK and the US), with 56 abstentions.[76] In her intervention shortly before the vote was taken, the UK Permanent Representative, Karen Pierce, articulated the combination of resistance and regret that had characterised the UK's involvement:

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71 United Kingdom, *Parliamentary Debates*, House of Commons, 26 February 2019, vol 655, col 144.

72 United Kingdom, *Parliamentary Debates*, House of Commons, 30 April 2019, vol 659, col 4WS.

73 Ibid.

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

75 Ibid para 3.

76 UN GAOR, 73rd sess, 83rd plen mtg, UN Doc A/73/PV.83 (22 May 2019) 25.

> [T]he United Kingdom is not in doubt about our sovereignty over the British Indian Ocean Territory. It has been under continuous British sovereignty since 1814. Contrary to what has been said today, it has never been part of the Republic of Mauritius.
>
> …
>
> It is worth noting here that this 1965 agreement, including the commitment to cede when no longer needed for defence purposes, was held to be legally binding by the 2015 *UNCLOS* Tribunal Arbitration Award.
>
> I want to turn … to the issue of the Chagos Islands themselves, and use this opportunity to state again, as the current United Kingdom Government and its predecessors have done before, the United Kingdom's sincere regret about the manner in which Chagossians were removed from the British Indian Ocean Territory in the late 1960s and early 1970s.
>
> …
>
> I need to take a moment to reject unconditionally the allegations that the United Kingdom was engaged in crimes against humanity. This is a very serious allegation; it is not to be used lightly. It is a gross mischaracterisation of the United Kingdom's position and, once again, I reject it without qualification. I hope that it will not be repeated.
>
> …
>
> [W]e do not challenge the authority of the General Assembly, let alone the authority of the International Court of Justice.[77]

The UK Permanent Representative gave three reasons why states should vote against the UN General Assembly resolution. First, she stated that the ICJ should not have heard a bilateral sovereignty dispute without the consent of both parties.[78] Second, the resolution 'goes beyond the advisory opinion' by setting a six-month deadline for the transfer of sovereignty and through the General Assembly's call for states and international organisations 'to take action that could have wide-ranging potential implications for the effective operation of the joint defence facility'.[79] Third, she emphasised that even though advisory opinions may, 'from time to time, carry weight in international law … that does not change the fact that they are not legally binding' and are clearly different to a judgment in a contentious case.[80]

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77 Ibid 10.
78 Ibid 11.
79 Ibid.
80 Ibid.

The 22 November 2019 deadline stated in the UN General Assembly resolution passed without any acknowledgment by the UK.[81] Mauritian Prime Minister Pravind Jugnauth saw only resistance in the silence of the UK. He said that the UK government's 'defiant criticism of the ICJ and its blatant disregard for the Advisory Opinion of the Court and UNGA *Resolution 73/295*, undermine its long-standing commitment to a rules-based international system'.[82]

On 18 May 2020, the UN Secretary-General issued a report to the General Assembly on the implementation of *Resolution 73/295*. The Secretary-General had invited all states to 'provide any information they might wish to contribute concerning the implementation of the resolution'; seven states submitted replies (Argentina, Australia, Azerbaijan, Mauritius, the Russian Federation, the UK and the US).[83] Reflecting its disenchantment with the ICJ's advisory function,[84] Australia noted that *Resolution 73/295* 'further entrenches the advisory jurisdiction as a means for States to circumvent the requirement for consent in the exercise of the Court's contentious jurisdiction'.[85] Mauritius and the UK submitted detailed replies. Mauritius emphasised the resistance of the UK to implementation and how this appeared to be in tension with its relationship to UN bodies:

> Despite the best efforts of the Republic of Mauritius, it is to be noted that the United Kingdom has shown no willingness whatsoever to engage with Mauritius to implement the advisory opinion … and General Assembly *resolution 73/295* … the United Kingdom has opted to challenge both the International Court of Justice and the General Assembly. Mauritius considers this attitude by the United Kingdom is at odds with its efforts to promote itself as a country that is respectful of the international rule of law and United Nations institutions. This is disappointing in itself and worthy of note and condemnation.[86]

For its part, the UK maintained the position it had taken before the ICJ during the proceedings and in the UN General Assembly at the time of the resolution:

> Despite clear reservations, the United Kingdom participated fully in the advisory proceedings in good faith and out of respect for the International Court of Justice. However, we do not share the Court's approach and have made known our views

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81 Lunn (n 9) 21. For the Chagossian reaction, see '6 Months on from UN General Assembly Deadline, Chagossians Still Waiting for Justice', *UK Chagos Support Association* (Blog Post, 22 November 2019) <https://www.chagossupport.org.uk/post/2019/11/22/6-months-on-from-un-general-assembly-deadline-chagossians-still-waiting-for-justice>, archived at <https://perma.cc/H4XH-Q7CJ>; 'Chagossians to Protest British High Commission', *UK Chagos Support Association* (Blog Post, 15 November 2019) <https://www.chagossupport.org.uk/post/2019/11/14/chagossians-to-protest-british-high-commission>, archived at <https://perma.cc/JYZ3-7Y2X>.

82 'Mauritius Condemns UK Position on Chagos', *Africa Times* (online, 22 November 2019) <https://africatimes.com/2019/11/22/mauritius-condemns-uk-position-on-chagos/>, archived at <https://perma.cc/5K84-Y3CG>.

83 *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965: Report of the Secretary-General*, 74th sess, Agenda Item 86, UN Doc A/74/834 (18 May 2020) 3 [3] ('*Report of the Secretary-General*').

84 See generally Hilary Charlesworth and Margaret A Young, 'Australian Encounters with the Advisory Jurisdiction of the International Court Of Justice' (2021) 21(3) *Melbourne Journal of International Law* 698.

85 *Report of the Secretary-General*, UN Doc A/74/834 (n 83) 5.

86 Ibid 13.

> on the content of the opinion, including the insufficient regard for significant material facts and legal issues.[87]

But the UK also reiterated its 'deep regret for the way Chagossians were treated', recalling the compensation paid, the GBP40 million support package and a programme of heritage visits.[88] It ended with a call for 'dialogue with Mauritius on matters of shared interest'.[89]

C *ITLOS*

The impact of advisory opinions often goes beyond their precise terms, and debates over their meaning may arise in courts other than the ICJ. The *Chagos Archipelago* advisory opinion now forms the backdrop to a dispute before ITLOS.

On 24 September 2019, Mauritius and the Maldives submitted a dispute concerning the delimitation of the maritime boundary in the Indian Ocean to a special chamber of ITLOS pursuant to a special agreement.[90] Despite the dispute having been brought jointly to ITLOS, the Maldives filed preliminary objections on 18 December 2019.[91]

The UK government had warned in November 2019 that the ITLOS proceedings 'can have no effect for the UK or for maritime delimitation between the UK (in respect of the British Indian Ocean Territory) and the Republic of the Maldives'.[92] Foreign and Commonwealth Office Minister Christopher Pincher emphasised the binding decision in the 2015 award:

> General Assembly resolution 73/295, adopted following the ICJ's advisory opinion, cannot and does not create any legal obligations for the member states. Nor can or does General Assembly resolution 73/295 create legal obligations for other international actors such as a special chamber of the international tribunal for the law of the sea. Neither the non-binding advisory opinion nor the non-binding General Assembly resolution alter the legal situation, that of a sovereignty dispute over the BIOT between the UK and Mauritius.
>
> A fundamental principle of international law and the international legal order is the principle of consent. It follows that the special chamber is not in a position to pronounce itself on the sovereignty dispute between the UK and Mauritius without the consent of the UK to resolve the sovereignty dispute before the special chamber.
>
> The UK remains committed to implementing the 2015 *UNCLOS* arbitral tribunal award and seeking direct, bilateral dialogue with Mauritius.[93]

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87 Ibid 15.

88 Ibid 16.

89 Ibid 17.

90 *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v Maldives) (Special Agreement and Notification)* (International Tribunal for the Law of the Sea, Case No 28, 24 September 2019).

91 'Written Preliminary Objections of the Republic of Maldives under Article 294 of the United Nations Convention on the Law of the Sea and Article 97 of the Rules of the International Tribunal for the Law of the Sea', *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, 18 December 2019).

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

93 Ibid col 85WS.

The emphasis on the binding nature of the 2015 award has been a key line in the UK's resistance to treating to the *Chagos Archipelago* advisory opinion as having any binding effect. Although the UK is not a party to the ITLOS case between Mauritius and the Maldives, a note of resistance was raised before the tribunal through the submissions of counsel for the Maldives:

> Mauritius' only argument as to why the Special Chamber can exercise jurisdiction — in disregard of the Monetary Gold principle, in disregard of the 2015 Chagos Award — is that the Advisory Opinion definitively settled its sovereignty dispute with the UK with binding effect. That contention is manifestly false. It is wholly without merit.[94]

D *Domestic Litigation*

In addition to the interstate dispute between the UK and Mauritius, there has been an ongoing dispute between the Chagossians and the British government. Since 1975, nine cases have been brought before the English courts in respect of the Chagos Archipelago. The cases fall into two categories: claims for damages and declaratory relief for removal from the Archipelago, and claims for judicial review of legislation and governmental decisions, especially in respect of resettlement.[95]

The first category of claims were brought by Michel Vencatessen, who was removed from the Chagos Archipelago in 1971.[96] The claim was not formally brought as a group action but came to be seen by the general public as a claim on behalf of Chagossians as a whole.[97] It led to a settlement and a 1982 agreement with Mauritius, which was later challenged by 5,023 Chagossian claimants in 2002.[98] After the challenge was rejected in the English courts, 1,786 Chagossians commenced proceedings before the European Court of Human Rights, claiming that their rights under arts 3 (prohibition on inhuman and degrading treatment), 6 (right to a fair trial), 8 (right to respect for private and family life) and 13 (right to an effective remedy) of the European *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*') and art 1 of its first Protocol (protection of property) had been breached.[99] In a 2012 decision, the European Court found the application inadmissible principally because the applicants were not 'victims' within the meaning of the Convention because their claims had been settled under the 1982 agreement.[100]

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94 'Verbatim Record ITLOS/PV.20/C28/1', *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, 13 October 2020) 17.

95 'UK Written Statement' (n 6) 58 [4.6]–[4.7]; 'Judgments', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 15 February 2018).

96 See *Chagos Islanders v Attorney-General* [2003] EWHC 2222 (QB), [54]–[75].

97 *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs [No 2]* [2009] 1 AC 453, 477–8 [12]–[13].

98 *Chagos Islanders v Attorney-General* (n 96) [72], [99]. All but 631 claimants were related to Mauritius; 58 related to Agalega; the rest, 573, related to Seychelles. 1,075 of the 5,023 claimants were born on the islands; 557 were deceased persons claiming through their heirs. The rest were the children of natives, alive or dead.

99 *Chagos Islanders v United Kingdom* (n 51) [32]–[36].

100 Ibid [77]–[87].

The second category of claims, which were for judicial review rather than damages, were brought by Louis Oliver Bancoult, a former resident of the Peros Banhos atoll. He challenged the legality of the removal of the population from the Chagos Archipelago in the 1970s,[101] the legislation passed in 2004 to prevent resettlement on the basis of a feasibility study[102] and the legality of the creation of a Marine Protected Area in 2010, which went all the way to the UK Supreme Court.[103] Mr Bancoult then brought another challenge that argued that the UK Secretary of State had failed to disclose documents relating to the original feasibility study; this case also went to the Supreme Court.[104] All these challenges were ultimately decided in favour of the UK government's position.[105]

Mr Bancoult and another former islander, Ms Solange Hoareau (from Seychelles), later challenged the UK government's November 2016 decision not to support or permit resettlement of the Chagossians on the Archipelago and instead to provide a support package of approximately GBP40 million for Chagossians in the communities in which they live.[106] This challenge was also decided in favour of the UK.[107]

This national and European Court of Human Rights litigation has interacted with the ICJ advisory proceedings in at least two ways. First, the UK set out the domestic litigation at length in its written pleading before the ICJ and urged the Court to take it fully into account.[108] In particular, the UK pointed out that the 1982 agreement with Mauritius and the settlement of the claims that followed were accompanied by 'freely made and broad renunciations of all future claims by the very great majority of Chagossians in Mauritius'.[109] They noted that the international legal significance of those renunciations as settling the claims through the implementation of the 1982 agreement was recognised by the European Court of Human Rights in 2012.[110] Moreover, the UK claimed, the judicial review litigation meant that the issue of resettlement was not a 'blank sheet of paper at the level of the underlying facts'[111] because it had been extensively addressed by the English courts, up to the highest level, and taking into account the practical challenges and costs that resettlement would entail.[112]

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101 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067.

102 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453.

103 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* [2018] 1 WLR 973.

104 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2017] AC 300.

105 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (n 101), resolved in favour of claimants but later considered to have been wrongly decided in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* (n 102) 490 [67] (Lord Hoffman), 507 [117]–[118] (Lord Rodger of Earlsferry), 513–4 [136] (Lord Carswell); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 3)* (n 103) 998 [49], 1003 [63] (Lord Mance), 1003 [64] (Lord Sumption); *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 4)* (n 104) 333 [76] (Lord Mance JSC), 333 [77] (Lord Clarke).

106 *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWCA Civ 1010, [1]–[2].

107 Ibid [184].

108 'UK Written Statement' (n 6) 58–72 [4.6]–[4.39].

109 Ibid 73 [4.41(a)].

110 Ibid.

111 Ibid 73 [4.41(b)].

112 Ibid.

Second, now that the advisory opinion has been issued, Chagossian claimants have incorporated it into their public law arguments in ongoing litigation reviewing the decision against resettlement. Although the judicial review proceedings by Mr Bancoult and Ms Hoareau had been initiated prior to the ICJ advisory proceedings, in an appeal heard in 2020, the claimants relied on the ICJ advisory opinion and the UN General Assembly resolution to argue that the *ECHR* extended to the Chagos Islands, requiring the UK to secure to the people of that territory the rights and freedoms of the *ECHR*.[113] The English Court of Appeal dismissed the appeal on all grounds. The English Court emphasised that, in addressing the narrow question on the application of the *ECHR*, it did not 'enter the debate which arises at the international level'.[114] At the same time, its judgment is compatible with the government's position on the advisory opinion and the General Assembly resolution.[115] The English Court observed that the advisory opinion 'is not a judgment in the traditional sense of determining a dispute as between parties where the judgment has binding effect'[116] and noted that, in any event, it was 'expressly confined to the issue of *partial* decolonisation ie the existence of a right of self-determination in the context of a process voluntarily commenced by a former colonial power'.[117] The advisory opinion did not assist the claimants' concern with securing resettlement on the Archipelago because 'the focus of the Advisory Opinion and the UN Resolution was upon completion of a process of decolonisation as part of the right of self-determination *of Mauritius*' and the relief sought 'does not lie in the hands of the UK government to grant nor could it therefore be for the domestic courts to enforce'.[118]

The national encounter between the UK and the ICJ did not end with the issuance of the advisory opinion. The dispute regarding resettlement between the Chagossians and the UK government and the sovereignty dispute between Mauritius and the UK will continue to unfold in various fora, domestic and international.[119]

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113 *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* (n 106) [43].

114 Ibid [139].

115 Ibid [110], referring to the report of the UN Secretary-General of 18 May 2020 and 'record[ing]' the UK's position without expressing views on the 'wider issues being aired at the level of the UN'.

116 Ibid [113].

117 Ibid [115] (emphasis in original).

118 Ibid [130] (emphasis added). The English Court also found, inter alia, that the right to self-determination and any right to resettlement are not the same, that customary international law could not give rise to an enforceable common law right of resettlement because it would not be consistent with the statutory block on resettlement in the 2004 BIOT Constitution Order, and that the ICJ advisory opinion did not conclude that the right of self-determination was a peremptory norm: at [133]–[136], [141]–[144].

119 Diane Marie Amann, 'Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965' (2019) 113(4) *American Journal of International Law* 784, 791, observing, '[n]o doubt they will rely in such future litigation on the ICJ's supportive opinion'.

VI CONCLUSION

The UK's encounter with the ICJ in the *Chagos Archipelago* advisory proceedings is marked by realism, with oscillations between engagement and resistance.

The UK resisted the UN General Assembly's request for an advisory opinion on the *Chagos Archipelago* and the ICJ's decision to answer the request. It perceived this as a bilateral dispute being heard and adjudicated without its consent. It nonetheless engaged actively and fully in the advisory proceedings. Once the advisory opinion was issued, the UK expressed continued support for the institutions of the UN while disagreeing with the opinion and pointing out that it was non-binding in law.[120] Although the UK is generally supportive of the ICJ, the *Chagos Archipelago* experience shows that it remains ready to resist the Court's exercise of its advisory function when such exercise jeopardises or undermines legal positions taken by the UK. The UK has also resisted action by other bodies taken in reliance on the Court's advisory opinion. It has dismissed the UN General Assembly resolution's six-month deadline for transferring sovereignty to Mauritius and has also resisted claims to a right to resettlement raised by Chagossians in domestic courts.

It is beyond the scope of this article comprehensively to compare the UK's response with those of other states whose legal positions have been undermined or challenged by advisory opinions. Some states have responded to advisory opinions with engagement, such as Malaysia's compliance with the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* advisory opinion[121] by dismissing the domestic lawsuits.[122] Others, such as Morocco in relation to the *Western Sahara* advisory opinion,[123] have engaged by taking a self-serving interpretation of the advisory opinion as affirming its claims.[124] However, resistance has been the more typical response. South Africa labelled the *Namibia* advisory opinion as 'completely unacceptable'.[125] Serbia, in relation to the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* advisory opinion,[126] criticised the ICJ's 'technical approach' as leaving room 'for a dangerous misinterpretation of the Court's view as having legalized the ethnic Albanians' attempt at unilateral secession'.[127] The Israeli Supreme Court took a

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120 *Report of the Secretary-General*, UN Doc A/74/834 (n 83) 15.

121 *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Advisory Opinion)* [1999] ICJ Rep 62.

122 Letter from Kofi A Annan, Secretary-General of the United Nations, to Ivan Šimonović, President of the Economic and Social Council, 26 April 2002 (UN1067, The Selected Papers of Former UN Secretary-General Kofi Annan) <http://ccnydigitalscholarship.org/kofiannan/items/show/4218>, archived at <https://perma.cc/V2B5-HSJK>.

123 *Western Sahara (Advisory Opinion)* (n 41).

124 UN SCOR, 1849th mtg, UN Doc S/PV.1849 (20 October 1975) 4 [25], quoting a press release of the Permanent Mission of Morocco to the UN on 16 October 1975.

125 UN SCOR, 1584th mtg, UN Doc S/PV.1584 (27 September 1971) 8 [96].

126 *Kosovo (Advisory Opinion)* (n 62).

127 UN SCOR, 6367th mtg, UN Doc S/PV.6367 (3 August 2010) 7. See also Ivana Sekularac, 'Serbia Defiant on Kosovo Ruling, Opposition Critical', *Reuters* (online, 23 July 2010) <https://www.reuters.com/article/us-serbia-kosovo-tadic/serbia-will-never-accept-independent-kosovo-tadic-idUSTRE66L3XZ20100722>, archived at <https://perma.cc/4TFL-7R3R>, for statements by the Serbian President rejecting the ICJ's Advisory Opinion.

legalistic approach to resisting the influence of the *Wall* advisory opinion on domestic proceedings by arguing that the ICJ's conclusion rested on a different factual basis and was therefore 'not *res judicata*, and does not obligate the Supreme Court of Israel to rule that each and every segment of the fence violates international law'.[128] It otherwise noted that it 'shall give the full appropriate weight to the norms of international law, as developed and interpreted by the ICJ in its Advisory Opinion'.[129]

Unlike these other states, the UK encounter with the ICJ in the *Chagos Archipelago* advisory opinion has been tempered with regret. The UK has used regret as a form of engagement mitigating its position of resistance to the Court. It has repeatedly expressed sincere regret for the 'callous disregard' for the interests of the Chagossians during their removal from the Archipelago in the 1960s and 1970s.[130]

Regret is an emotion that allows us to re-examine past action but does not necessarily equip us with the tools to take positive action in the future. As Jeremy Webber has observed in the context of indigenous title in Australia:

> There is a problem … with regret as the foundation for law. Regret concentrates, above all, on eliminating the evils of the past. But once one accomplishes that, how does one define the law's positive content? A body of law requires more than mere opposition to discrimination. It requires structures and rules appropriate to the interests concerned, and those rules must have sufficient social warrant, sufficient claim to be law, to justify their enforcement by judges.[131]

Regret — perhaps in contrast to remorse — acknowledges a past act or omission as undesirable but also as beyond one's (present) control, and therefore spins a narrative of life as determined. If regret seeks to mitigate resistance, then remorse aims to overcome resistance. Remorse tells us that we are 'responsible yet imperfect', and it might spur on pardon, forgiveness and the 'remedying [of] the act or omission'.[132] For some Chagossians, the only acceptable remedy is resettlement, and the GBP40 million support package offered by the UK government is perceived 'as an attempt to persuade them to abandon the idea of resettlement'.[133]

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128 *Mara'abe v The Prime Minister of Israel* (n 45) [74].

129 Ibid.

130 See, eg, *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* (n 106) [4], quoting *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* (n 102) 477 [10].

131 Jeremy Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*' (1995) 17(1) *Sydney Law Review* 5, 17. See also at 10.

132 Harold Anthony Lloyd, 'Law and the Cognitive Nature of Emotion: A Brief Introduction' (2019) 54(4) *Wake Forest Law Review* 909, 926.

133 Lunn (n 9) 8–9. Complaints about alleged misstatements about the financial support package were rejected by the Court of Appeal: *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* (n 106) [182]–[183].

After the request for an advisory opinion was made to the ICJ, but before the opinion was issued, the UK Parliament's Foreign Affairs Committee conducted an inquiry on 'The UK's Influence in the UN'.[134] Evidence given by Sir Robert John Sawers, Permanent Representative of the UK to the UN (2007–09), and Lord Hannay of Chiswick, Permanent Representative of the UK to the UN (1990–95), expressed regret, but not remorse:

> Sir John Sawers: In the case of the Chagos Islands, we have both been public servants, and you have to defend decisions of previous British Governments even when they are a bit awkward. The facts of the Chagos Islands case are not attractive. It is a very difficult issue to defend at the United Nations, where there are still memories. There is still a committee; the fourth committee on decolonisation is focused on a number of small issues that are persistent and where Britain plays a role.
>
> Largely, they are confined to specific issues — the Falkland Islands or whatever — at the UN, but the question of Diego Garcia and the Chagos islanders is one of those residuals from the 1960s where, frankly, the current British Government would not behave in the same way, but we do have to defend the legacy of the past 50 years.
>
> Lord Hannay: Yes, what you might call the relics of the former, much bigger colonial outreach were there in my time. They popped up from time to time but they were not a dominant feature, partly because the UN was so busy doing a lot of other things. But they were there as a minor irritant and difficulty.[135]

Both former diplomats acknowledged, however, the impact on the future standing of the UK on the international stage:

> Lord Hannay: … I think there are some straws in the wind, of which the Chagos Islanders instance is one. The other, which I imagine we are coming on to, is the International Court of Justice. They show which way the wind is blowing, in my estimation. I don't think it is going to stop blowing in that direction any time soon, and I think they demonstrate that our ability to fend for ourselves in the much more exposed position we are in now is not as great as we would perhaps wish it to be.
>
> Chair: Sir Simon, the current [Permanent Under-Secretary to the Foreign and Commonwealth Office], said that 'this is not the worst reverse you could sketch for this country or this country's diplomacy'. Although we agree that it is not a defeat in war or a major reversal, it appears, as you say, to be an indicator of a troubling future.[136]

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134 The report was published on 28 February 2018 and did not receive a response from the Government: Foreign Affairs Committee, *2017 Elections to the International Court of Justice* (House of Commons Report No HC 860, 28 February 2018). Following the dissolution of Parliament on 6 November 2019, all select committees ceased to exist until after the general election.

135 Evidence to Foreign Affairs Committee, House of Commons, Parliament of the United Kingdom, London, 19 December 2017, Q5 (Sir John Sawers and Lord Hannay) ('Evidence to Foreign Affairs Committee').

136 Ibid Q9–Q10.

Lord Hannay's reference to the ICJ was to the fact that Judge Greenwood was not re-elected onto the Court by the UN in 2017, meaning that the Court for the first time in its history had no British judge among its members.[137] In his response to a question on this point, Lord Hannay referred to the UK's commitment to the Court but recognised it as a setback for the UK:

> Ian Murray: We talked about the Chagos Islands, and you mentioned the ICJ. How significant is it that the UK is not represented on the ICJ for the first time in its history?
>
> Lord Hannay: You have to distinguish, in answering that question, whether it in some way invalidates in our eyes or anyone else's eyes the operation of the ICJ. I would say very firmly that it does not. The ICJ has an important role to play on the international spectrum and, I believe, will continue to play it even in — in my view — the lamentable situation that we are in of not having a judge at the ICJ. But if you ask me whether it was a setback for this country, I have to say yes, I think it was.
>
> …
>
> All in all it is a setback but, as I say, to my mind it does not invalidate in any way the legitimacy of the International Court of Justice.[138]

One bright spot from the UK's encounter with the ICJ in the *Chagos Archipelago* advisory proceedings is that it is perceived as a 'setback' within the context of an enduring commitment to the UN's principal judicial organ. Although this particular encounter has been characterised largely by resistance, the belief in the Court's role as an important mode for dispute settlement between states remains, for now, intact.

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137 'Four Judges Elected to the International Court of Justice', *UN News* (online, 9 November 2017) <https://news.un.org/en/story/2017/11/570322-four-judges-elected-international-court-justice>, archived at <https://perma.cc/FYU6-9CUT>. See also *2017 Elections to the International Court of Justice* (n 134).

138 Evidence to Foreign Affairs Committee (n 135) Q12. See also Evidence to Foreign Affairs Committee, House of Commons, Parliament of the United Kingdom, London, 7 February 2018, Q55 (Lord Ahmad Minister of State for the Commonwealth and the UN), Q115 (Sir Iain Macleod KCMG, Legal Adviser, Foreign and Commonwealth Office).