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# The Rules-Based Order, International Law and the British Indian Ocean Territory: Do as I Say, Not as I Do

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(Received 29 April 2021; accepted 04 August 2021)

## Abstract

Perpetuating Britain's controversial administration of the Chagos Archipelago (BIOT – British Indian Ocean Territory) raises questions about the UK's commitment to the rules-based order and international law. This interdisciplinary article examines British administration of the Chagos Archipelago by taking a legal-international relations perspective. It provides an overview to the rules-based order concept and its relation with international law, briefly examines the Territory's history, and outlines how BIOT violates the principles enshrined in the rules-based order concept, specifically promotion of self-determination, prohibition of forced displacement and respect for international institutions. This study is significant due to its timing – set in a period of increased international pressure on the United Kingdom to cede sovereignty of the Chagos Archipelago to Mauritius – and also significant in a period of increased rules-based order strain throughout the Indo-Pacific. This article argues that, despite Britain's assertion that it is a champion of the rules-based order, of which international law is a component, continued British administration of the Chagos Archipelago is in contravention of both. In an era of rules-based order strain, British BIOT policy provides fertile ground to criticisms of its foreign policy and international law selectivity and double standards.

**Keywords:** BIOT; Chagos Archipelago; self-determination; rules-based order; international law; Chagos Advisory Opinion

## A. Introduction

Sovereignty over the Chagos Archipelago has been an issue of contention since the establishment of the British Indian Ocean Territory (BIOT) in 1965. Under British rule, BIOT—comprising the Chagos Archipelago, including the atoll of Diego Garcia—located in the middle of the Indian Ocean, has witnessed a dubious establishment process, the removal of its local population, and the establishment of a major United States military base. The Archipelago has also been subject to various international legal battles. Concurrently, the rules-based order, established post-1945 but accelerated in the post-Cold War era, has come to define the foreign policies of many major powers, including Britain.

Using British policy toward BIOT as a case study, this article will argue that the United Kingdom's policy of establishing and retaining BIOT is inconsistent with its commitment to the rules-based order, especially international law—a core component of the rules-based order. The article engages both international relations and international law scholarship. This interdisciplinary lens illuminates for legal scholars an example of how international law is translated into foreign policy and how international legal non-compliance can delegitimize international orders

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and foreign policies. For international relations scholars, this interdisciplinary analysis demonstrates the interconnectedness of international law to international relations, the complexities inherent in tying foreign policy commitments to international law, and the international legal principles at play in the Chagos dispute. The article examines the relationship between the rules-based order and international law—a critical conceptual relationship currently understudied in scholarly literature. As a whole, this inter-disciplinary approach enables a better understanding of the “hybridity and complexity of international law today”<sup>1</sup> and of the contributions of the rules-based order to advance international law’s objectives. Through this lens, this article demonstrates that the UK’s policy on BIOT significantly undermines both international law and the rules-based order, weakening an already fragile international system which is torn by the interests of divergent geopolitical powers.

This article begins by examining the rules-based order concept, including its theoretical underpinnings, its subscribers and its relationship with international law, before outlining a brief post-Second World War (WWII) history of the Chagos Archipelago. The article will then turn to analyze how British policy defies the rules-based order, namely by denying self-determination, perpetuating forced displacement, and by disregarding the decisions of international institutions. It will conclude with a discussion of the consequences of Britain’s conduct in an era in which the rules-based order is eroding. While upholding and perpetuating the rules-based order now defines the foreign policies of many U.S. allies—including Britain—Whitehall’s flagrant violation of the ethos enshrined in the rules-based order is particularly destructive to the order itself.

## B. Analytical Framework: The Rules-Based Order

### 1. Post WWII Paradox

The end of WWII brought about an international legal paradox. In one perspective, the international legal order that emerged in the aftermath of WWII continued to ensure, through the United Nations (UN), that States were to be shielded against interference in their domestic affairs and that various geo-strategic interests would be underpinned by the principles of State sovereignty, State equality, and State consent—even though their application remains far from uniform or consistent in practice to the present day. To this effect, the UN was, and remains, an expression of power dynamics, the end goal of which is the balance of powers. The UN has acted as a stop to political, socio-economic and cultural domination in a deeply heterogenous and pluralistic international order, the very premise of which is its neutrality.<sup>2</sup> At the same time, and despite the significance of human rights, which themselves continue to bear the stigma that they are a Western idea and, to be more specific, “the historical continuum of the Eurocentric colonial project,”<sup>3</sup> geo-strategic interests continued to influence foreign policies and international relations.<sup>4</sup> Moreover, self-determination free from alien domination did not apply in equal measure, with imperialism continuing as long as it benefited the empire under utilitarian imperialism.<sup>5</sup>

From another perspective, the end of WWII brought States together for the purpose of promoting international peace and security, friendly relations among States, international collaboration, and harmonization of State action for achieving these common goals. The UN was founded to fulfil these precise purposes, with the respect of human rights, equal rights, and self-determination of peoples playing a central role.<sup>6</sup> In attaining these objectives and principles, a

<sup>1</sup>Karen J. Alter, *Visions of International Law: An Interdisciplinary Retrospective*, 33 LEIDEN J. INT’L L. 837, 839 (2020).

<sup>2</sup>Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 418 (1983).

<sup>3</sup>Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 204 (2001).

<sup>4</sup>ELENA KATSELLI PROUKAKI, *THE PROBLEM OF ENFORCEMENT IN INTERNATIONAL LAW: COUNTERMEASURES, THE NON-INJURED STATE AND THE IDEA OF INTERNATIONAL COMMUNITY* 96 (Routledge, 1st ed. 2010).

<sup>5</sup>Tom Frost & Colin R.G. Murray, *The Chagos Islands Cases: The Empire Strikes Back*, N. IR. LEGAL Q. 263, 266 (2015).

<sup>6</sup>U.N. Charter art. 1, <https://legal.un.org/repertory/art1.shtml>.

proliferation of norms emerged which set out standards of State behavior and which act as a stabilizing force to constrain behavior and increase international predictability.<sup>7</sup>

This paradox, namely the peaceful co-existence of “heterogenous and equal States”<sup>8</sup> through the balancing of power and the promotion of common interests, originates from and underpins “the twin roots of international law.”<sup>9</sup> Yet, the contemporary significance attached to these common interests has had a catalytic force on restricting State sovereignty. It is in this context that the rules-based order emerged as a popular and persuasive set of rules and norms to govern the international community, as the analysis below shows.

## II. A “Rules-Based” “Order”

In international relations, an “order” is an organized group of international institutions, created and managed by great powers that help govern the interactions among member States and in dealings with non-member States, as the institutions have a regional or global scope.<sup>10</sup> An order need not necessarily be ideological, but liberal orders are characterized by an emphasis on individual rights, regardless of nationality. In a liberal international order, the “aim is to create a world order consisting exclusively of liberal democracies that are economically engaged with each other and bound together by sets of common rules. The underlying assumption is that such an order will be largely free of war and will generate prosperity for all of its member States.”<sup>11</sup>

When the Cold War ended, the U.S.-led, liberal, rules-based order—created to compete with the Soviet Union—was spread globally as constraints to U.S. power dissolved.<sup>12</sup> This U.S.-led, rules-based order—created after WWII but accelerated post-Cold War—is the order currently in existence today and the subject of this article. “Inspired by a remarkable combination of visionary idealism, national self-interest and pragmatism,” the U.S. was the “system’s architect, master builder and guardian.”<sup>13</sup> According to John J. Mearsheimer, advancing the rules-based order post-1990 consisted of three tasks: building and maintaining a “web of international institutions with universal membership,” for example, the UN, World Bank, and World Trade Organization, promoting international economic inclusivity and openness, and spreading liberal democracy.<sup>14</sup> This rules-based order is credited for creating “public goods” across domains including “political-military affairs, economic relations, ecological relations and human rights.”<sup>15</sup> Proponents argue that the rules-based order has led to “unprecedented degrees of prosperity and security” for the creators and members of the international community.<sup>16</sup> Some even credit the rules-based order for keeping the “long peace”—the period of unprecedented peace since the Second World War, absent of major wars between great powers.<sup>17</sup>

<sup>7</sup>Andrew Carr & Daniel Baldino, *An Indo-Pacific Norm Entrepreneur? Australia and Defence Diplomacy*, 11 J. INDIAN OCEAN REG. 30, 32 (2015).

<sup>8</sup>Weil, *supra* note 2, at 418.

<sup>9</sup>Weil, *supra* note 2, at 418.

<sup>10</sup>John J. Mearsheimer, *Bound to Fail: The Rise and Fall of the Liberal International Order*, 43 INT’L SEC. 7, 9 (2019).

<sup>11</sup>*Id.* at 14.

<sup>12</sup>*Id.* at 21.

<sup>13</sup>Guy de Jonquières, *The World Turned Upside Down: The Decline of the Rules-Based International System and the Rise of Authoritarian Nationalism*, 54 INT’L POL. 552, 553 (2017).

<sup>14</sup>Mearsheimer, *supra* note 10, at 22.

<sup>15</sup>JOSEPH S. NYE, JR., *DO MORALS MATTER? PRESIDENTS AND FOREIGN POLICY FROM FDR TO TRUMP* 216 (Oxford Univ. Press 2020).

<sup>16</sup>Daniel Twining, *Defending a Fraying Rules-Based Global Order*, in JOHN LEE, PATRICK CHOVANEC, JULIA M. MACDONALD, & VOLKER STANZEL, *DEFENDING A FRAYING RULES-BASED GLOBAL ORDER: THE IMPERATIVE OF CLOSER U.S.-EUROPE-JAPAN COOPERATION* 1, Research report (Daniel Twining ed., 2016), [www.jstor.org/stable/resrep18953](http://www.jstor.org/stable/resrep18953).

<sup>17</sup>Nathan Gardels, *Only a Rules-Based Trading Order Can Keep the Long Peace*, WASH. POST: THE WORLDPOST (Apr. 13, 2018), <https://www.washingtonpost.com/news/worldpost/wp/2018/04/13/tariffs/>.

Nevertheless, this order was not free from contradictions and double standards. Structurally, despite being charged with the maintenance of international peace, the UN Security Council's five-permanent-member system is criticized as unfairly favoring the interests of WWII's victors, including the United States and United Kingdom. Plus, the United States, as the World Bank's largest shareholder, wields greater influence over its policies and programs. Aside from structural double standards inherent in the rules-based order, the NATO bombing of Kosovo in 1999, the U.S. invasion of Iraq in 2003,<sup>18</sup> as well as from the U.S.' continuing hostility towards the International Criminal Court further demonstrated contradictions embedded in this order.<sup>19</sup> As such, while the rules-based order can and does temper competition among States via its rules and norms, it has not in practice created an egalitarian international society.

The rules-based order concept is underpinned by liberal international relations theory.<sup>20</sup> While liberal theorists generally agree that international order is anarchic to a degree and that, if left unchecked, international order would degenerate into conflict, they agree that inter-State conflict is possible, rather than inevitable.<sup>21</sup> In neoliberal institutionalist theory, theorists posit that while international institutions cannot transcend international anarchy, "they can change the character of the international environment by influencing State preferences and State behavior."<sup>22</sup> This assertion implies that international institutions can coordinate international action for the collective benefit.

While the current US-led rules-based order is known by several similar and overlapping terms, for example, international rules-based order, liberal world order, liberal international order, rules-based global order, rules based international system, this article will consistently use the term "rules-based order." According to David Lake, Lisa Martin, and Thomas Risse,<sup>23</sup> the rules-based order is characterized by liberal democratic polity and economy; free movement of goods and capital; human equality, freedom, rule of law and human rights; multilateralism, including pooling and delegating authority; and collective security.<sup>24</sup>

This U.S. led rules-based order is now considered under strain due to both the rise of China and the rise of nationalistic populism in many States. China threatens the order by its demonstrated behavior in revising norms, ignoring international law, such as in relation to the South China Sea, and its creation of new institutions, including the Asian Infrastructure Investment Bank.<sup>25</sup> In this way, China purports to "reshape the international system" and, through this, to reinforce a less interventionist international law at the expense of human rights.<sup>26</sup> Populism, on the other hand, defined as a "resistance to elites, including the type of institutions and commentators who supported the liberal international order," results in demagogic tactics used to sway foreign policy choices.<sup>27</sup> The Trump administration, even though it has now come to an end, is the "most striking manifestation of the recent populist upsurge" which contests the bipartisan consensus on American foreign policy interests and asserts that the international system is "rigged" and that

<sup>18</sup>See Ian Brownlie & C.J. Apperley, *Kosovo Crisis Inquiry: Memorandum On The International Law Aspects*, 49 INT'L COMPAR. L.Q. 878 (2000); Vaughan Lowe, *The Iraq Crisis: What Now?*, 52 INT'L COMPAR. L.Q. 859 (2003).

<sup>19</sup>William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701 (2004).

<sup>20</sup>G. John Ikenberry, *The End of Liberal International Order?*, 94 INT'L AFFS. 7, 8 (2018); Constance Duncombe & Tim Dunne, *After Liberal World Order*, 94 INT'L AFFS. 25, 27 (2018).

<sup>21</sup>Edward Smith, *The Traditional Routes to Security: Realism and Liberalism*, in INTERNATIONAL SECURITY STUDIES: THEORY AND PRACTICE 19 (Peter Hough, Shahin Malik, Andrew Moran, & Bruce Pilbeam eds., 1st ed. 2015).

<sup>22</sup>Cornelia Navari, *Liberalism*, in SECURITY STUDIES: AN INTRODUCTION 42 (Paul D. Williams ed., 2d ed. 2013).

<sup>23</sup>Not that David Lake, Lisa Martin, and Thomas Risse use the term "Liberal International Order."

<sup>24</sup>David Lake, Lisa Martin, & Thomas Risse, *Challenges to the Liberal Order: Reflections on International Organization*, 75 INT'L ORG. (SPECIAL ISSUE) 225, 229–32 (2021).

<sup>25</sup>Mark Beeson & Fujian Li, *China's Place in Regional and Global Governance: A New World Comes Into View*, 4 GLOB. POL'Y 491, 491 (2016).

<sup>26</sup>Alter, *supra* note 1, at 863.

<sup>27</sup>Nye, *supra* note 15, at 211–13.

the rules-based order is not in the U.S. national interest.<sup>28</sup> These two factors threaten the future of the rules-based order.

While some academics debate whether the rules-based order is actually manifest, describing the theory in practice as “conceptual jell-o,”<sup>29</sup> “mythical”<sup>30</sup> and an “illusion,”<sup>31</sup> adhering to and upholding the rules-based order has come to define the foreign policies of many contemporary major powers, as this article will now demonstrate. Maintaining this order, which has delivered immense benefits to its myriad of subscribers, is a foreign policy priority for many Indo-Pacific regional and extra-regional powers.

### III. Rules-Based Order Proponents

The rules-based order concept is supported by most major powers in the Indo-Pacific, evidenced through Stated foreign policy objectives. According to the U.S. Department of State and Agency for International Development’s FY2018–2022 Joint Strategic Plan, “since the conclusion of the Second World War, the United States has led the development of a rules-based international order that allows nations to compete peacefully and cooperate more effectively with one another. Yet past successes alone cannot ensure this system will continue indefinitely without being renewed, rejuvenated, and made to be truly reciprocal.”<sup>32</sup> Through Japan’s “Free and Open Indo-Pacific” concept, the country “aims to promote peace, stability and prosperity across the region to make the Indo-Pacific free and open as ‘international public goods’, through ensuring rules-based international order including the rule of law, freedom of navigation and overflight, peaceful settlement of disputes, and promotion of free trade.”<sup>33</sup> India’s Ministry of External Affairs’ 2019–20 Annual Report States that the nation “believes in an Indo-Pacific that is free, open and inclusive, and one that is founded upon a cooperative and collaborative rules-based order.”<sup>34</sup> While arguably not a major power, Australia’s 2017 Foreign Affairs White Paper states that the country “has a long record of helping to develop the rules-based component of the global order, beginning with the establishment of the United Nations,”<sup>35</sup> and underscores that “Australia’s interests are strongly served by acting with others to support a rules-based international order.”<sup>36</sup> Promotion and support of the rules-based order is a core foreign policy element for many U.S. allies, which indicates coordinated policies and a desire for U.S. predominance as East Asia’s “fundamental ordering principle.”<sup>37</sup>

The UK also proclaims its foreign and security policy is in support of the rules-based order. According to the Foreign and Commonwealth Office’s (FCO) 2019 departmental plan, the FCO advances British interests and its national security by “working in partnership with others and supporting an international system based on rules, norms, and values, to lead and deliver shared

<sup>28</sup>Thorsten Wojczewski, *Trump, Populism, and American Foreign Policy*, 16 FOREIGN POL’Y ANALYSIS 292, 292 (2019).

<sup>29</sup>Graham Allison, *The Myth of the Liberal Order: From Historical Accident to Conventional Wisdom*, 97 FOREIGN AFFS. 124, 125 (2018).

<sup>30</sup>Naazneen Barma, Ely Ratner, & Steven Weber, *The Mythical Liberal Order*, 124 NAT’L INT. 56, 57 (2013).

<sup>31</sup>Brahma Chellaney, *The Illusion of a Rules-Based Global Order*, THE STRATEGIST (Dec. 23, 2019), <https://www.aspistrategist.org.au/the-illusion-of-a-rules-based-global-order/>.

<sup>32</sup>U.S. DEP’T OF STATE, JOINT STRATEGIC PLAN: F.Y. 2018–2022, 45 (2018), <https://www.State.gov/wp-content/uploads/2018/12/Joint-Strategic-Plan-FY-2018-2022.pdf>.

<sup>33</sup>MINISTRY OF FOREIGN AFFS., FREE AND OPEN INDO-PACIFIC 1 (2019) (Japan), <https://www.mofa.go.jp/files/000430632.pdf>.

<sup>34</sup>MINISTRY OF EXTERNAL AFFS., ANNUAL REPORT 2019–20 401 (2019) (New Delhi), [http://www.mea.gov.in/Uploads/PublicationDocs/32489\\_AR\\_Spread\\_2020\\_new.pdf](http://www.mea.gov.in/Uploads/PublicationDocs/32489_AR_Spread_2020_new.pdf).

<sup>35</sup>DEP’T OF FOREIGN AFFS. AND TRADE, FOREIGN POL’Y WHITE PAPER 82 (2017) (Austl.), <https://www.dfat.gov.au/sites/default/files/2017-foreign-policy-white-paper.pdf>.

<sup>36</sup>*Id.* at 79.

<sup>37</sup>Nick Bisley & Benjamin Schreer, *Australia and the Rules-Based Order in Asia: Of Principles and Pragmatism*, 58 ASIAN SURV. 302, 309 (2018).

action on the world's most pressing challenges in a period of geopolitical change."<sup>38</sup> According to Britain's 2015 National Security Strategy and Strategic Defence and Security Review, the UK "sit[s] at the heart of the rules-based international order," and one of four challenges which is "likely to drive UK security priorities" is the "erosion of the rules-based international order."<sup>39</sup> The same report articulates Britain's definition of the rules-based order, which the UK states

is founded on relationships between States and through international institutions, with shared rules and agreements on behaviour. It has enabled economic integration and security cooperation to expand, to the benefit of people around the world. It has done much to encourage predictable behavior by States and the non-violent management of disputes, and has led States to develop political and economic arrangements at home which favor open markets, the rule of law, participation and accountability. The UK has consistently championed this framework.<sup>40</sup>

Contrary to this statement, this article will posit that UK policy in relation to the Chagos Archipelago contravenes the rules-based order by selectively deciding if and when it will comply with the normative standards that the order has developed.

#### *IV. Rules-Based Order and International Law: Complementary Constructs*

As foreshadowed, the relationship between international law and the rules-based order occupies a gap in existing academic literature. While definitions of the rules-based order, such as the Lake, Martin, and Risse definition provided above, include rule of law and human rights as core elements, the exact relationship between international law and the rules-based order is little analyzed. These two concepts incorporate elements such as power asymmetry and reinforcement of powerful State interests, but also the potential to outcast rogue actors and be a force for change and transformation. Importantly, this analysis demonstrates that while breaching international law undermines and weakens the credibility of the international legal system, breaches also similarly affect the rules-based order. While perhaps inadvertently, international law and the rules-based order were co-developed in the post-WWII world and are intrinsically interconnected concepts.

For the purposes of this article, the rules-based order, coined by various States as indicated in the preceding sections, has found embodiment in the international rules, legal regimes, and institutions that emerged post-1945 and aim to promote harmonic relations between States.<sup>41</sup> Heavily influenced and shaped by Western States,<sup>42</sup> the rules-based order has been strengthened by the UN,<sup>43</sup> the Charter of which explicitly seeks to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."<sup>44</sup> While the rules-based order is broader than

<sup>38</sup>FOREIGN AND COMMONWEALTH OFFICE, SINGLE DEPARTMENTAL PLAN (2019) (U.K.), <https://www.gov.uk/government/publications/foreign-and-commonwealth-office-single-departmental-plan/foreign-and-commonwealth-office-single-departmental-plan-2019-20>.

<sup>39</sup>NATIONAL SECURITY STRATEGY AND STRATEGIC DEFENCE AND SECURITY REVIEW 2015: A SECURE AND PROSPEROUS UNITED KINGDOM 14–15 (2015) (U.K.), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/478933/52309\\_Cm\\_9161\\_NSS\\_SD\\_Review\\_web\\_only.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/478933/52309_Cm_9161_NSS_SD_Review_web_only.pdf).

<sup>40</sup>*Id.* at 20.

<sup>41</sup>GRENVILLE CLARK & LOUIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW* (1958), cited in Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AM. J. INT'L L. 88, 88 (2006).

<sup>42</sup>ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* 280 (Oxford Univ. Press 2017).

<sup>43</sup>U.N. ASS'N OF AUSTL., *THE UNITED NATIONS AND THE RULES-BASED INTERNATIONAL ORDER* 7 (2015), [https://www.unaia.org.au/wp-content/uploads/2015/07/UNAA\\_RulesBasedOrder\\_ARTweb3.pdf](https://www.unaia.org.au/wp-content/uploads/2015/07/UNAA_RulesBasedOrder_ARTweb3.pdf).

<sup>44</sup>U.N. Charter, *supra* note 6.

international law and encompasses non-legally binding and political commitments,<sup>45</sup> it is influenced by the development, transformation, and instrumental changes that international law continues to witness.

International law on its part, shying away from the “classic” bilateral co-existence model on which it was conceived in the post-Westphalian context,<sup>46</sup> is increasingly moving towards community interests which encompass the idea of collective benefits above and beyond those of individual sovereign States.<sup>47</sup> The International Court of Justice’s (ICJ) proclaimed its position, even if *obiter dictum*, in the *Barcelona Traction* case on obligations *erga omnes* and Article 53 of the 1969 Vienna Convention on the Law of Treaties on peremptory norms of international law are illustrative of the compelling legal shifts towards recognition of an international community, even if this is still rooted in State consent.<sup>48</sup>

Nevertheless, while international law, and through this the rules-based order, developed to promote and protect certain common interests, the maintenance of international peace and security, it is still considerably underpinned by the need to balance and protect the competing interests of States. As Alter rightly cautions, “[T]he broader group of actors who use the language of international law to discuss policy matters, or who encourage compatriots to follow international law, may not share similar international legal beliefs, and they may be motivated by instrumental rather than shared beliefs about the importance of adhering to international law.”<sup>49</sup> It is accordingly debatable to what extent the rules-based order promoted by Western powers especially at the end of WWII and the Cold War reflects or represents accurately the international legal system which continues to this date to consist of States with distinct socio-economic and political systems. One could argue that today’s international legal system was put in place to balance out the different geo-strategic interests of powerful States. The veto powers of the five permanent member States to the UN Security Council and the principles of State equality, sovereignty, and non-interference are examples of how the international legal system, despite some of its accomplishments through multilateralism and cooperation, which coincide to an extent with the rules-based order, is still driven by individual State interests. This explains why international law is often perceived “as a disposable tool of diplomacy, its system of rules merely one of many considerations to be taken into account by government when deciding, transaction by transaction, what strategy is most likely to advance the national interest.”<sup>50</sup>

In a political realist sense, “law has no greater claim than any other policy or value preference.”<sup>51</sup> This is true, according to Franck, in the American context, where the executive perceives international law as an “anomaly,” a weakness, and an obstacle to materializing national interest.<sup>52</sup> In this context, Franck continues, law abidance or non-abidance is seen by some as a matter of sovereign choice on the basis of what best serves State interest.<sup>53</sup> This may in fact explain the UK’s own stance in relation to the separation of the Chagos Archipelago and its continuing refusal to accept Mauritius’ sovereign rights over the Archipelago and to allow the return of those forcibly removed. The sovereign rights of Mauritius as well as the fundamental human rights of the Chagossians who have endured discrimination and hardship through their displacement are dispensable in the pursuance of the “interests of

<sup>45</sup>Stefan Talmon, *Rules-Based Order v. International Law?*, GER. PRAC. INT’L L. (2019), <https://gpil.jura.uni-bonn.de/2019/01/rules-based-order-v-international-law/>.

<sup>46</sup>For Weil’s strong rejection of the idea that international law has changed, see Weil, *supra* note 2, at 419.

<sup>47</sup>PROUKAKI, *supra* note 4, at 96.

<sup>48</sup>Pierre-Marie Dupuy, *Prosper Weil’s Article: A Stimulating Warning*, 114 AM. J. INT’L L. UNBOUND 72, 75 (2020).

<sup>49</sup>Alter, *supra* note 1, at 862.

<sup>50</sup>Franck, *supra* note 41, at 89.

<sup>51</sup>*Id.* at 89.

<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 90.

the Empire”<sup>54</sup> as these are masked through the need to protect from “conflict, terrorism, drugs, crime, and piracy.”<sup>55</sup>

This selective application of international norms and the ability of powerful States to disregard their international obligations when national interests so dictate put into serious question the authority of international law and its proclaimed principles of State equality and State sovereignty, which are themselves the product of imperial powers.<sup>56</sup> Such imbalance reflects the “asymmetrical”<sup>57</sup> nature of both international law and the rules-based order, where power and colonialism continue to influence inter-State relations and determine the fates not only of the Chagossians but also others fighting for justice. Differently put, “it is sometimes precisely the international system and institutions that exacerbate, if not create, the problem they ostensibly seek to resolve.”<sup>58</sup> To this effect, international law and the principles that underpin it, are the “product of empires and colonial projects, and at the same time empires and colonial projects have been constituted and enabled by international law.”<sup>59</sup> This “imperialist thinking,” in other words, the “ongoing power structure replicating colonial and neoliberal thinking on the superiority of Western culture,”<sup>60</sup> dominates both the rules-based order and international law today.

The asymmetrical nature of international law, as evidenced by, among other things, the lack of enforcement mechanisms to ensure compliance with its rules,<sup>61</sup> also casts significant doubt about international law’s ability to promote community interests, including respect for the self-determination of peoples, especially in the context of colonization. The “imperialistic thinking” of the rules-based order and international law is further manifested by the use of environmental concerns to justify denial of the right of the Chagossians to return.<sup>62</sup> It is no coincidence then that even human rights are accused of being a tool of neo-colonialism,<sup>63</sup> which continues to serve the interests of its creators. The rule of law is also loaded with ideals representing Western liberal democracies and is used as a tool of subjugation and marginalization.<sup>64</sup> As well put, “for all its apparent attempts to promote decolonisation and self-determination, the international legal order has been and continues to remain complicit in the maintenance of exactly the kind of asymmetrical legal relations that constitute empires.”<sup>65</sup> The ICJ was fully aware of these asymmetrical relations of power, which are entrenched in international law and which, in its view, exerted influence on the agreement between the UK and Mauritius to separate the Chagos Archipelago.<sup>66</sup>

<sup>54</sup>For similar UK colonial attitudes towards other territories, see Tom Frost & Colin R.G. Murray, *Homeland: Reconceptualising the Chagossians’ Litigation*, 40 OXFORD J. LEGAL STUD. 764, 769 (2020).

<sup>55</sup>Karen Pierce, *Resolution on the British Indian Ocean Territory*, (June 21, 2019) (Statement and explanation of vote on Resolution by UK Permanent Representative to UN), <https://www.gov.uk/government/speeches/resolution-on-the-british-indian-ocean-territory>.

<sup>56</sup>Susan Marks, *Empire’s Law*, 10 IND. J. GLOB. LEGAL STUD. 449, 457 (2003); Gail Rythgoe, *Asymmetrical International Law and Its Role in Constituting Empires: The ICJ Chagos Advisory Opinion*, 71 N. IR. LEGAL Q. 305, 312 (2020).

<sup>57</sup>Rythgoe, *supra* note 56, at 309.

<sup>58</sup>ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 192 (Cambridge Univ. Press 2005). See also Ardi Imseis, *Negotiating the Illegal: On the United Nations and the Illegal Occupation of Palestine 1967–2020*, 31 EUR. J. INT’L L. 1055, 1056 (2020).

<sup>59</sup>Rythgoe, *supra* note 56, at 312.

<sup>60</sup>Kinnari Bhatt, *A Post-Colonial Legal Approach to the Chagos Case and the (Dis)Application of Land Rights Norms*, 15 INT’L J.L. CONTEXT 1, 3 (2019).

<sup>61</sup>Rythgoe, *supra* note 56, at 313.

<sup>62</sup>Bhatt, *supra* note 60, at 13.

<sup>63</sup>Martti Koskeniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT’L L. 113, 116 (2005).

<sup>64</sup>Alter, *supra* note 1, at 844.

<sup>65</sup>Rythgoe, *supra* note 56, at 307. See also Carsten Stahn, *Reckoning with Colonial Injustice: International Law as Culprit and as Remedy?*, 33 LEIDEN J. INT’L L. 823, 826 (2020); Tendayi Achiume (Special Rapporteur on Contemporary Forms of Racism), *Rep. on Reparation, Racial Justice and Equality*, 18, U.N. Doc. A/74/321 (2019).

<sup>66</sup>Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 172 (Feb. 25). See also Rythgoe, *supra* note 56, at 310.



While international law perpetuates the injustices of the past, it nevertheless also offers the potential for real change and transformation. Despite the significant limitations presented by international norms and how they are interpreted or given effect—or not—international law and the rules-based order which is built partly upon it can also offer a remedy and transform the structures that have enabled such injustices.<sup>67</sup> Importantly, and as Stahn rightly points out, “[l]aw was implicated in creating structural conditions of injustice, but it is not only a tool of domination and suppression. It should be revisited in order to have a stake in undoing them.”<sup>68</sup> There is indeed an urgent need to transform the “legalized structure of racial inequalities” and “colonial injustice” which enabled, and continues to enable “patterns of deliberate and ruthless exploitation of human subjects and destruction of their cultural and ecological environments.”<sup>69</sup> This can be achieved through redress and reconceptualization of past injustices and how the international community responds to these. International criminal law and international human rights law have a vital role to play in this respect, as further explained below. There is therefore great hope in international law and the rules-based order being used to push back and to place barriers to the arbitrary power that continues to determine international decision-making.<sup>70</sup> International institutions, such as the ICJ, have a pivotal role to play in the transformation and decolonization of international law. As Koskenniemi rightly says, the fight for the international rule of law, which arguably is advanced through international law, “is a fight against politics, understood as a matter of furthering subjective desires and leading into an international anarchy. Though some measure of politics is inevitable, it should be constrained by non-political rules.”<sup>71</sup>

The assumption then, as evident from the UK’s stance on BIOT, that States can choose to breach international law overlooks the fact that abidance with all the norms of international law does not only come as a natural expectation of the fact that it is the law and hence legally required but also the fact that international law is the free creation of States themselves.<sup>72</sup> As such, it is oxymoronic for States to refuse to abide by a law of their own making. This holds true for the principle of self-determination, particularly in the colonial context, which gradually found fertile legal ground in the post-1945 context. This is so even though the former empires were not jumping with joy to see the colonial status quo being shaken.<sup>73</sup>

While violation of international law and of the rules-based order may undermine their credibility or weaken their effectiveness, it does not have a catalytic force over their existence. Importantly, rather than States violating international law when not in their national interests, as in something like a “Hobbesian anarchy,”<sup>74</sup> the reality is that States find themselves obeying its rules not only because of a “coincidence of self-interest” but because the rules-based order, as reflected in international law, provides a chain of “continuing interactions”<sup>75</sup> and “proactive collaborations.”<sup>76</sup> At the same time, violation of international law brings about considerable stigma on the wrongdoer, a “social outcasting,”<sup>77</sup> whilst it invites further violations by other States. The evidence of this can be found in the annexation of Crimea by Russia and the lack of consensus at a

<sup>67</sup>Stahn, *supra* note 65, at 827.

<sup>68</sup>Stahn, *supra* note 65, at 829.

<sup>69</sup>Wouter Veraart, *Beyond Property: A Reflection on the Value of Restitution of Looted Cultural Objects* (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3524852](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3524852), quoted in Stahn, *supra* note 65, at 829.

<sup>70</sup>Alter, *supra* note 1, at 842.

<sup>71</sup>Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT’L L. 4, 5 (1990).

<sup>72</sup>Franck, *supra* note 41, at 91.

<sup>73</sup>Miodrag A. JOVANOVIĆ, *THE NATURE OF INTERNATIONAL LAW* 198 (Cambridge Univ. Press 2019).

<sup>74</sup>Benedict Kingsbury, *The International Legal Order* 13 (Int’l L.J., Working Paper 2003/1, 2003), [https://iilj.org/wp-content/uploads/2016/08/Kingsbury-The-International-Legal-Order-IILJ-WP-2003\\_1-HTIL.pdf](https://iilj.org/wp-content/uploads/2016/08/Kingsbury-The-International-Legal-Order-IILJ-WP-2003_1-HTIL.pdf).

<sup>75</sup>Franck, *supra* note 41, at 92.

<sup>76</sup>Barma et al., *supra* note 30, at 57.

<sup>77</sup>Alter, *supra* note 1, at 858.

Security Council level in relation to the bloodshed in Syria, which followed international law violations in Kosovo, Iraq, and Libya in 2011.<sup>78</sup>

It can therefore be demonstrated that the violation of international law results in significant costs for the rule-based order and for the promotion of common interests. Hence States do not, most of the time, take lightly non-adherence to it. This is particularly so since the creation of this law, which may place restrictions on State power, emanates from the voluntarist nature of international law, which is built upon State consent, as mentioned earlier.

The balancing of national interests through the rules-based order and international law rectifies some existing pragmatic inequalities and puts limits on the power of States, which may at times portray themselves, as is the case of BIOT,<sup>79</sup> as the guardians of common interest<sup>80</sup> or even be guided by conflicting interests.<sup>81</sup> At the same time, and while “faced with the obvious erosion of the authority of international obligations in the eyes of some governments . . . international society can no longer be reduced to the individualized expression of the will of juxtaposed sovereigns.”<sup>82</sup> In this respect, States, including the UK, cannot pick and choose and selectively apply the norms of international law, for the rules-based order must correspond with certain, non-arbitrary standards, which are essential for predictability of conduct and, in turn, for the peaceful coexistence and cooperation of States.

In sum, while international law is but one component of the current rules-based order, the two concepts share various common elements, including power asymmetry and reinforcement of powerful State interests, but also the potential to outcast rogue actors and check power and tyranny. Lastly, while breaching international law undermines and weakens the credibility of the international legal system, so too does it affect the rules-based order. Having discussed the nature of the rules-based order and its relationship with international law, the analysis turns next to the dispute between the UK and Mauritius concerning the Chagos Archipelago.

## C. Brief History of the British Indian Territory

### 1. BIOT and the Chagossians

After 1945, as Britain was decolonizing former colonies, one last colony—the British Indian Ocean Territory—was created. On November 8, 1965, Queen Elizabeth II and her Privy Council met to create an “Order in Council” —also known as a royal decree—called the British Indian Ocean Territory 1965 Order. This exercise of royal prerogative established BIOT, which at the time included the Chagos Archipelago—formerly part of the Colony of Mauritius—and Aldabra, Farquhar, and Desroches—formerly part of the Colony of the Seychelles but later ceded from BIOT to the Republic of Seychelles in 1976.<sup>83</sup> Using an “Order in Council” to create BIOT avoided parliamentary and judicial oversight of this sensitive strategic initiative. BIOT was thereby established with the intention of creating a joint UK–U.S. military facility on Diego Garcia—the largest island in the Archipelago. This was seen as necessary to protect national security, broadly construed as “decisions and actions deemed imperative to protect domestic core values from external threats.”<sup>84</sup> As the UK withdrew “East of Suez,” the U.S. sought to establish military basing arrangements in the Indian Ocean both to fill the power vacuum left by

<sup>78</sup>Patrick C.R. Terry, *The Libya Intervention (2011): Neither Lawful, Nor Successful*, 48 COMPAR. INT’L L.J. S. AFR. 162 (2015).

<sup>79</sup>Pierce, *supra* note 55.

<sup>80</sup>Kingsbury, *supra* note 74, at 17.

<sup>81</sup>For an analysis on conflicting State interests and their impact on international law, see ROBERTS, *supra* note 42.

<sup>82</sup>Dupuy, *supra* note 48, at 75.

<sup>83</sup>JEAN CLAUDE DE L’ESTRAC, NEXT YEAR IN DIEGO GARCIA 65 (Touria Prayag trans., Editions le Printemps 2011); Exchange of Notes Amending the Agreement of Dec. 30, 1966, Concerning the Availability for Defence Purposes of the BIOT, UK–U.S., June 22, 1976, <https://drive.google.com/file/d/0B22gskZt3mK-NGo2SmhwRVVNajA/view>.

<sup>84</sup>Melvyn P. Leffler, *National Security*, 77 J. AM. HIST. 143, 143 (1990).

the British withdrawal and to contain the Soviet Union and, to a lesser extent, China.<sup>85</sup> According to David Vine, the U.S. military sought a base in the Indian Ocean that fulfilled not only strategic criteria but also “certain political, economic, cultural and social factors.”<sup>86</sup> Diego Garcia was an attractive proposition to U.S. military planners as its economic output was negligible, meaning the islands were of limited interest to Mauritian leaders at that time. Furthermore, it was hoped that the isolated and small population of the Archipelago could be evicted without drawing much notice or international objection.<sup>87</sup> Nevertheless, the issue of cession and militarization of the Archipelago attracted international attention and criticism, with the UN General Assembly calling on the UK not to take any action that would undermine Mauritius’ territorial integrity.<sup>88</sup> Despite this, and in an effort to eliminate risks arising from UN scrutiny over de-colonialization and independence movements, the UK agreed with the U.S. to depopulate the Archipelago. To this effect, between 1965 and 1973, the UK implemented several measures with a view to depopulating the Archipelago. These included transfer, through purchase, of property rights over the copra plantations and the whole of the territory to the Crown,<sup>89</sup> denial of return to those who had left the islands, cutting off the source of income of the inhabitants, the majority of whom were working on coconut oil and copra plantations, prohibition of supply imports, and eventual removal of the remaining inhabitants.<sup>90</sup> By 1973, due in part to the 1971 BIOT Immigration Ordinance and other factors, the total number of inhabitants directly affected by BIOT’s creation (and closure of the plantations) was approximately 1,550.<sup>91</sup> These people were displaced to Mauritius and Seychelles, and were banned from returning.<sup>92</sup> Many of the Chagossians have campaigned, through various international and national fora, for the right of return and compensation ever since their eviction without succeeding in their quest for permanent return yet.<sup>93</sup>

## II. Naval Support Facility Diego Garcia Today

Since its establishment, the joint military base on Diego Garcia has grown to become one of the most critical U.S. overseas military installations. According to Andrew S. Erickson and his

<sup>85</sup>DAVID VINE, *ISLAND OF SHAME: THE SECRET HISTORY OF THE U.S. MILITARY BASE OF DIEGO GARCIA* 59 (Princeton Univ. Press 2011).

<sup>86</sup>*Id.* at 61.

<sup>87</sup>*Id.*

<sup>88</sup>Resolution adopted by eighty-nine votes to zero, with eighteen abstentions. See G.A. Res. 2066 (XX) (Dec. 16, 1965), [https://undocs.org/en/A/RES/2066\(XX\)](https://undocs.org/en/A/RES/2066(XX)).

<sup>89</sup>Frost & Murray, *supra* note 54, at 771. This property rights transfer can be compared with the one carried out by the Immovable Property Commission in the occupied part of Cyprus, which the European Court of Human Rights has contentiously endorsed. See Elena Katselli Proukaki, *The Right of Displaced Persons to Property and to Return Home after Demopoulos*, 15 HUM. RTS. L. REV. 701 (2014).

<sup>90</sup>Laura Jeffery, *Historical Narrative and Legal Evidence: Judging Chagossians’ High Court Testimonies*, 29 POL. & LEGAL ANTHROP. REV. 228, 229 (2006); Frost & Murray, *supra* note 5.

<sup>91</sup>NIGEL WENBAN-SMITH AND MARINA CARTER, *CHAGOS: A HISTORY: EXPLORATION, EXPLOITATION, EXPULSION* 507 (Chagos Conservation Trust 2016). Wenban-Smith and Carter stress that the proportion of these removals attributable to BIOT is “debatable,” complicated by newly independent Mauritius removing shipping subsidies to Chagos, commercial decisions to replace Ilois with Seychellois labour, and global trends away from coconut oil to other vegetable oils including palm oil.

<sup>92</sup>Anmolam Farheen Ahmad, *Separation of the Chagos Archipelago from Mauritius*, 54 ECON. & POL. WKLY. (June 15, 2019).

<sup>93</sup>*Chagos Islanders v. Att’y Gen. and BIOT Comm’r* [2003] EWHC (QB) 2222 (Eng.); *Regina (Bancoult) v. Sec’y of State for Foreign and Commonwealth Affs.* [2001] QB 1067 (Eng.), <http://www.uniset.ca/other/cs2/2001QB1067.html>; *R (on the application of Bancoult) v. Sec’y of State for Foreign and Commonwealth Affs.* [2008] UKHL 61 (Eng.); *Chagos Islanders v. United Kingdom*, App. No. 35622/04 (Dec. 12, 2012), <https://hudoc.echr.coe.int/eng/#%22itemid%22:%22001-115714%22>]; *In re Chagos Marine Protected Area Arb.*, XXXI Reps. Int’l Arb. Awards 359, Award (UNCLOS Arb. Tribunal, Mar. 18, 2015), [https://legal.un.org/riaa/cases/vol\\_XXXI/359-606.pdf](https://legal.un.org/riaa/cases/vol_XXXI/359-606.pdf); *Regina (on the application of Bancoult No. 3) v. Sec’y of State for Foreign and Commonwealth Affs.* [2018] UKSC 3 (Eng.); *Regina (Hoareau) v. Sec’y of State for Foreign and Commonwealth Affs.* [2021] 1 WLR 472 (Eng.).

colleagues, Diego Garcia today performs four primary functions for U.S. military power-projection in the Indian Ocean Region. First, Diego Garcia's lagoon is home to one third of the U.S.'s afloat prepositioning force, which consists of container ships brimming with warfighting equipment including tanks, armored infantry fighting vehicles, fuel, munitions, and spare parts.<sup>94</sup> Second, Diego Garcia's deep wharf accommodates nuclear fast-attack submarines and surface ship berths, facilitating the transfer of food, fuel, personnel, munitions, and maintenance in the Indian Ocean. Third, the sizable airfield hosts long-range bombers including B-1, B-2, and B-52 aircraft, which can execute missions in the Middle East from Diego Garcia. Fourth, Diego Garcia functions as a telecommunications and signals intelligence station, relaying broadcasts to units, commanding and tracking satellites, monitoring and intercepting communications, and hosting one of the five Global Positioning System ground antennas.<sup>95</sup> The military base on Diego Garcia has become the United States' "major geostrategic and logistics support base in the Indian Ocean," situating U.S. military platforms within "striking distance" of strategic maritime choke points, busy sea lines of communication, and China's various Indian Ocean interests.<sup>96</sup> The base on Diego Garcia supports U.S. military activities across the Indian Ocean Region, South Asia, the Middle East, and Africa, meaning U.S. access to the Archipelago is paramount for U.S. defense planners.

### III. Disputed Sovereignty

Despite Mauritian leaders purportedly agreeing to the Chagos Archipelago's separation at the time of Mauritian independence negotiations in the 1960s, since 1980 Mauritius has reasserted its claims to sovereignty over the Archipelago and is engaged in a dispute with the UK. In 2019, Mauritian sovereignty claims were buoyed by two landmark international developments, the first in the ICJ and the second in the UN.

In February 2019, the ICJ issued an advisory opinion on whether Mauritius was lawfully decolonized during its 1968 independence and the legal implications of continued British administration of the Chagos Archipelago, including as it pertains to the resettlement of the Chagossians.<sup>97</sup> The Court opined that "having regard to international law, the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago."<sup>98</sup> Further, the ICJ was of the opinion that "the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible."<sup>99</sup>

On May 22, 2019, the UN General Assembly adopted Resolution 73/295 on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. With a majority of 116 votes to six—Australia, Hungary, Israel, Maldives, the UK, and the U.S.—with 56 abstentions, the Resolution demanded "that the United Kingdom unconditionally withdraw its colonial administration from the area within six months."<sup>100</sup> Further, the General Assembly affirmed that continued British administration of the Archipelago constitutes a "wrongful act" and that the UK should cooperate with Mauritius to facilitate the return of Mauritian nationals, including

<sup>94</sup>Pierre Belanger & Alexander Scott Arroyo, *Logistics Islands - The Global Supply Archipelago and the Topologies of Defense*, 3 PRISM 54, 63 (2012).

<sup>95</sup>Andrew S. Erickson, Ladwig C. Walter, & Justin D. Mikolay, *Diego Garcia and the United States' Emerging Indian Ocean Strategy*, 6 ASIAN SEC. 214, 224 (2010).

<sup>96</sup>Michael McDevitt, *Diego Garcia: An American Perspective*, INTERPRETER (May 19, 2020), <https://www.lowyinstitute.org/the-interpreter/diego-garcia-american-perspective>.

<sup>97</sup>Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95 (Feb. 25).

<sup>98</sup>*Id.* at ¶ 174.

<sup>99</sup>*Id.* at ¶ 182.

<sup>100</sup>Meetings Coverage, General Assembly Welcomes International Court of Justice Opinion on Chagos Archipelago, Adopts Text Calling for Mauritius' Complete Decolonization, U.N. Meetings Coverage GA/12146 (May 22, 2019), <https://www.un.org/press/en/2019/ga12146.doc.htm>.

Chagossians, to the Archipelago, and “pose no impediment.”<sup>101</sup> Despite these blows to the legitimacy and lawfulness of BIOT, the UK did not submit to the UN-mandated November 22, 2019, deadline to cede sovereignty.<sup>102</sup> In a statement after the vote on Resolution 73/295, the UK stated that “the United Kingdom is disappointed by the result in the General Assembly today,” adding that “we are not in any doubt of our sovereignty and it is not in our plan to give the islands to Mauritius.”<sup>103</sup> The spokesperson also restated the UK Government’s commitment to cede the Chagos Archipelago to Mauritius when it no longer be required for defense purposes, but no timeline had been set.<sup>104</sup> As was made clear, “In this important part of the world, the joint United Kingdom and United States defence facility on the British Indian Ocean Territory plays a vital role in our efforts to keep our allies and friends, including Mauritius, in the region, and beyond, safe and secure.”<sup>105</sup> This echoes a disturbing resemblance of colonial racist justification as “a motive of duty, a sense of a job to be done for the people whom we found in our care . . . It would be ignorant, dangerous, nonsense to talk about grants of full self-government to many of the dependent territories for some time to come. In those instances it would be like giving a child of 10 a latch-key, a bank account, and a shot gun.”<sup>106</sup>

Despite the developments at a UN level, the UK demonstrated the trials it is willing to endure to retain sovereignty of the Archipelago.<sup>107</sup> By ignoring the UN resolution and ICJ opinion, the UK demonstrated its steadfast resolve to retain the Chagos Archipelago as British and dismiss Mauritian and Chagossian claims. Thus, the dispute continues into 2022 with domestic laws and policies<sup>108</sup> contravening international law concerning the territorial integrity, sovereignty, and self-determination of Mauritius and the fundamental rights of the Chagossians. The fate of the Chagos Archipelago therefore highlights the continuing deep inequalities in the current rules-based order and in international law.

## D. Defying the Rules-Based Order and International Law

Following the rules-based order conceptual analysis, its relation with international law and the brief historical case study of BIOT, this article will now pivot to examine how BIOT and its continued administration defies the rules-based order concept and international law by examining the issues of self-determination, forced displacement, and respect for international institutions. While the UK asserts it has “consistently championed this [rules-based order] framework,” the following analysis, as it pertains to BIOT, will prove its assertion is more selective than universal.

### I. Self-Determination

#### 1. Self-Determination and International Law

While self-determination did not enter the international legal vocabulary until relatively recently, the idea that people are free to determine their own destiny through self-government is not new. President Wilson’s idea stipulated in the shadows of WWI that issues relating to

<sup>101</sup>*Id.*

<sup>102</sup>Chagos Islands Dispute: UK Misses Deadline to Return Control, BBC NEWS (Nov. 22, 2019), <https://www.bbc.com/news/uk-50511847>.

<sup>103</sup>United Nations, *United Kingdom on Indian Ocean Islands & other topics - Media Stakeout (22 May 2019)*, YOUTUBE (May 22, 2019), <https://www.youtube.com/watch?v=5gdQ2blmBZA>.

<sup>104</sup>*Id.*

<sup>105</sup>Pierce, *supra* note 55.

<sup>106</sup>*Mr. Herbert Morrison on Colonial Policy, Post-War Economics and Post-War Organisation*, in KEESING’S RECORD OF WORLD EVENTS 5636 (Longman 1943).

<sup>107</sup>Samuel Matthews Bashfield, *Mauritian Sovereignty over the Chagos Archipelago? Strategic Implications for Diego Garcia from a UK-US Perspective*, 16 J. INDIAN OCEAN REG. 166, 166 (2020).

<sup>108</sup>For a critical analysis of the domestic legal framework which continues to advance “imperial interests,” see Frost & Murray, *supra* note 54, at 765.

territory and sovereignty need to be guided by the will of the people immediately affected and not by other States' material interests and advantages laid out the tenets of self-determination.<sup>109</sup> Wilson's idea for self-determination was limited to the protection of ethnic minorities in Eastern Europe and the Balkans and the breaking of the empires in that context. Wilson realized that if self-determination were to be construed more broadly, it would give rise to political upheavals and threaten territorial integrity, opening the floodgates to highly sensitive claims.<sup>110</sup>

The principle that "no territorial changes that do not record with the freely expressed wishes of the people concerned" gained new momentum in the shadows of WWII.<sup>111</sup> Even though Churchill subsequently qualified this upon the Empire's stated policies on its colonies,<sup>112</sup> following the end of WWII, self-determination was re-configured as extending to the inhabitants of territories under colonial control and ending overseas colonialism. Self-determination found expression in the UN Charter as one of the purposes of the UN for developing friendly relations among nations. Through this, it developed as a response to the imperialistic hegemony to which much of the world's population was still subject.<sup>113</sup> Furthermore, the principle of self-determination evolved into a right under customary international law, supported by the many instances of decolonization,<sup>114</sup> and the unanimous adoption of the Declaration on Granting Independence to Colonial Countries by the UN General Assembly, even though the U.S. and all other western powers abstained.<sup>115</sup>

In this context, "the universality of the 'all peoples' of the United Nations has been identified as the non-self-governing peoples separated by salt water from their colonial masters, who are all white Europeans or European-descended peoples."<sup>116</sup> Emerson, wary of various entities claiming independence and self-determination outside the colonial context, went on to argue that self-determination applied to liberate existing States or colonies from alien rule. Once achieved, no claim for self-determination could exist except "when a dependent people, to the displeasure of the anti-colonialists, has opted for some status short of full independence. Where this occurs, the current doctrine accepts that the right to opt out remains permanently in full force, to be invoked whenever the people concerned so desires."<sup>117</sup> In these circumstances where the people were deprived of full independence, there exists a right for continued exercise of self-determination. This is consistent with the UN 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—findings that

any act of self-determination which calls for less than independence should be subject to reversal by a later and definitive act of self-determination which would record the peoples' demand for independence. . . self-determination is an inalienable right to which access must remain available until the ultimate option of independence has been exercised.<sup>118</sup>

<sup>109</sup>Theodore S. Woolsey, *Self-Determination*, 13 AM. J. INT'L L. 302, 303 (1919).

<sup>110</sup>Jan Klabbbers, *Shrinking Self-determination: The Chagos Opinion of the International Court of Justice*, 8 EUR. SOC'Y INT'L L. REFLECTIONS 1 (2019); JOVANOVIĆ, *supra* note 73, at 197.

<sup>111</sup>*Joint Anglo-American Declaration*, in KEESING'S RECORD OF WORLD EVENTS 4739 (Longman 1941).

<sup>112</sup>*The Prime Minister's Review of the War Situation*, in KEESING'S RECORD OF WORLD EVENTS 4781 (Longman 1941).

<sup>113</sup>Imseis, *supra* note 58, at 1058.

<sup>114</sup>Rosalyn Higgins, *The United Nations and Lawmaking: The Political Organs*, 64 AM. J. INT'L L. 37, 43 (1970); *Independent Countries*, in KEESING'S RECORD OF WORLD EVENTS 22334 (Longman 1967).

<sup>115</sup>See also Final Communiqué of the Asian-African Conference, 11 INTERVENTIONS 94 (2009).

<sup>116</sup>Rupert Emerson, *Self-Determination*, 60 PROC. AM. SOC'Y INT'L L. ANN. MEETING 135, 137–38 (1966); Rupert Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 463 (1971).

<sup>117</sup>Emerson (1966), *supra* note 116, at 138.

<sup>118</sup>Emerson (1971), *supra* note 116, at 470.

Similar to the continuing nature of the right to internal self-determination, advanced by Mr. Fursland at the UN in 1984, the right to self-determination of those territories not liberated from alien subjugation “is not a one-off exercise”<sup>119</sup> but rather continues for as long as denial of the right persists. Not only this, but denial of self-determination has been described as a continuing aggression, violating one of the cornerstones of the current international legal system.<sup>120</sup> So much so that States must provide political and material support to colonized entities to materialize self-determination, over-riding the principle of non-interference.<sup>121</sup> This is fully consistent with the “irreproachable” nature of the principle of self-determination as giving rise to obligations *erga omnes* as stipulated by the ICJ in the East Timor case.<sup>122</sup> Fundamentally, the right to self-determination in the context of colonization is regarded as having attained the highest status of international norms as one that has a peremptory character. While the ICJ’s advisory opinion on the Chagos Archipelago is mute on this point,<sup>123</sup> prompting the UK Court of Appeal in the recent *Hoareau* case to conclude that the ICJ was “deliberately not seeking to cast into legal doubt acts taken by the UK in the field of foreign relations,”<sup>124</sup> there is a compelling argument to be made in support of the peremptory character of the right to self-determination.<sup>125</sup> According to Judge Sebutinde, “There can be no doubt that the inalienable right to self-determination sits at the pinnacle of the international legal order” and “is a rule of special importance.”<sup>126</sup> She draws support from, among other sources, the ICJ’s advisory opinion in the *Wall* case, where the Court concluded that the right to self-determination had been violated. According to its findings, “[G]iven the character and the importance of the rights and obligations involved,” all other States had an obligation not to recognize the situation arising from the construction of the wall, not to render any aid or assistance to its maintenance, and to assist in bringing the unlawful situation to an end.<sup>127</sup> While the Court did not expressly proclaim the right to self-determination as having a peremptory character, it inferred its peremptory character by using language identical to Articles 40 and 41 of the 2001 Articles on State Responsibility, which deal with the consequences arising from the serious violation of a peremptory norm.<sup>128</sup>

Having considered the right to self-determination as developed in international law, the next section evaluates the Chagossians’ claim to self-determination as well as Mauritius’ demand for respect of its territorial integrity and to exercise its sovereignty over the Archipelago. This will enable some conclusions on the impact of the UK’s refusal to return the Archipelago on the rules-based order and international law.

<sup>119</sup>Richard Fursland, Statement by UK Representative to the Third Committee of the General Assembly (Oct. 12, 1984). See United Kingdom Materials on International Law 1984, 55 BRIT. Y.B. INT’L L. 405, 432 (1985).

<sup>120</sup>Emerson (1966), *supra* note 116, at 139.

<sup>121</sup>Emerson (1971), *supra* note 116, at 466–67.

<sup>122</sup>East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. 90, 102 (June 30); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 88 (July 9).

<sup>123</sup>Stephen Allen, *Self-Determination, the Chagos Advisory Opinion and the Chagossians*, 69 INT’L COMPAR. L.Q. 203, 220 (2020).

<sup>124</sup>Regina (Hoareau) v. Sec’y of State for Foreign and Commonwealth Affs. [2021] 1 WLR 472, ¶ 136 (Eng.). For an analysis on existing ambiguities, see Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, 11 HUM. RTS. L. REV. 609 (2011).

<sup>125</sup>International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries 85 ¶5 (2001), [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf); Robinson, J. (Separate Opinion), Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 50 (Feb. 25); Klabbers, *supra* note 110, at 2.

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 172 (Feb. 25).

<sup>126</sup>Sebutinde, J. (Separate Opinion), Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 30 (Feb. 25).

<sup>127</sup>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 122, 149, 155, 159 (July 9); Sebutinde, J. (Separate Opinion), Consequences of Separation, 2019 I.C.J. 95, ¶ 39.

<sup>128</sup>Sebutinde, J. (Separate Opinion), Consequences of Separation, 2019 I.C.J. 95, ¶ 39.

## 2. *Chagossians and the Right to Self-Determination*

There are two points that need to be made concerning the Chagossians' claim to self-determination. The first relates to whether they represent a sufficiently homogenous group which qualifies as a "people," entitling them to exercise the right to self-determination. Such uncertainty is not specific to the Chagossians, but rather ambiguity exists in international law as to who the people entitled to self-determination actually are.<sup>129</sup> Yet, and as Emerson points out, it is

no longer nations, as in the classic cases of the Germans, the Italians, or the Czechs, which are the beneficiaries of the right of self-determination, but the ethnically amorphous inhabitants of colonially defined territories which have been or are to be liberated from alien rule and which are not henceforward to be disturbed by any clamor of separately distinguishable peoples within them or cutting across their frontiers.<sup>130</sup>

Historical records show that the French colonized the Archipelago from around 1780, populating the islands with captured slaves from Madagascar and east Africa.<sup>131</sup> Since then, the Archipelago continued to be populated by groups of slaves and workers brought initially by the French and subsequently by the British.<sup>132</sup> The work conditions were particularly harsh, with very little commodities, which led to high mortality rates. This led many individuals to seek a better life in Mauritius. Nevertheless, and while their life on the islands was far from ideal, something that has been used to cast doubt on the Chagossians' claim to return, their removal brought upon the population further social and economic disadvantage.<sup>133</sup>

Significantly, and while the Chagossians are descendants of former slaves brought to the Archipelago against their will at different times, initially by the French colonialists and subsequently by the British, the population forcibly uprooted in the 1960s and 1970s consisted of a people who had lived in the Archipelago for nearly 200 years and who had developed a "distinct society, culture, and language."<sup>134</sup> Attempting to deny the wrongs, which are continuing in nature, done against the Chagossians is to advance the imperialistic agenda that was at the root of the Chagos Archipelago's separation in the first place.<sup>135</sup> Not only have the Chagossians encountered one of the gravest violations of contemporary international law, namely slavery, but they continue to be discriminated against through denial of their identity as a group as well as their right to return to their homeland. It is this denial of Chagossians' suffering as a group that led to the dismissal of their claim to self-determination before UK courts<sup>136</sup> and which marked the UK's colonial strategy, as such "recognition would bring with it international obligations."<sup>137</sup> This, however, runs counter to the agreement between the UK and Mauritius, which refers to the Ilois and hence recognizes them as a group.<sup>138</sup> Not only this, but refusal to recognize the Chagossians as people is another reflection of "the myriad ways in which empire has marginalised colonised people."<sup>139</sup>

<sup>129</sup>Emerson (1966), *supra* note 116, at 135–36.

<sup>130</sup>*Id.* at 138–39.

<sup>131</sup>Marina Carter, *Towards a Workers' History of the Chagos Archipelago*, 13 J. INDIAN OCEAN REG. 213, 216 (2017).

<sup>132</sup>*Id.*

<sup>133</sup>*Id.*

<sup>134</sup>David Vine, *What If You Can't Protest the Base? The Chagossian Exile, the Struggle for Democracy, and the Military Base on Diego Garcia*, 111 S. ATL. Q. 847, 848 (2012); Allen, *supra* note 123, at 217.

<sup>135</sup>Henry Jones, *A Historical Approach to Chagos Islanders v the United Kingdom*, in RESEARCH METHODS FOR INTERNATIONAL HUMAN RIGHTS LAW: BEYOND THE TRADITIONAL PARADIGM 171–200 (Damian Gonzalez-Salzburg & Loveday Hodson eds., 2019) <http://dro.dur.ac.uk/29450/>.

<sup>136</sup>*See, e.g.*, *Chagos Islanders v. Att'y Gen. and BIOT Comm'r* [2003] EWHC (QB) 2222 (Eng.); Jones, *supra* note 135.

<sup>137</sup>Frost & Murray, *supra* note 54, at 771.

<sup>138</sup>*Id.* at 783.

<sup>139</sup>*Id.* at 785.



Despite the UK's continuing efforts to undermine the Chagossians' claims over the Chagos Archipelago, the position that colonialism "is illegitimate under all and any circumstances" and that socio-economic and political status "should never serve as a pretext for delaying independence"<sup>140</sup> gained significant ground in the efforts for decolonization. To this effect, the Chagossians' right to exercise self-determination, and through this, their ability to return to the land from which they were forcibly removed as well as to exercise all the other rights that self-determination gives rise under international law, cannot be denied. Importantly, the ICJ, by focusing in its advisory opinion on self-determination in the colonial context, seems to preclude its application in situations of secession, except in situations of serious oppression. In this way, the ICJ attempted to relieve some of the pressures associated with the vagueness of who the people entitled to self-determination are.<sup>141</sup>

This issue is linked to the second point, which relates to whether Mauritius is right to claim that its decolonization process was not lawfully completed as a result of the separation of parts of its territory, which were not necessarily homogenous. It is this that fell at the heart of the question on which the ICJ was asked to give its opinion and not specifically whether the Chagossians themselves had the right to exercise self-determination.<sup>142</sup> Seen in this light, homogeneity is not to be expected in self-determination claims in the decolonization context. This was a cause for concern among many African and other States who feared territorial disintegration should homogeneity or national coherence be instrumental for self-determination. As pointed out,

the existing States must be preserved intact, not because they embody coherent nations which might otherwise be divided, but because each embraces so little unified a congeries of peoples as to be exposed to disastrous and anarchic shattering if its sovereignty and territorial integrity are called in question. African insistence on maintenance of existing States is not selfish whim but a profound political necessity.<sup>143</sup>

This is particularly relevant to the Chagos Archipelago. As noted earlier, the Chagos Archipelago was administered as part of the colony of Mauritius. Its separation in 1965 was in violation of the customary international law which pertained at the time and which had crystallized the territorial integrity of non-self-governing territories as a "key element" of the exercise of the right to self-determination.<sup>144</sup> By separating the Chagos Archipelago for pursuing its self-interests,<sup>145</sup> the UK created a new colony<sup>146</sup> by "amputating" Mauritius' territory in violation of the principle of the territorial integrity of non-self-governing territory which is "a corollary of the right to self-determination."<sup>147</sup> Despite this, the UK had never acquired title over the Chagos Archipelago, as evidenced by the fact that in the Lancaster House agreement it undertook to return the Archipelago to Mauritius when no longer needed for defense purposes.<sup>148</sup>

It follows from this that the Chagos Archipelago shouldn't have been separated from Mauritius at the time of its independence. It is this principle of respecting the territorial integrity of former

<sup>140</sup>Emerson, *supra* note 116, at 139.

<sup>141</sup>Klabbers, *supra* note 110, at 3.

<sup>142</sup>*Id.* at 3–4.

<sup>143</sup>Emerson (1966), *supra* note 116, at 138–39.

<sup>144</sup>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 160, 174 (July 9).

<sup>145</sup>Abraham, J. (Declaration), Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, 153 (Feb. 25).

<sup>146</sup>Vice President Xue (Declaration), Consequences of Separation, 2019 I.C.J. 95, ¶9.

<sup>147</sup>Consequences of Separation, 2019 I.C.J. 95, ¶160.

<sup>148</sup>Vice President Xue (Declaration), Consequences of Separation, 2019 I.C.J. 95, ¶14.

colonies that the UK violated in establishing BIOT, demonstrating disregard for one of the most fundamental principles of the rules-based order and of international law as established post-1945.

Nevertheless, one needs to be cautious in “giving the principle of ‘territorial integrity’ a near absolute scope” in a way that would override the freely expressed will of the population that the right to self-determination aims to protect.<sup>149</sup> Judge Sebutinde herself acknowledges this, arguing that while respect for territorial integrity in the colonial context has itself attained the status of a norm of a peremptory character, in some rare cases, the people entitled to self-determination may not always correspond to the colonial boundaries.<sup>150</sup>

Even so, the UK’s failure to respect the territorial integrity of Mauritius as a former colony continues today by the UK’s refusal to recognize Mauritius’ sovereign rights over the Archipelago, the right to self-determination, and the Chagossians’ right to return.<sup>151</sup> Not only this, its continuing control of the Chagos Archipelago violates Article 73 of the UN Charter, which requires that the best interests of the people of non-self-government territories be taken into consideration.<sup>152</sup> These violations have important ramifications for the responsibility of the UK under international law, for the obligations that it has as a result of this continuing violation, and for the responsibility that may arise at an individual level. This final ramification is considered next.

## *II. Forced Displacement Under International Law and the Chagossians’ Right to Return*

Quite separate from the question of self-determination of the Chagossians and Mauritius and the consequences to which its continuing violation gives rise under the law on State responsibility lies the issue of the Chagossians’ forcible removal from the Archipelago and their continuing prevention from returning home. Such is the severity and seriousness of the coercive uprooting of individuals from the territory in which they lawfully resided, either across an international border—deportation—or within national boundaries—forcible transfer—that it has been prohibited under international criminal law as a war crime, when such displacement occurs in the context of armed conflict, or as a crime against humanity, when committed in a systematic or widespread manner. Indeed, the Rome Statute, to which the UK is a party, prohibits forced displacement as both a war crime and a crime against humanity,<sup>153</sup> violation of which gives rise to individual criminal responsibility. While the Rome Statute came into existence in 2002, decades after the coercive expulsion of the Chagossians in the 1960s, the prohibition of forced displacement was already well established under international law at the time.

Importantly, forced displacement through prevention from returning is an international crime of a continuing character. For the purposes of this article, it is noteworthy to point out that the ongoing investigation before the International Criminal Court (ICC) in relation to the alleged deportation of the Rohingya by Myanmar introduce a new legal twist on the question of forced displacement and are particularly important for the Chagossians’ claims. The very essence of the prohibition of such coercive uprooting, whether across borders or within the same national territory, lies in the refusal to allow return and continues as long as such prevention persists. To this effect, the proceedings are important in recognizing the lasting detrimental impact of forced displacement by prevention of the displaced from returning to a territory. In deciding whether the ICC could exercise jurisdiction over the alleged deportation of the Rohingya and to authorize investigations in this situation, the Pre-Trial Chambers I and III opened the door

<sup>149</sup>Abraham, J. (Declaration), *Consequences of Separation*, 2019 I.C.J. 95, 154; *see also* Gaja, J. (Separate Opinion), *Consequences of Separation*, 2019 I.C.J. 95, 267; JAMIE TRINIDAD, *SELF-DETERMINATION IN DISPUTED COLONIAL TERRITORIES* (Camb. Univ. Press 2018).

<sup>150</sup>Sebutinde, J. (Separate Opinion), *Consequences of Separation*, 2019 I.C.J. 95, ¶ 32.

<sup>151</sup>*Consequences of Separation*, 2019 I.C.J. 95, ¶ 177.

<sup>152</sup>Klabbers, *supra* note 110, at 5.

<sup>153</sup>Rome Statute arts. 7(1)(d), 8(2)(b)(viii), 8(2)(e)(viii).

to prosecutions for preventing the displaced from returning,<sup>154</sup> inviting consideration of the continuing character of forced displacement. This brings about significant considerations for ICC jurisdiction in the context of the Chagossians. This is because, and quite independently from the issue of whether the Rome Statute extends to the Chagos Archipelago, which does not fall within the scope of this article, it raises significant issues concerning the nature of the violations that the Chagossians continue to endure as well as the impact that such violations have on the rules-based order and international law. At the same time, it opens up the potential for Prosecutorial requests similar to the ICC Prosecutor's request to extend ICC's territorial jurisdiction over the Rohingya and over Palestine.<sup>155</sup>

Related, prevention from returning is a continuing interference with fundamental human rights well-established under international law.<sup>156</sup> This is particularly the case when such prevention is the consequence of unlawful expulsions. The circumstances of the expulsions, and the fact that they were carried out in violation of international law, are determining factors in the Chagossians' continuing struggle for resettlement and return, contrary to the recent UK Court of Appeal's judgment concluding that such rights had been extinguished.<sup>157</sup> The human rights dimension of continuing coercive expulsion through prevention from returning is distinct from, although inter-related with, a self-determination claim. Moreover, it is a perversion of justice and legal reasoning to argue, as the Court of Appeals did, that the issue of resettlement is a matter that falls within the jurisdiction of Mauritius and not the UK while simultaneously recognizing that the UK at all material times continues to be responsible for the exercise of foreign relations of BIOT, which, according to its opinion, precludes the application of the European Convention on Human Rights to BIOT.<sup>158</sup> This is an artificial legal argument intended to deny the Chagossians any standing and remedy under international law<sup>159</sup> and is another illustration of how current politico-legal structures, at national and international levels, advance the imperialistic thinking discussed earlier. Both in pragmatic and legal terms, the UK continues to exercise control and authority over the Chagos Archipelago, and failure to abide by its international obligations burdens it exclusively under the law on State responsibility, international human rights, and international criminal law, the latter giving rise to the potential of individual criminal responsibility.

Placing the Chagossians' plight not only in the context of colonization but also in the frame of international criminal and international human rights law is an essential step for decolonizing international law and the rules-based order. Failure to do so will simply be "a perpetuation of past injustice."<sup>160</sup>

<sup>154</sup>Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, ICC-RoC46(3)-01/18-1, ¶ 28 (Apr. 9, 2018), [https://www.icc-cpi.int/CourtRecords/CR2018\\_02057.PDF](https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF); Request for Authorisation of an Investigation Pursuant to Article 15, ICC-01/19-7 (July 4, 2019); Decision on the Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, Pre-Trial Chamber I, ICC-RoC46(3)-01/18, ¶ 77 (Sept. 6, 2018); Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Pre-Trial Chamber III, ICC-01/19-27, ¶ 111 (Nov. 14, 2019).

<sup>155</sup>Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine, ICC-01/18-12 (Jan. 22, 2020), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/18-12>.

<sup>156</sup>For analysis on the right to return, see Elena Katselli Proukaki, *The Right to Return Home and the Right to Property Restitution under International Law*, in ARMED CONFLICT AND FORCIBLE DISPLACEMENT: INDIVIDUAL RIGHTS UNDER INTERNATIONAL LAW 46 (Elena Katselli Proukaki ed., Routledge 2018).

<sup>157</sup>Regina (Hoareau) v. Sec'y of State for Foreign and Commonwealth Affs. [2021] 1 WLR 472 (Eng.).

<sup>158</sup>*Id.* at ¶¶ 130, 132, 139.

<sup>159</sup>Bhatt, *supra* note 60, at 3.

<sup>160</sup>Stahn, *supra* note 65, at 832.

### III. Disregard for International (Legal) Institutions

#### 1. 2019 UNGA and ICJ

Britain's disregard for the ICJ opinion and subsequent General Assembly resolution endorsement of that opinion calling for it to cease administration of the Chagos Archipelago and complete the decolonization of Mauritius, betray its professed commitment to the rules-based order and international law.

While UN General Assembly resolutions are “recommendations” and not legally binding, they represent the will of the international community, and as such, provide evidence for the existence or emergence of a customary rule as evidence through *opinio juris* and State practice.<sup>161</sup> Importantly, ICJ opinions are likewise not legally binding but encompass the expert judgement of the ICJ on the applicable law. British intransigence in this matter risks delegitimizing these international institutions and has the potential to render future similar resolutions and opinions irrelevant. As strong multilateral institutions are core to the rules-based order, and the UK publicly proclaims to invest public funds in “strengthening the efficiency and capacity of the United Nations, the world’s leading multilateral institution,” noncompliance is notable.<sup>162</sup> Britain’s disregard for the will of the “world’s leading multilateral institution” is striking when examined in parallel to the rules-based order concept, in which States “recognize that foreign-policy choices are constrained” by such multilateral institutions for their “aggregate benefit.”<sup>163</sup>

In the ICJ opinion, the Court for the first time found that UN General Assembly Resolution 1514 (XV), otherwise known as the “Decolonisation Declaration,” had, between 1965 and 1968, attained customary international law status.<sup>164</sup> Among several provisions, this Declaration states that “[a]ll peoples have the right to self-determination” and 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 UN Charter.<sup>165</sup> By creating BIOT, Britain was found to have violated customary international law and was therefore directed by the ICJ to complete the decolonization of Mauritius.

Britain disputed both the outcome and the fact that the issue was referred to the ICJ. In a written statement, the UK asserted that BIOT issue is a bilateral dispute between the UK and Mauritius should only be referred for judicial settlement with the consent of both parties.<sup>166</sup> Following the embarrassing February 2019 ICJ opinion, the UK again dismissed the Court’s findings, stating that advisory opinions are not “legally binding judgement[s]” and that despite carefully considering the opinion, “we do not share the Court’s approach.”<sup>167</sup> The UK’s disregard for the ICJ opinion, which the international community endorsed and operationalized via the subsequent UN General Assembly resolution, demonstrates the UK’s unwillingness to have foreign policy choices constrained by international institutions and international norms.

<sup>161</sup>Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 151 (Feb. 25).

<sup>162</sup>FOREIGN AND COMMONWEALTH OFFICE, SUPPORTING HUMAN RIGHTS, DEMOCRACY AND THE RULES BASED INTERNATIONAL SYSTEM: OBJECTIVES 2018 TO 2019 (2018) (U.K.), <https://www.gov.uk/government/publications/official-development-assistance-oda-fco-departmental-programme-spend-objectives-2018-to-2019/supporting-human-rights-democracy-and-the-rules-based-international-system-objectives-2018-to-2019>.

<sup>163</sup>Barma, Ratner, & Weber, *supra* note 30, at 57.

<sup>164</sup>Victor Kattan, *The Chagos Advisory Opinion and the Law of Self-Determination*, 10 ASIAN J. INT’L L. 12, 13 (2020).

<sup>165</sup>G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and People (Dec. 14, 1960), [~https://www.sfu.ca/~palys/UN-Resolution%201514.pdf](https://www.sfu.ca/~palys/UN-Resolution%201514.pdf).

<sup>166</sup>Written Statement of the UK 1, Consequences of Separation, 2019 I.C.J. 95 (Feb. 15, 2018), <https://www.icj-cij.org/public/files/case-related/169/169-20180215-WRI-01-00-EN.pdf>.

<sup>167</sup>Sir Alan Duncan, Minister of State for Europe and the Americas, *British Indian Ocean Territory*, Statement UIN HCWS1528 (Apr. 30, 2019) (UK), <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-04-30/HCWS1528/>.

## 2. International Treaties

Despite Britain's self-described commitment to the norms of international law, Diego Garcia has been described as both a "grey-hole" and "black-hole" as it pertains to the application of rule of law.<sup>168</sup>

While the UK has ratified various international treaties, many have never been extended to BIOT, including the 1966 Covenant on Economic, Social, and Cultural Rights, the 1966 Covenant on Civil and Political Rights, the 1984 Convention against Torture, and the 1998 Statute of the International Criminal Court.<sup>169</sup> Various environmental treaties have also never been extended to BIOT despite being ratified by the UK, including the 1989 Basel Convention on Hazardous Wastes, the 1992 Rio Framework Convention on Climate Change, the 1992 Rio Convention on Biological Diversity, and the 2001 Stockholm Convention on Persistent Organic Pollutants.<sup>170</sup> Importantly, while both the UK and Mauritius have ratified the above eight treaties, the U.S. has not. By not extending these treaties to BIOT, the UK contravenes the provided Lake, Martin, and Risse rules-based order definition, under which countries pool and delegate authority.<sup>171</sup>

The African Nuclear-Weapon-Free Zone Treaty (Pelindaba Treaty) is another controversial area of international law as it pertains to BIOT. While contested by every member of the African Union, the UK and the U.S. view BIOT as outside the purview of the Pelindaba Treaty.<sup>172</sup> Despite the Treaty explicitly covering the "Chagos Archipelago-Diego Garcia," during negotiations, at the insistence of the UK, a footnote was inserted under the Annex 1 map stating that BIOT appears "without prejudice to the question of sovereignty."<sup>173</sup> By excising BIOT from its Pelindaba Treaty obligations, the UK is not obligated to prohibit the possession or stockpiling of nuclear explosive devices in BIOT.<sup>174</sup> As Diego Garcia is frequented by nuclear-powered submarines and nuclear-capable strategic bomber aircraft, the strategic utility of BIOT to the U.S. is greatly increased by its excision from the Pelindaba Treaty.

By selectively applying a range of international treaty law to BIOT, the UK appears to prioritize the facilitation of U.S. power projection and relative-advantage over regional collective security. Further, by ignoring international treaty law pertaining to the environment, UK policy runs counter to the rules-based order concept of proactive collaboration on universal challenges, namely climate change and environmental conservation. Due to gains in relative advantage and power projection capabilities attained by selectively applying international treaty law to BIOT, the UK undermines its commitment to the rules-based order by not allowing multilateral institutions to constrain its foreign-policy choices for the aggregate benefit of all.

## E. Chagos in an Era of Rules-Based Order Erosion

After outlining how Britain's establishment and perpetuated administration of BIOT defies the rules-based order, this article will assess the consequences of this policy in an era of rules-based order erosion. While BIOT may be perceived as a relatively insignificant and niche area of foreign

<sup>168</sup>Geoffrey Robertson, *Who Owns Diego Garcia? Decolonisation and Indigenous Rights in the Indian Ocean*, 36 UNIV. W. AUSTRAL. L. REV. 1 (2012), <http://classic.austlii.edu.au/au/journals/UWALawRw/2012/1.html>; Peter H. Sand, *The Shadow of Pelindaba: Chagos and the African Nuclear-Weapon-Free Zone*, 26 S. AFR. J. INT'L AFFS. 323, 335 (2019).

<sup>169</sup>Sand, *supra* note 168, at 330.

<sup>170</sup>Sand, *supra* note 168, at 330.

<sup>171</sup>Lake, Martin, & Risse, *supra* note 24, at 5.

<sup>172</sup>Peter H. Sand, *Fortress Conservation Trumps Human Rights?: The "Marine Protected Area" in the Chagos Archipelago*, 21 J. ENV'T DEV. 36, 37 (2012).

<sup>173</sup>Peter H. Sand, "Marine Protected Areas" Off UK Overseas Territories: Comparing the South Orkneys Shelf and the Chagos Archipelago, 178 GEOG. J. 201, 205 (2012).

<sup>174</sup>African Nuclear-Weapon-Free Zone Treaty art. 4, *opened for signature* Apr. 12, 1996, 35 I.L.M. 698, [https://au.int/sites/default/files/treaties/37288-treaty-0018\\_-\\_the\\_african\\_nuclear-weapon-free\\_zone\\_treaty\\_the\\_treaty\\_of\\_pelindaba\\_e.pdf](https://au.int/sites/default/files/treaties/37288-treaty-0018_-_the_african_nuclear-weapon-free_zone_treaty_the_treaty_of_pelindaba_e.pdf).

policy, Britain's actions have wider consequences, and the international community is aware of UK duplicitous policy in this controversial dispute. This article has demonstrated how Britain's historic and current BIOT policy runs counter to its advocacy and support for the rules-based order. But does it also contribute to wider rules-based order erosion?

The rules-based order has been subject to a range of challenges in the past decade, most prominently the rise of China and spread of populism, as reflected in Brexit, but also in recent U.S. isolationist policies.<sup>175</sup> The rules-based order is only as strong as its subscribers. An assertive China and resurgent Russia now play increasingly prominent roles across the Indo-Pacific. As such, Britain's supposed subscription to a notion of legalized hegemony—in contradiction to its own rules-based order—is worrisome. Further, the unipolar global order that emerged with the end of the Cold War has now been replaced by a multipolar order, resulting from nationalistic trends in Western States and the determination of States such as Russia and China to re-assert power.<sup>176</sup>

China has emerged as a major-power, and its creation of new multilateral institutions has led scholars to argue that the Indo-Pacific is now “made up of not one rules-based order, but several overlapping ones.”<sup>177</sup> Under China's foreign policy agenda, new international architecture has been created, such as the Asian Infrastructure Investment Bank and the Belt and Road Initiative. These new entities mean that smaller countries are no longer beholden to institutions of the Western-led rules-based order for financing, investment, and, perhaps, future security needs. As more nations engage with the Chinese-led order, the U.S.-led rules-based order erodes.

Through the formal and comprehensive alliance with the U.S., the UK is able to increase its relative military advantage in partnership with the U.S. Rather than pooling and delegating authority as per the provided rules-based order definition, the UK retained territory from the colony of Mauritius to further its own national security interests.<sup>178</sup> This holds true in other contexts, such as Cyprus, where the price for independence was to allow the UK to establish sovereign military bases over three per cent of the island's territory. British policy reinforces the idea of legalized hegemony which characterizes the international legal order and, according to which, there is “a powerful elite of States whose superior status is recognized by minor powers as a political fact giving rise to the existence of certain constitutional privileges, rights and duties and whose relations with each other are defined by adherence to a rough principle of sovereign equality.”<sup>179</sup> Such legalized hegemony seems to be built into the UN Charter which itself brought tensions, and the paradox identified earlier, between “effective organization” under a rule of law and general system of security.<sup>180</sup>

In the context of the rules-based order, Britain's stance on BIOT contributes to its delegitimization. Britain's refusal to comply with the ICJ advisory opinion and UN Resolution generated significant media attention and brought this little-known issue to wider public consciousness. In the context of China's island building in the South China Sea, North Korea's nuclear weapon development programs, and Russia's invasion of Ukraine, it is striking to observe Britain, a prominent rules-based order proponent, abrogate its international legal responsibilities so flagrantly. As weaker governments consider which order to follow in this increasingly multipolar world order, major power hypocrisy causes rules-based order delegitimization. It is therefore true to assert, “When a community loses faith on law's power to restrain and channel conduct, this perception

<sup>175</sup>ROBERTS, *supra* note 42, at 278.

<sup>176</sup>ROBERTS, *supra* note 42, at 279.

<sup>177</sup>Matthew Sussex & Michael Clarke, *One Belt, One Road, Multiple Rules-Based Orders*, Policy Options Paper No. 7, Austl. Nat'l Univ. (November 2017), [https://nsc.crawford.anu.edu.au/sites/default/files/publication/nsc\\_crawford\\_anu\\_edu\\_au/2017-11/pop7\\_one\\_belt\\_many\\_orders.pdf](https://nsc.crawford.anu.edu.au/sites/default/files/publication/nsc_crawford_anu_edu_au/2017-11/pop7_one_belt_many_orders.pdf).

<sup>178</sup>Frost & Murray, *supra* note 5.

<sup>179</sup>GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 68 (Cambridge Univ. Press 2004).

<sup>180</sup>Gerry Simpson, *Great Powers and Outlaw States Redux*, 43 NETH. Y.B. INT'L L. 83, 91 (2012).

propels the descent into anarchy.”<sup>181</sup> The flagrant violation of international law and the rules-based order which Western States, and in particular the UK, helped to develop, undermines further the international positioning and standing of the UK and contributes further to the establishment of a competitive world order, as Roberts rightly identifies,<sup>182</sup> in which other global powers gain strength and influence. Indeed, double standards and selective abidance by the rules that States themselves created sends the signal to other States that they are free to violate such rules themselves.

Nevertheless, and despite the grave impact that such conduct has on the integrity and even the credibility of the rules-based order, such order, as embedded in international law, is not eroded by the conduct. As Franck acutely points out,

it seems apparent to me that the normative system established by the UN Charter is not eroding. On the contrary, its legitimacy is rather consistently upheld in the rhetoric of all States and the behavior of most. The unlawful conduct of the scofflaws may be a great political problem because of the scale of the suffering it inflicts on the innocent and because of its great capacity to destabilize world order. But such aberrant behavior has not been a serious challenge to the law, because only the most extreme of its apologists openly attack the normative order or seek to replace it with any alternative set of rules.<sup>183</sup>

In other words, while the rise of China and nationalistic populism directly erodes the rules-based order, Britain’s Chagos policy rather delegitimizes and undermines the order, even as Britain continues to publicly pledge its support of the order. This is evident from the UK’s public statements that attempt to justify its action pertaining to BIOT as compliant with international law, which is telling of the strength of the rules-based order which emanates from it.

Notwithstanding this distinction, at a time when the tide of nationalism and populism is high and the tensions between various powers keep rising, the rules-based order which is built on co-existence and cooperation for the accomplishment of common interests is needed more than ever before. The same holds true for international law. As Roberts acknowledges, “International law reflects international power. If international power becomes more competitive and fragmented, one can expect increased pressure to be placed on notions of universal international law.”<sup>184</sup>

The implications of non-compliant behavior are that it invites breaking the unitary rules-based order and creating several orders which apply different rules to different States.<sup>185</sup> This will backfire, compromising the peaceful co-existence and cooperation of States with detrimental consequences for the unity of the rules-based order that the UK advances. While the rules-based order is deficient of enforcement mechanisms to ensure the UK’s compliance with its international obligations as identified by the ICJ in its advisory opinion, the UK has already paid a heavy price for retaining the imperialistic status quo on the Chagos Archipelago. One can point to the UK’s increasing isolation at the international sphere. In 2017, the UK was indeed left with no more than 14 allies in the General Assembly voting against referring the issue concerning the lawfulness of the separation of the Chagos Archipelago to the ICJ for an advisory opinion. Two years later, the UK was even more isolated with only five allies voting against the General Assembly resolution with which it was called to end its colonial control over the Archipelago. The UK’s “crushing defeat”<sup>186</sup> for its refusal to comply with international law and the rules-based order is also evident from the fact that its arguments stood little legal ground in the proceedings before the ICJ. This

<sup>181</sup>Franck, *supra* note 41, at 91.

<sup>182</sup>ROBERTS, *supra* note 42, at 280–82.

<sup>183</sup>Franck, *supra* note 41, at 98.

<sup>184</sup>ROBERTS, *supra* note 42, at 289.

<sup>185</sup>Malcolm Jorgensen, *International Law Cannot Save the Rules-Based Order*, INTERPRETER (Dec. 18, 2018, 11:30 AM), <https://www.lowyinstitute.org/the-interpreter/international-law-cannot-save-rules-based-order>.

<sup>186</sup>Bhatt, *supra* note 60, at 1.

prompted some of the Judges to call out the UK for its serious violation of a norm of a peremptory character.<sup>187</sup> The fact that the ICJ in its advisory opinion did not refer to the right of self-determination as a peremptory norm will not sidestep the true character of the violation and the obligations of other States to ensure its cessation.<sup>188</sup>

## F. Conclusions

The UK's continuing refusal to end the separation of the Chagos Archipelago falls at the heart of the right to self-determination, Mauritius' sovereign rights, and the fundamental human rights of the Chagossians, which encompass their right to return to their homeland. Alongside domestic legal challenges, international law and the rule-based order premised in part on it and advocated by powers such as the UK have a significant role to play in rectifying this continuing injustice. Despite this, the structures of the system which continues to be driven by imperialism have spectacularly failed in doing so. Compensation offered to the Chagossians is not sufficient to undo the injustice which continues to marginalize the Chagossians and to deprive them of their identity, which is strongly inter-connected with the land they have lost. Moreover, and as the preceding analysis has demonstrated, the Chagossians will continue to be subjected to injustice until international law and the rules-based order influenced by it are truly "decolonized."<sup>189</sup>

For Britain to satisfy its commitment to the rules-based order and international law, its only option is to cede sovereignty of the archipelago to Mauritius. This course of action would require military access to be re-negotiated, would change the dynamics of close US-UK relations, and raises questions around which landlord (Mauritius or the UK) would be more amenable to U.S. interests in the long term.<sup>190</sup> As long as Whitehall believes the Archipelago is required for "defense purposes"<sup>191</sup> and former U.S. Secretary of State Michael Pompeo believes that the Chagos' "status as a U.K. territory is essential to the value of the joint U.S.- UK base on Diego Garcia and our shared security interests,"<sup>192</sup> ceding the territory to Mauritius is not a straightforward decision. By deciding to perpetuate BIOT, which violates international law and defies the decisions made by international institutions, Britain's policy is in clear contravention of the rules-based order. As a result, while the order is in a period of flux, Britain should expect this episode in international affairs to contribute to the further delegitimization of the rules-based order. If the UK truly believes in the rules-based order and the institutions that this order supports, including the ICJ, and in international law, then it must ensure that its decisions are consistent with them. Otherwise, it gives fertile ground to criticisms of selectivity and double standards captured in President Putin's words:

Our western partners, led by the United States of America, prefer not to be guided by international law in their practical policies, but by the rule of the gun. They have come to believe in their exclusivity and exceptionalism, that they can decide the destinies of the world, that only they can ever be right. They act as they please: here and there, they use force against sovereign States, building coalitions based on the principle 'If you are not with us, you are against us.' To make this aggression look legitimate, they force the necessary resolutions

<sup>187</sup>Sebutinde, J. (Separate Opinion), *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019 I.C.J. 95, 283–85 (Feb. 25).

<sup>188</sup>*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 122, 149, 155, 159 (July 9).

<sup>189</sup>Stahn, *supra* note 65, at 829.

<sup>190</sup>See, e.g., Bashfield, *supra* note 107, at 166; Peter Harris, *A Footprint of Unfreedom: The Future of Naval Support Facility Diego Garcia*, 3 J. INDO-PAC. AFFS. 78 (2020), <https://media.defense.gov/2020/Jun/08/2002311975/-1/-1/1/HARRIS.PDF>.

<sup>191</sup>Sir Alan Duncan, *supra* note 167.

<sup>192</sup>Michael R. Pompeo, Sec'y of State, Press Availability with British Foreign Secretary Jeremy Hunt (May 8, 2019), <https://2017-2021.State.gov/press-availability-with-british-foreign-secretary-jeremy-hunt/index.html>.



from international organisations, and if for some reason this does not work, they simply ignore the UN Security Council and the UN overall.<sup>193</sup>

The rising threats from populism and nationalism, the unlawful uses of armed force, the serious denial of human rights, the neo-imperialism that the world is confronted with, the double standards in inter-State affairs, and the undermining of international institutions like the UN and the ICJ all have significantly undermined the credibility of the rules-based order and international law. As Alter points out, “The world is a mess, and the past was not so great either.”<sup>194</sup> As this analysis has shown, the UK’s refusal to decolonize the Chagos directly undermines and delegitimizes the rules-based order and international law that it supposedly champions.

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<sup>193</sup>President Vladimir Putin, Address Before the State Duma Deputies (Mar.18, 2014), *quoted in* Anthea Roberts, *Is International Law International?* 297 (Oxford Univ. Press 2017).

<sup>194</sup>Alter, *supra* note 1, at 869.