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ARTICLE

A Heartfelt Commitment to the International Rule of Law? The United Kingdom and the International Court of Justice

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Abstract
The UK proudly describes its longstanding commitment to the International Court of Justice as a sign of its broader commitment to international adjudication and, in turn, the international rule of law. This article calls into question this narrative suggesting that, despite official pledges and rhetoric to the contrary, the UK cannot be said to have truly accepted the authority of the Court to scrutinize its conduct, nor to have consistently acted in a manner that is respectful of that institution. To the extent that the UK wishes to present itself as a genuine supporter of the international rule of law, this article posits that it should reformulate its approach to the Court with regard to both its contentious and advisory jurisdictions.

Keywords International Court of Justice · Optional clause · UK declaration · Advisory opinion · International rule of law

1 Introduction

From a British perspective, the idea of the rule of law 'is at its heart a British one'.[1] Early traces of an embryonic notion of the rule of law can be found in the 1215 Magna Carta. In the nineteenth century, Dicey developed the original theory of the English rule of law that would come to represent one of the main formulations of

All websites in the footnotes were accessed on 18 August 2023.

[1] 'Britain and the International Rule of Law', Speech to Chatham House on Britain's Contribution to the Development of International Law by former Attorney General Dominic Grieve, 3 July 2013, at https://www.gov.uk/government/speeches/britain-and-the-international-rule-of-law; 'Britain Reconnected, for Security and Prosperity at Home', Speech to Chatham House by David Lammy, Labour's Shadow Foreign Secretary, 24 January 2023, at https://www.chathamhouse.org/sites/default/files/2023-01/David%20Lammy-Chatham-House-speech-2023-01-23.pdf.

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this concept within Europe. Today, the rule of law is not only crucial to the correct functioning of the United Kingdom's (UK) system of government, but also a defining element of the country's political identity.[2] Given these premises, it is not surprising that the UK has long committed itself not only to honouring the rule of law at home, but also to promoting it abroad.[3] This foreign policy effort is aimed at encouraging other States to uphold key values such as the supremacy of the law, equality before the law, and accountability to the law as part of their domestic systems. In other words, it is directed at promoting the rule of law *within* States.

In parallel with this, the UK has also been a vocal supporter of another dimension of the rule of law, namely the rule of law at the international level. The latter, which will be referred to as the international rule of law, operates *between*, as opposed to within, States.[4] The UK presents itself as a 'fierce advocate[] of the international rule of law',[5] describes the latter as a guiding principle of its foreign policy[6] and considers its commitment to it as one of its 'strengths as a global player'.[7] Quite importantly, the British commitment to strengthening and defending the international rule of law was most recently reaffirmed at a critical juncture in the country's history. In January 2020, eighteen days before the UK's exit from the European Union, Foreign Secretary Dominic Raab appeared before the House of Commons to set out the government's new foreign policy vision. Post-Brexit Global Britain, he announced, will be:

> 'more than just international trade and investment'; it will also be about 'continuing to uphold our values of liberal democracy and our *heartfelt commitment to the international rule of law*—values for which we are respected the world over'.[8]

[2] Attorney General Jeremy Wright, House of Commons, Rule of Law (Magna Carta), Hansard, 2 July 2015, Col. 1612.

[3] See, for example, Policy Approach to Rule of Law, UK Department for International Development, 12 July 2013, para. 9, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/306396/policy-approach-rule-of-law.pdf; and the keynote address by the Attorney General Jeremy Wright to the Global Law Summit, 25 February 2015, at https://www.gov.uk/government/speeches/global-law-summit-keynote-address.

[4] Burnay (2018), pp. 45–63.

[5] Deputy Prime Minister Nick Clegg's Speech to the UN General Assembly, 24 September 2010, at https://www.gov.uk/government/speeches/deputy-pm-s-speech-to-the-un-general-assembly.

[6] 'Human Rights and Democracy: the 2019 Foreign and Commonwealth Office Report', Preface, 16 July 2020, at https://www.gov.uk/government/publications/human-rights-and-democracy-report-2019/human-rights-and-democracy-the-2019-foreign-and-commonwealth-office-report.

[7] '2017 Elections to the International Court of Justice', Fourth Report of Session 2017–19, House of Commons Foreign Affairs Committee, p. 3, at https://publications.parliament.uk/pa/cm201719/cmselect/cmfaff/860/860.pdf; and 'Human Rights and Democracy: the 2021 Foreign, Commonwealth & Development Office Report', Preface, 9 December 2022, at https://www.gov.uk/government/publications/human-rights-and-democracy-report-2021/human-rights-and-democracy-the-2021-foreign-commonwealth-development-office-report.

[8] Emphasis added. Foreign Secretary's Introduction to the Queen's Speech Debate, House of Commons, 13 January 2020, at https://www.gov.uk/government/speeches/foreign-secretary-introduction-to-queens-speech-debate.

This self-proclaimed commitment to the international rule of law will be the focus of this article. It is no secret that the UK does not always practice what it preaches when it comes to adhering to this fundamental principle. Just in the past few years, for example, it has come under intense scrutiny for a series of legislative initiatives deemed to flirt with, or go beyond, the limits of international law.[9] Twenty years ago, it contributed, more dramatically, to 'fracture[] the international rule of law'[10] by intervening militarily in Iraq without the authorization of the Security Council.

These types of actions are antithetical to the rule of law in that they show little regard for international law. As will be explained below, however, a broader notion of the international rule of law, one to which the UK subscribes, requires more than just compliance with the law. Accordingly, this article will question Britain's self-image as a country that abides by the international rule of law by focusing on a less discussed, yet important, aspect of the latter, namely access to international adjudication. It will do so through a political and legal analysis of the nature and extent of the country's commitment to the most important judicial body operating at the international level, that is, the International Court of Justice (ICJ or Court).

Before proceeding further, it is important to acknowledge that recourse to the ICJ is by no means the only way of solving an international dispute. The only obligation that the Charter of the United Nations (UN Charter) imposes upon States is in fact to solve their disputes peacefully.[11] Accordingly, the vast majority of disputes of an international character are solved using non-judicial methods. That said, while States are not legally obliged to settle their disputes through the ICJ, an important correlation exists between this key judicial institution and the rule of law at the international level. Indeed, the UK itself presents its support and respect for the Court as a sign of a broader commitment to the international rule of law. Thus, it is the narrative that the UK respects and promotes the international rule of law by, *inter alia*, supporting the adjudicative function of the ICJ that will be questioned in the following pages.

The remainder of the article will proceed by examining, in Sect. 2, the notion of the international rule of law, including, crucially, its connection with international adjudication. Subsequently, Sect. 3 will offer an overview of optional clause declarations, that is, those unilateral acts that, in accordance with the Statute of the ICJ, allow States to voluntarily accept the jurisdiction of the Court as compulsory. Following on from that, Sect. 4 will scrutinize the UK's optional clause declaration, analysing a number of problematic reservations that significantly limit the ability of the Court to hear a dispute involving the UK. Before the conclusive remarks, Sect. 5

[9] 'Projet de Loi Contre l'Immigration Illégale: Londres Flirte Avec les Limites du Droit International', *Le Parisien*, 7 March 2023; G. Parker, S. Payne, P. Foster and J. Pickard, 'UK Government Admits it Will Break International Law over Brexit Treaty', *Financial Times*, 8 September 2020; Shami Chakrabarti, 'The British Government is Preparing to Break the Law Again—This Time on Torture', *The Guardian*, 22 September 2020.

[10] J. Steyn, 'Invading Iraq Was Not Just A Disaster: It Was Illegal', *Financial Times*, 30 November 2009.

[11] Art. 33, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

will discuss Britain's defiant response to a recent advisory opinion issued by the ICJ, assessing the reputational costs of this open challenge to the authority of the Court.

2 The International Rule of Law and the International Court of Justice

The international rule of law lacks a universally agreed definition.[12] This is not too surprising considering that such a definition would require the convergence of views of nearly 200 States and that even the domestic rule of law remains an 'uncertain concept'.[13] One should also refrain from drawing direct analogies between the national and international versions of the rule of law. This is so because of the decentralised and horizontal nature of the international legal system, which, founded on the principle of the equal sovereignty of States, does not provide for the existence of the three classic branches of national government that are, instead, central to the functioning of the rule of law.[14] It is for this reason that James Crawford once noted that 'when we turn to international law, we might initially doubt whether the cardinal legal virtue of the rule of law can be looked for even in principle'.[15] These complications have led many to conclude that any workable formulation of the international rule of law should be a minimalist one revolving around the basic principle that States, in their relationship to one another, should be ruled by law.[16] In this sense, the international rule of law would require, first and foremost, that States obey international law. What would happen, though, in the event of a dispute between two sovereign States?

The existence of an effective system of independent courts is normally regarded as a central pillar of the domestic rule of law. This is so because, as explained by Lord Bingham, 'an unenforceable right or claim is a thing of little value to anyone'.[17] What one needs, therefore, is the capacity to resort, when and if necessary, to the authoritative ruling of an adjudicative body. As mentioned before, however, the international legal system operates under different assumptions than national systems do. In particular, at the international level there is no system of courts capable of routinely enforcing the rights of States. Instead, the principle of equal sovereignty dictates that a dispute can only be taken to a court or tribunal with the consent of both the applicant and respondent State. This stringent limitation affects all international adjudicative bodies, including, crucially, what the UN Charter describes as the 'principal judicial organ' of the UN, that is, the ICJ.[18] The importance of the ICJ lies in the fact that it is the only international court where States could turn to for

[12] See, among others, Arajärvi (2021), pp. 173–193; McCorquodale (2016), pp. 277–304.

[13] House of Lords, Select Committee on the Constitution, 6th Report of Session 2014–2015, 11 December 2014, para. 17.

[14] Burgess (2019), pp. 65–96.

[15] Crawford (2003), p. 10.

[16] See, for example, Kumm (2003), pp. 19–32; Beaulac (2009) and Arajärvi (2021), pp. 173–193.

[17] Bingham (2011), p. 102.

[18] Art. 92 UN Charter.

virtually any dispute concerning international law. No other court or tribunal operating on the international plane has a comparable jurisdiction. For this reason, the UN Charter affirms the principle whereby 'legal disputes should as a general rule be referred by the parties to the International Court of Justice'.[19]

The fact that an aggrieved State cannot pursue a legal claim before the ICJ without the consent of the respondent State represents a serious blow to the international rule of law, for it undermines one of its basic components, that is, access to justice. This problem has been widely acknowledged not only by international lawyers,[20] but also by various UN organs, which, in their efforts to promote the rule of law, have regularly emphasized the importance of referring inter-State disputes to the ICJ. In this regard, it is worth recalling that the High-Level Declaration on the Rule of Law at the National and International Levels, a solemn affirmation of the UN commitment to the rule of law adopted by the General Assembly in 2012, dedicates a whole paragraph to the role and function of the ICJ.[21] After recognizing its positive contribution to the realization of the international rule of law, this declaration calls on States to accept as compulsory the jurisdiction of the Court in advance of any specific dispute, a possibility which, as will be discussed in Sect. 3 below, is specifically envisaged in the Statute of the ICJ. Similar calls have been made within UN quarters by, among others, the Secretary-General and the Security Council.[22] The reason for this is obvious. If all States were to voluntarily accept the compulsory jurisdiction of the ICJ, the latter would enjoy unrestrained authority. This, in turn, would move it closer to the model of courts operating at the domestic level, with profound implications for the international rule of law.

In light of the above, an important correlation exists between States' attitudes towards the ICJ and their commitment to the rule of law at the international level. Crucially, for the purpose of this investigation, the UK openly endorses the validity of this correlation, presenting its voluntary acceptance of the compulsory jurisdiction of the ICJ as an indication of its broader commitment to the international rule of law.[23] In particular, the UK often invokes the fact that it is the only permanent member of the Security Council to have submitted, in advance of a dispute, to the

[19] Art. 36(3) UN Charter.

[20] See, for example, Watts (1993), pp. 15-45 and Chesterman (2008), pp. 331-361.

[21] Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels: General Assembly Resolution of 30 November 2012, UN Doc. A/RES/67/1.

[22] For example, 'Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels', Report of the Secretary-General, UN Doc. A/66/749 (16 March 2012), paras. 14–15; Security Council Presidential Statements S/PRST/2010/11 (29 June 2010) and S/PRST/2012/1 (19 January 2012). See, also, the Manila Declaration on the Peaceful Settlement of International Disputes, UN General Assembly Resolution of 15 November 1982, UN Doc. A/RES/37/10.

[23] See, for example, 'Britain and the International Rule of Law', Speech to Chatham House by former Attorney General Dominic Grieve, 3 July 2013, at https://www.gov.uk/government/speeches/britain-and-the-international-rule-of-law.

jurisdiction of the Court to boast about the country's commitment to the international rule of law,[24] faith in a rules-based approach to foreign policy,[25] and staunch defence of international law.[26]

The underlying assumption of this narrative is that while the UK is prepared to allow other States to bring claims against it before the ICJ, other powerful States, in defiance of the international rule of law, resist the judicialization of international relations in an attempt to defend their privileged position *vis-à-vis* other (weaker) States. The validity of this assumption must be carefully tested, especially after a series of recent developments have altered the UK's approach to both the jurisdiction and authority of the ICJ. Before developing this investigation any further, however, it is necessary to consider the history and nature of optional clause declarations, examining, in particular, the question of reservations to these unilateral acts.

3 The 'Optional Clause' and the International Rule of Law

As already explained in the previous section, the ICJ only has jurisdiction over a State with its consent. From a rule of law perspective, this is highly unsatisfactory. As the former president of the ICJ, Rosalyn Higgins, once put it, 'the absence of a compulsory recourse to the Court falls short of a recognisable "rule of law" model'.[27] In an attempt to alleviate this problem, the Statute of the ICJ provides that States can accept the jurisdiction of the Court as obligatory, in advance of a specific dispute, in two different manners.[28] First, States may become parties to a treaty, created for the specific purpose of dispute settlement, that establishes that disputes between States parties to that treaty will be submitted to the ICJ for resolution. In a similar way, some treaties contain a provision, known as a compromissory clause, that grants the ICJ jurisdiction with regard to disputes concerning their interpretation and application. By becoming parties to such treaties, States submit to the jurisdiction of the Court prior to the emergence of a dispute with another State party but only to the extent that the dispute will fall within the specific subject matter and terms of the treaty in question.

The second method, known as the 'optional clause', is more far-reaching. In essence, the 'optional clause' provides that a State may, at any time, declare that it recognises as compulsory the jurisdiction of the Court in relation to any other State

[24] UK Statement, 'The promotion and strengthening of the rule of law in the maintenance of international peace and security', Security Council, 7113th Meeting, 19 February 2014, UN Doc. S/PV.7113.

[25] UK Statement, 'The promotion and strengthening of the rule of law in the maintenance of international peace and security', Security Council, 6705th Meeting, 19 January 2012, UN Doc. S/PV.6705.

[26] 'The Modern Law of Self-Defence', Speech by Attorney General Jeremy Wright at the International Institute for Strategic Studies, London, 11 January 2017, at https://www.gov.uk/government/speeches/attorney-generals-speech-at-the-international-institute-for-strategic-studies.

[27] 'The ICJ and the Rule of Law', speech by H. E. Rosalyn Higgins at the United Nations University, 11 April 2007, at https://archive.unu.edu/events/files/2007/20070411_Higgins_speech.pdf.

[28] In addition, the Statute of the International Court of Justice provides that the jurisdiction of the Court comprises all cases which the parties refer to it after reaching a 'special agreement'. United Nations, Statute of the International Court of Justice, 18 April 1946, Art. 36.

accepting the same obligation. The optional clause was first envisaged in the statute of the predecessor of the ICJ, that is, the Permanent Court of International Justice (PCIJ). It was intended as a political compromise between the less powerful States, which believed that the first permanent tribunal with general jurisdiction operating on the international plane should have compulsory jurisdiction, and the more powerful States, which firmly opposed that idea.[29] To avoid an impasse, it was decided that, while States would not be bound by the mandatory jurisdiction of the Court, they should be given the option to accept it voluntarily on the basis of a general consent given in advance.[30] Twenty years later, the principle of compulsory jurisdiction was once again contemplated in the preparation of the statute of the ICJ. Once again, the great powers' lack of enthusiasm for compulsory jurisdiction prevailed over the more progressive views of the majority of States, with the consequence that the optional clause was ultimately retained.[31]

From a rule of law perspective, the important point to make here is that the optional clause system represents the closest approximation to a system of compulsory jurisdiction in that it seeks to create a stable jurisdictional network among States aimed at enabling the ICJ to routinely solve international disputes.[32] For this reason, writing in 1945, Philip Jessup referred to optional clause declarations as 'the greatest single contribution' that States could make to the establishment of a strong and effective court,[33] while, today, these declarations continue to be regarded as a touchstone of a State's commitment to the ICJ.[34] As a matter of fact, the 'optional clause' has not been as successful as had been hoped for. At the time of this writing, only 73 States have deposited a declaration recognizing the jurisdiction of the Court as compulsory. The fact that the vast majority of States have not taken this step signals a widespread reluctance among them to commit in advance to the Court. The picture is even starker in relation to the great powers, which, by their very nature, have a predilection for diplomatic, as opposed to judicial, methods of solving inter-State disputes. Russia has never accepted the compulsory jurisdiction of the Court. In 1972, shortly after being admitted to the UN, China withdrew from the optional clause system, disowning the declaration that had been previously made by the Republic of China.[35] On their part, France and the United States (US) reversed their pledges in the wake of cases brought against them. France terminated its optional clause declaration in 1974 after the ICJ indicated provisional measures in a case concerning French nuclear tests conducted in the South Pacific;[36] the US withdrew its declaration in 1985 following the Court's finding that it

[29] Lloyd (1985), pp. 28–51; for an overview of the British opposition, see Katzenstein (2014), p. 178.

[30] Kelly (1987), p. 345.

[31] Ibid.; see, also, Report on Draft of Statute of an International Court of Justice Referred to in Chapter VII of the Dumbarton Oaks Proposals (Professor J. Basdevant, Rapporteur), Submitted by the United Nations Committee of Jurists to the United Nations Conference on International Organization at San Francisco (San Francisco, 25 April 1945).

[32] Merrills (2016).

[33] Jessup (1945), p. 236.

[34] Wood (2020), p. 3267.

[35] Report of the International Court of Justice (August 1972–July 1973), 28 GAOR. 28th Session, Supp. No. 5 (A/9005), p. 1.

[36] Letter of 10 January 1974, 20 *Annuaire Français de Droit International* (1974), pp. 1052–4.

had jurisdiction to entertain a case concerning the legality of American military activities in Nicaragua.[37] Against this background, the UK rarely misses an opportunity to remark that it is the only permanent member of the Security Council to have accepted the obligatory jurisdiction of the Court.[38]

In light of other States' hesitancy to accept the same obligation, the UK's recognition of the compulsory jurisdiction of the ICJ is, undoubtedly, of a certain significance. Yet, this is only half the story. Since the time of the PCIJ, it has been common practice for States to limit the scope of their 'optional clause' declarations by means of reservations.[39] This practice is important both in legal and political terms. Legally, there is no doubt that the act of qualifying an 'optional clause' declaration is, generally, permitted. As noted by the Court itself, these declarations:

> are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration a State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations.[40]

It follows that States are well within their rights to accept the compulsory jurisdiction of the Court only to the extent that they see fit. As will be discussed in the next section, however, this does not imply that every reservation will be undoubtedly legal. Politically, reservations raise other important issues. Given that international law disputes tend to involve high stakes, it is understandable that States may want to exclude from the scope of the Court's jurisdiction certain matters which are deemed to be either too sensitive or, simply, unsuitable for international adjudication.[41] At the same time, the function of reservations is that of allowing an otherwise reluctant State to submit itself, if in a more limited manner, to the authority of the Court. In this sense, reservations should not be used as a tool to prevent the latter from exercising its jurisdiction to the largest possible extent. Of course, such a misuse of the instrument of reservations would not be, in itself, legally problematic, but it would raise important political questions regarding a State's commitment to the Court. For example, Christian Tomuschat has noted that India's declaration is tactically

[37] United States: Department of State Letter and Statement concerning Termination of Acceptance of ICJ Compulsory Jurisdiction, 24 *ILM* (1985), p. 1742.

[38] See, for example, UK Statement, Security Council, 2700th Meeting, 29 July 1986, UN Doc. S/PV.2700, 25(5) *ILM* (1986), pp. 1337-1365; UK Statement, UN Security Council Open Debate on the Maintenance of International Peace and Security, 23 February 2015, at https://www.gov.uk/government/speeches/70-years-ago-the-un-charter-established-the-three-founding-pillars-of-the-un-system-peace-and-security-human-rights-and-development; and 'International Law and Justice in a Networked World', Speech by Foreign Secretary William Hague at The Hague on 9 July 2012, at https://www.gov.uk/government/speeches/international-law-and-justice-in-a-networked-world.

[39] This article will use the term 'reservations' to refer to all formal conditions (related to duration, modification and withdrawal) and limitations (aimed at excluding certain disputes from the jurisdiction of the Court) that are used by States in order to define the boundaries of their optional clause declarations. On this point, see Trober (2017), pp. 8 and 9.

[40] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment on Jurisdiction and Admissibility, 26 November 1984, ICJ Reports 1984, p. 392, at p. 418, para. 59.

[41] Kolb (2016), p. 192.

tailored in such a way to 'prevent any attempt ever to bring an application against it, thus converting the act of acceptance into a barely veiled act of non-acceptance'.[42] More broadly, an excessive use of reservations by States risks also undermining the 'optional clause' system as a whole. This is especially true since reservations work on the basis of the principle of reciprocity. Thus, a reservation that protects reserving State A from State B's attempt to bring a case against it, can equally be invoked by State B in the event that State A decides to initiate proceedings against it. As a result, the jurisdiction of the Court is weakened twice.

In light of all the above, Britain's acceptance of the compulsory jurisdiction of the ICJ should not be taken *per se* as an indication of its support for the Court. Instead, its optional clause declaration must be carefully analysed in order to provide a more realistic assessment of the degree and genuineness of the country's commitment to the most important judicial body of the UN and, in turn, the international rule of law.

4 The UK's Optional Clause Declaration

The UK made its first optional clause declaration in 1929 in connection with the PCIJ.[43] Since the very beginning, however, the British commitment to the Court was characterised by a certain degree of hesitancy. It is telling, for example, that by the late 1950s the UK had earned the 'unenviable distinction' of having added more reservations to its declaration than any other State.[44] While between then and the late 1960s it reversed course by gradually reducing both the quantity and scope of

[42] Tomuschat (2012), p. 761.

[43] For a discussion, see Lauterpacht (1930), pp. 137–172.

[44] Briggs (1958), p. 303.

its reservations,[45] important limitations to the acceptance of the Court's jurisdiction have continued to feature in its declaration up until today.[46]

This is not to say that the UK is unique in its reluctance to fully accept the jurisdiction of the ICJ. Most optional clause declarations are in fact replete with reservations, some of which can be quite far-reaching. Yet, as will be discussed below,[47] the current version of the UK declaration includes a number of particularly controversial conditions and limitations that hardly match its pro-rule of law rhetoric and amount to a *de-facto* 'exit' from the system of compulsory jurisdiction.[48]

4.1 The Right to Terminate and Amend the Declaration with Immediate Effect

The first striking feature of the UK's declaration is that it is both instantly terminable and modifiable.[49] Since the time of its first declaration in 1929, the UK has accepted

[45] For a timeline, see Wood (2020), p. 3267.

[46] The latest version of the UK optional clause declaration reads as follows:
'1. The Government of the United Kingdom of Great Britain and Northern Ireland accepts as compulsory ipso facto and without special convention, on condition of reciprocity, the jurisdiction of the International Court of Justice, In conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate the acceptance, over all disputes arising after 1 January 1987, with regard to situations or facts subsequent to the same date, other than:
(i) any dispute which the United Kingdom has agreed with the other Party or Parties thereto to settle by some other method of peaceful settlement;
(ii) any dispute with the government of any other country which is or has been a Member of the Commonwealth;
(iii) any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court;
iv) any claim or dispute which is substantially the same as a claim or dispute previously submitted to the Court by the same or another Party;
v) any claim or dispute in respect of which the claim or dispute in question has not been notified to the United Kingdom by the State or States concerned in writing, including of an Intention to submit the claim or dispute to the Court failing an amicable settlement, at least six months in advance of the submission of the claim or dispute to the Court;
vi) any claim or dispute that arises from or is connected with or related to nuclear disarmament and/or nuclear weapons, unless all of the other nuclear-weapon States Party to the Treaty on the Non-Proliferation of Nuclear Weapons have also consented to the jurisdiction of the Court and are party to the proceedings in question.
2. The Government of the United Kingdom also reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect as from the moment of such notification, either to add to, amend or withdraw any of the foregoing reservations, or any that may hereafter be added'.

[47] This article does not aim to provide a comprehensive analysis of the reservations included in the UK declaration. Instead, it focuses on a number of reservations that are considered particularly problematic in rule of law terms. For a critical overview of all the UK reservations, see Ulfstein (2023).

[48] Ulfstein (2023).

[49] In line with the ICJ's jurisprudence, this article will consider the acts of withdrawing and modifying a declaration as producing the same effects in that the former leads to a total denunciation and the latter to a partial denunciation of the declaration. ICJ, *Case concerning Right of Passage over Indian Territory (Portugal v. India)*, Judgment of 26 November 1957, ICJ Reports 1957, p. 125, at p. 144.

the compulsory jurisdiction of the Court (first the PCIJ, then the ICJ) only 'until such time as notice may be given to terminate the acceptance'.[50] In addition, since 1958, the UK has expressly reserved the right to 'add to, amend or withdraw any reservation included in its declaration with immediate effect as from the moment of notification'.[51] The fact that the UK is not the only country to have retained the right to terminate or amend its declaration instantly does little to dispel doubts over the appropriateness of these clauses, which have been decried for their 'devastating' effects on the system of compulsory jurisdiction.[52] Thanks to them, in fact, the UK has the ability to prevent any State, which may contemplate initiating proceedings against it, from validly seizing the Court. All the UK would need to do is either withdraw its declaration or strategically amend it before the forthcoming case is actually filed. Considering that in most cases it would not be difficult to anticipate the filing of a hostile application,[53] these clauses give the UK the power to virtually immunize itself from the judicial scrutiny of the ICJ. Crucially, the controversies surrounding this aspect of the UK's pledge to the ICJ are not only of a political nature; the legal validity of the termination and modification clauses incorporated in the UK declaration can in fact be questioned too.

There is no doubt that States have the right to withdraw and modify their optional clause declarations. What needs to be considered more carefully, however, is whether they can do so without a period of notice. The ICJ has not provided a definitive answer to this question, leaving room for different interpretations. The more orthodox view would highlight that the terms of a declaration, no matter how regrettable or incoherent they may be, reflect the freely expressed will of a State.[54] As such, they must be fully respected by the ICJ, whose jurisdiction is based on the full consent of the States party to a dispute. This view finds some support in the *Right of Passage* case. There, the Court accepted the validity of a clause incorporated into Portugal's declaration which gave the latter the right to 'exclude from the scope of [its] declaration […] any given category or categories of disputes' with effect from the moment of notification to the UN Secretary-General.[55]

Some authors, however, have pointed out that the validity of instantly terminable or modifiable declarations has never been specifically addressed by the Court and, therefore, 'remains open to serious doubt'.[56] The proponents of this view base their argument on *Nicaragua*, where the Court held that declarations that are silent as to their termination cannot be terminated with immediate effect but require,

[50] Lauterpacht (1930), pp. 137–172.

[51] Lauterpacht (1958), pp. 197–201.

[52] Kelly (1987), pp. 342–374.

[53] This point will be further elaborated upon in Sect. 4.3 below.

[54] Tomuschat (2012), p. 762.

[55] ICJ, *Case concerning Right of Passage over Indian Territory (Portugal v. India)*, Judgment of 26 November 1957, ICJ Reports 1957, p. 125, at p. 141.

[56] For example, Kolb (2016), p. 196.

instead, reasonable notice.[57] As seen above, the UK's declaration is different in that, rather than being silent thereon, it contains explicit clauses regarding the right to instant termination and modification. It follows that what the ICJ held in *Nicaragua* does not directly apply to the British case. Yet, as will be explained below, it is not implausible to maintain that the reasoning in *Nicaragua* has fundamental ramifications also for the type of reservations entered by the UK that allow a State 'to play fast and loose' with the jurisdiction of the Court.[58]

In *Nicaragua*, the ICJ set clear limits on the ability of States to backtrack on their pledges concerning the optional clause system. The fact that States, which choose to make an optional clause declaration, are free to do so unconditionally or to qualify it with reservations, does not signify—the Court explained—that they are also 'free to amend the scope and the contents of [their] solemn commitments as it pleases'.[59] This freedom is curtailed, in particular, by the principle of good faith, which, playing a pivotal role in the functioning of the optional clause system, requires that States that have made a declaration are entitled to expect that other States, which have also made a declaration, will act in accordance with the obligation that they have assumed.[60] It is on the basis of this principle that the ICJ concluded that the declaration of Nicaragua, being silent as to its termination, could not be terminated with immediate effect. Yet, this reasoning can be extended to the UK's declaration inasmuch as the latter is seen as conflicting with not only the principle of good faith but also the very spirit of the optional clause system. In this sense, the termination and modification clauses contained in the UK's declaration can be equated to those reservations which, being incompatible with the object and purpose of a treaty, are considered impermissible under international law.[61]

It is, of course, far from certain that the ICJ would be willing to go as far as to challenge the validity of instantly terminable or amendable clauses. It is also not difficult to foresee further complications if it chose to do so.[62] For example, could the Court construe those clauses as requiring a period of notice while contextually preserving the validity of the rest of the declaration? After all, it is unlikely that a country like the UK would have accepted the jurisdiction of the ICJ without the benefit of those conditions. An analysis of the legal complexities arising in such circumstances is beyond the scope of this article. The key point here is that the very existence of these legal doubts and complications reveal the inherent problem with the position of the UK, which has gone to great lengths in order to prevent other States from challenging its conduct before the ICJ. By retaining the right to suddenly

[57] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment on Jurisdiction and Admissibility, 26 November 1984, ICJ Reports 1984, p. 392, at pp. 419–420, para. 63.

[58] Kolb (2016), p. 196.

[59] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment on Jurisdiction and Admissibility, 26 November 1984, ICJ Reports 1984, p. 392, at p. 418, para. 59.

[60] Ibid., para 60.

[61] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS, p. 331, Art. 19.

[62] McCall-Smith (2014), pp. 599–634.

terminate and amend its declaration, the UK cannot be said to have truly committed, in advance, to the jurisdiction of the Court; instead, defeating the very purpose of the optional clause system, it has kept open the possibility of choosing, on an *ad hoc* basis, which dispute, to which it is a party, may be referred to that body.

4.2 The 2005 Amendment to the Commonwealth Reservation

The potential for an abuse of the clauses discussed in the previous section was fully revealed in 2005 when the UK hastily amended its optional clause declaration in order to avoid unwanted litigation.[63] The modification in question concerned the so-called 'Commonwealth reservation', which excludes from the jurisdiction of the Court any dispute between the reserving State and any other member of the Commonwealth. The Commonwealth reservation was developed in the late 1920s when the association was made of the UK and its dominions which, despite being autonomous, owed allegiance to the British monarch, a circumstance that was deemed to deprive any intra-Commonwealth dispute of a truly international character.[64] For that reason, proposals were also made to establish a special machinery for the settlement of 'internal' disputes instead of relying on pre-existing international institutions. That said, as the dominions gained full independence and the appetite for a special tribunal waned, the Commonwealth reservation became increasingly 'obsolete'.[65] Despite that, it has continued to feature, to this day, in the declaration of both the UK and several other Commonwealth countries. Considering that, at the time of this writing, 56 States make up this association, the combined effect of these reservations on the jurisdiction of the ICJ is not negligible; yet, this is not the aspect of the UK's Commonwealth reservation that requires further scrutiny here.

Since the 1980s, a member of the Commonwealth, namely Mauritius, has advanced sovereignty claims over the Chagos Islands, a group of small islands located in the Indian Ocean that form part of British overseas territory. These islands were administered between 1814 and 1965 by the UK as a dependency of the colony of Mauritius. Before granting independence to Mauritius, the UK separated the archipelago from the territory of the colony in order to retain its possession and lease its major atoll, Diego Garcia, to the US for military purposes. The UK has defended the lawfulness of its action pointing to the fact that the then Council of Ministers of Mauritius agreed to the detachment. By contrast, considering the British conduct to be in violation of the laws regulating the process of decolonisation, Mauritius sought in various ways to regain possession of what it considers unjustly lost territory. Although both States accepted the compulsory jurisdiction of the ICJ,

[63] A similar tactic was employed in the mid-1950s, when the UK added a reservation to its declaration excluding from the jurisdiction of the court any dispute 'in respect of which arbitral or judicial proceedings are taking, or have taken, place, with any state which, at the date of the commencement of the proceedings, had not itself accepted the compulsory jurisdiction of the International Court of Justice'. This reservation was aimed at preventing Saudi Arabia from filing an application following the abandoned Buraini Oasis arbitration. See Wood (2020), p. 3274.

[64] Coffey (2019), pp. 240–260.

[65] As noted, for example, by Judge Ago in ICJ, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judgment of 26 June 1992, ICJ Reports 1992, p. 240, Dissenting Opinion at pp. 326–328.

the inclusion of the Commonwealth reservation in their respective declarations precluded the possibility of automatically referring the dispute to the Court. That said, the ICJ is always competent to entertain a dispute that has been referred to it with the consent of both parties. The UK, however, refused to conclude a special agreement with Mauritius to that effect, affirming, instead, that it would 'remain open to discussions regarding the future of the territory'.[66] Faced with British intransigence, Mauritius thought of a creative solution to get the Court involved, namely leaving the Commonwealth in order to bypass the UK's Commonwealth reservation.[67] Upon becoming aware of such intentions, however, the UK rushed to reformulate its reservation, with immediate effect, in order to exclude from the jurisdiction of the Court any dispute not only with current but also *former* members of the Commonwealth.[68]

Politically, this deliberate attempt to prevent Mauritius from referring the dispute to the ICJ is undoubtedly antithetical to the rule of law. Legally, things are less clear-cut. While there could be reasons to doubt the legal validity of amendments designed to prevent another State from bringing a particular dispute before the Court, the latter has thus far refrained from engaging in this type of analysis. In 1974, for example, India expanded its Commonwealth reservation in exactly the same terms as those used by the UK, excluding from the jurisdiction of the Court any dispute with the government of any State 'which is or has been' a member of the Commonwealth.[69] The timing of this amendment suggested that it was essentially directed at one State, i.e., Pakistan, which had left the Commonwealth in 1972.[70] Crucially, the ICJ had an opportunity to comment on the validity of this reservation when, in 1999, Pakistan filed an application against India in respect of a dispute concerning the destruction of a Pakistani aircraft. Pakistan, which by that time had re-joined the Commonwealth, argued that the ICJ should refuse to apply India's reservation because of its discriminatory nature, given that its only *raison d'être* was to prevent Pakistan from bringing judicial action against India. In rebutting this argument, the ICJ made two key observations. First, it affirmed that the reservation made by India was not explicitly directed at Pakistan but, rather, at any present or former member of the Commonwealth. Second, it noted that, in any case, it was bound to apply any limitation that India, as a declarant State, had placed on its declaration. While the Court's words appear to recognize the ability of States to unscrupulously amend the content of their declarations, it is important to emphasise that not all judges agreed. In his dissenting opinion, Judge Al-Khasawneh acknowledged that not all reservations *ratione personae*, that is, reservations intended to exclude from the Court's jurisdiction disputes with certain States, are problematic. He noted, for

[66] ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, p. 95, Written Statement by the UK, 15 February 2018, paras. 5.10–5.12.

[67] E. MacAskill, 'Mauritius May Sue for Diego Garcia', *The Guardian*, 7 July 2004.

[68] ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, p. 95, Written Statement by the UK, 15 February 2018, para. 5.19.

[69] Ibid.

[70] ICJ, *Case Concerning the Aerial Incident of 10 August 1999 (Pakistan v. India)*, Judgment of 21 June 2000, ICJ Reports 2000, p. 12, Dissenting Opinion of Judge Al-Khasawneh, para. 11.

example, that those reservations that contextually identify alternative ways of peaceful settlement have a 'reasonably defensible justification'.[71] However, he described India's reservation as exceptional in that it showed 'a clear will of arbitrary exclusion'[72] that was incompatible with the purpose of international adjudication.

The question of manipulative reservations was also relevant in the 1998 *Fisheries Jurisdiction* case between Spain and Canada.[73] The latter had entered a reservation to its optional clause declaration aimed at excluding any dispute concerning conservation and management measures taken in the regulated area of the Northwest Atlantic Fisheries Organisation. What is most notable about this reservation is that it was deposited by the government of Canada on the same day on which it submitted to Parliament a legislative proposal to empower it to take certain fisheries protection measures precisely in the area of the Northwest Atlantic covered by the above reservation. In other words, since it had doubts about the legality of the actions it intended to take on the basis of the new legislation, Canada pre-emptively barred the ICJ from deliberating on the matter. On that occasion, the ICJ found that it had no jurisdiction to adjudicate upon the dispute due to the Canadian reservation. Some judges, however, expressed unease with this position. Judge Kooijmans, for example, explained that he voted with the majority 'with a heavy heart', condemning the way in which Canada ridiculed the optional clause system by purposely depriving the Court of jurisdiction over an anticipated dispute.[74] Judge Bedjaoui, dissenting, conceded that a State has the sovereign power to choose whether, and to what extent, it wishes to participate in the optional clause system but noted that this does not imply that it is also entitled to provoke the 'implosion' of that very system.[75] In particular, he observed that a declarant State 'cannot swear fealty to international justice by submitting itself to the latter's verdict in respect of those acts where it considers it has behaved correctly, while shunning that same justice in the case of those acts whose legality it fears may be questionable'.[76]

These cases signal a certain hesitancy on the part of the ICJ to identify and sanction bad faith conduct. In this sense, the practice of modifying a declaration with the sole purpose of preventing unwanted litigation may well stand the Court's test of acceptability. That said, doubts can be, and have been, legitimately raised with regard to not only the appropriateness but also the legal validity of this stratagem by virtue of its incompatibility with the very purpose of the optional clause system.

4.3 The Requirement of Prior Notice

In 2017, the UK further limited the scope of its declaration by adding new reservations to it. Among those, a particularly controversial one requires other States to

[71] Ibid., para. 18.

[72] Ibid., para. 19. See also the Dissenting Opinion of Ad Hoc Judge Pirzada, para. 4.

[73] ICJ, *Fisheries Jurisdiction (Spain v. Canada)*, ICJ Judgment of 4 December 1998, ICJ Reports 1998, p. 432.

[74] *Fisheries Jurisdiction (Spain v. Canada)*, Dissenting Opinion of Judge Kooijmans, para. 1.

[75] *Fisheries Jurisdiction (Spain v. Canada)*, Dissenting Opinion of Judge Bedjaoui, para. 46.

[76] Ibid., para. 53.

give six months' notice of any dispute against the UK that they intend to submit to the ICJ. As will be explained in this section, it is not an exaggeration to say that this requirement makes the UK declaration almost meaningless. In order to understand this point, it is important, first, to examine the background and substance of the ICJ's verdict that triggered the UK's decision to include such a sweeping clause in its declaration.

On 24 April 2014, the Marshall Islands filed an application against nine nuclear-weapon States for their alleged failure to fulfil international obligations related to the cessation of the nuclear arms race and nuclear disarmament. The UK was one of the States that could actually be taken before the Court to respond to the complaint. This is so because, when the application was filed, both the Marshall Islands and the UK were parties to the optional clause system. The fact that the Marshall Islands deposited its declaration of acceptance of the jurisdiction of the ICJ on 24 April 2013, that is to say, a year before initiating proceedings against the UK, is of special significance here. The UK declaration includes a commonly used anti-ambush clause that excludes disputes where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited less than twelve months prior to the filing of the application. This clause addresses the disadvantages faced by States that have made an optional clause declaration *vis-à-vis* those that have not. This imbalance derives from the retroactivity of an optional clause declaration, which can be used to refer to the ICJ a dispute that arose before the declaration was actually made. Thus, State A, which has not made an optional clause declaration, could not be sued by State B, which, instead, has made such a declaration. However, if State A wanted to initiate proceedings against State B, it could do so by simply depositing a declaration before filing an application. Crucially, the twelve-month cooling-off period guaranteed by the anti-ambush clause would allow a State like the UK, whose optional clause declaration is terminable and modifiable with immediate effect, to adjust the latter in order to avoid being sued by a State that has just accepted the compulsory jurisdiction of the ICJ. This defensive tactic, however, can only work inasmuch as the respondent State is able to foresee the impending legal action. For example, had the UK anticipated the intentions of the Marshall Islands, it could have modified its declaration in order to prevent the Pacific nation from seising the ICJ. Instead, caught by surprise, it was taken to Court.[77]

At the preliminary hearings, the UK's strategy centred precisely on the element of surprise that characterised this litigation, hoping that the case would not proceed to the merits stage. In essence, the UK argued that the ICJ could not be asked to solve a dispute between itself and the Marshall Islands because, quite simply, there was no dispute to be solved. More specifically, the UK argued that, while the Marshall Islands might have made some generic statements concerning nuclear disarmament at various international meetings, it failed to articulate an alleged breach by the UK of its international obligations related to nuclear weapons. Accordingly, the UK

[77] This was the first contentious case brought against the UK at the ICJ since 1999. See, Legal Directorate Annual Report, 2015, Foreign and Commonwealth Office, at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/551807/FCO_legal_directorate_annual_report_2014-15.pdf.

was not aware of the existence of a dispute with the Marshall Islands on this matter. In fact, the UK went one step further, suggesting that the Marshall Islands should have not only made the existence of such a dispute more explicit but should have also notified the British government of its claim before filing the application.[78]

The suggestion that formal notification should be a precondition to the filing of an application was not endorsed by the ICJ, which rejected the view that 'notice or prior negotiations are required where [the Court] has been seised on the basis of [optional clause] declarations'.[79] However, in a rather surprising move, the ICJ accepted the UK proposition that, as a respondent State, it should have been 'aware, or could not have been unaware' that its views on international law obligations concerning nuclear disarmament were 'positively opposed' by the Marshall Islands. That this was a controversial decision is confirmed by the fact that the Court reached the verdict in a split vote (8 to 8) with the casting vote of the President. The reason for this division is simple. According to earlier jurisprudence, the existence of a dispute is determined objectively by the Court on the basis of the evidence available before it.[80] As part of this process, realism and flexibility, rather than formalism, are expected to guide the examination of the relevant facts.[81] For example, the Court once affirmed that 'a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not be necessarily be stated *expressis verbis*'.[82] While it was pointed out that the Marshall Islands decision represents 'the culmination of a judicial trend in which formalism and verbalism have replaced the objective assessment of facts by the Court',[83] it remains true that the ICJ had never before dismissed an entire case on the sole basis of the non-existence of a dispute between the parties. This hardening of the Court's position was criticised by several judges in their dissenting opinions. For example, Judge Crawford noted that the introduction of the requirement of 'objective awareness' imposes upon the judges the prohibitive task of investigating

[78] ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections of the UK, 12 June 2015, para. 44(c).

[79] 'Unless one of those declarations so provides'. ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment of 5 October 2016, ICJ Reports 2016, p. 833, at p. 852, para. 45.

[80] For example, ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion of 30 March 1950, ICJ Reports 1950, p. 65, at p. 74; and ICJ, *East Timor (Portugal v. Australia)*, Judgment of 20 June 1995, ICJ Reports 1995, p. 90, at p. 100, para. 22.

[81] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment of 18 November 2008, ICJ Reports 2008, p. 412, at p. 438, para. 81; ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, ICJ Reports 2016, p. 3, at pp. 26-27, para. 50; and ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, ICJ Reports 2011, p. 70, at p. 84, para. 30.

[82] ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment of 11 June 1998, ICJ Reports 1998, p. 275, at p. 315, para. 89.

[83] Miron (2017).

'the state of mind of a State'.[84] Reprimanding the Court for not taking a stance on a question of such great importance as that of nuclear disarmament, Judge Robinson warned that the ICJ wrote 'the Foreword in a book on its irrelevance to the role envisaged for it in the peaceful settlement of disputes that implicate highly sensitive issues'.[85] On his part, Judge Bennouna condemned the Court for choosing to 'shelter behind purely formalistic considerations […] rather than contributing, as it should do, to peace through international law'.[86]

It is not the purpose of this article to dwell on the merits of the ICJ's decision in the *Marshall Islands* case. What matters here, instead, is what the UK did as a result thereof. The Court made a distinction between the respondent State's awareness of the existence of a dispute and awareness of the intention of the applicant State to file a case, clarifying that only the former is a requirement for the exercise of its jurisdiction. Not satisfied with this finding, the UK took the matter in its own hands by including a new reservation in its declaration that excludes from the jurisdiction of the Court any dispute in respect of which the applicant State has not given it six months' notice of its intention to initiate proceedings. While the UK has sought to justify the inclusion of this clause by explaining that it 'would provide an opportunity for diplomatic engagement with the State concerned',[87] there is little doubt that the requirement of prior notification has more cynical motivations.[88] As discussed in Sect. 4 above, the UK has reserved the right to instantly terminate and modify its optional clause declaration. In terms of 'access to justice', it was noted, these clauses are problematic because they allow the UK to prevent *unwanted* litigation. Yet, the one thing that these clauses alone cannot do is to protect the UK from *surprise* litigation. This is precisely the *raison d'être* of the 'prior notice' requirement, which, combined with the previously discussed 'instantly terminable and amendable' clauses, deprives the British optional clause declaration of much of its significance. As the ICJ would not disapply the terms of a voluntary declaration of the acceptance of its jurisdiction, a State failing to notify the UK of its intention to file an application in 6 months' time would be unable to seise the Court. If that same State were to notify the UK, however, the outcome would not be necessarily different given the 'unpredictability' of the British declaration.

Let us suppose that important doubts existed as to the legality of the British conduct at the heart of the dispute in question and that the latter related to a matter of strategic importance to the country. Under those circumstances, would the UK run the

[84] ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment of 5 October 2016, ICJ Reports 2016, p. 833, Dissenting Opinion of Judge Crawford, para. 1.

[85] Ibid., Dissenting Opinion of Judge Robinson, para. 70.

[86] Ibid., Dissenting Opinion of Judge Bennouna, p. 902.

[87] Amendments to the UK's Optional Clause Declaration to the International Court of Justice, Statement made by the Minister of State for Foreign and Commonwealth Affairs (Sir Alan Duncan) to the House of Commons, 23 February 2017, at https://questions-statements.parliament.uk/written-statements/detail/2017-02-23/HCWS489.

[88] On this point, see also ICJ, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Judgment of 5 October 2016, ICJ Reports 2016, p. 833, Separate Opinion of Judge Tomka, para. 31.

risk of losing the impending case or would it terminate, or amend, its declaration in order to prevent the dispute from reaching the Court's docket? The very fact that the UK could have this choice is of course troubling; but what is even more troubling is the fact that its attempt to escape judicial scrutiny would be, in all likelihood, successful. As explained in Sect. 4 above, the ICJ is not in a position to declare an instantly terminable or modifiable declaration invalid. In the normal course of events, then, the UK's withdrawal, or tactical modification, of its declaration would lead to the Court dismissing the case. Even applying the reasoning developed in *Nicaragua*, the furthest a courageous Court could go in relation to a State that has *expressly* retained the right to terminate or modify its declaration with immediate effect would be to require 'reasonable notice' before termination or modification. At that point, the question of the duration of the notice would become paramount. In *Nicaragua*, the court did not provide any indication as to the length of the required notice. As part of its reasoning, it made a reference to the law of treaties, a circumstance which could be taken to suggest that a State should give no less than 12 months' notice of its intention to terminate or amend its optional clause declaration.[89] This, however, would be a dramatic departure from the original intention of the State in question. This is even more so considering that several States have included within their declarations a specific notice period of six months,[90] a practice which would certainly be among the factors feeding into the Court's assessment of what constitutes an appropriate period of notice. Thus, even assuming that the ICJ were to be prepared to challenge the validity of an instantly terminable or amendable clause, the longest period of notice it could request is, in all probability, six months. As a result, the UK would still be in the very enviable position of being able to choose between litigating a case and precluding access to justice to the would-be applicant by terminating or modifying its declaration upon receipt of notice.

Without doubt, the decision to act so blatantly against the rule of law would be costly in political terms. Yet, the fact remains that, in practice, the UK retains the absolute right to choose which disputes, to which it is a party, can be referred to the ICJ. The net effect of this is that, despite having formally deposited an optional clause declaration, the UK can hardly be said to have accepted the jurisdiction of the Court as compulsory, a paradox which, in turn, questions its commitment to international adjudication as an element of the international rule of law.

5 The Advisory Jurisdiction of the International Court of Justice

The first part of the article focused on the UK position vis-à-vis the ICJ's contentious jurisdiction, which refers to the Court's competence to decide legal disputes submitted to it by States. That analysis will now be extended to cover the ICJ's advisory jurisdiction, which enables it to give opinions on legal questions at the request of duly authorized UN organs and specialised agencies.[91] As an instrument aimed

[89] In line with Art. 56 of the Vienna Convention on the Law of Treaties.

[90] For example, Denmark, Finland, Mexico, New Zealand and Spain with regard to termination, and Hungary and Poland with regard to both termination and modification.

[91] UN Charter, Art. 96.

to 'guide the United Nations in respect of its own action',[92] advisory opinions contribute to strengthening the international rule of law by promoting compliance with international law not only within the UN but also, more broadly, among the international community. It is, therefore, not a coincidence that the 2012 UN Declaration on the Rule of Law that was mentioned in Sect. 2 above refers to advisory opinions as an expression of the ICJ's contribution to the realization of the rule of law at the international level.[93]

A discussion of the advisory function of the ICJ is particularly relevant in the context of this article given that the UK has recently come under the spotlight for its defiant response to an opinion rendered by the Court concerning the legality of the detachment of the Chagos Islands from Mauritius in 1965. As explained in Sect. 4.2 above, as a dispute over the legality of this detachment erupted between the Mauritius and UK governments, the latter successfully prevented the former from accessing the ICJ by expanding the scope of its Commonwealth reservation. In 2017, while the dispute between the two parties remained unresolved, the UN General Assembly adopted a resolution requesting the ICJ to provide an advisory opinion on this issue. As a duly authorised organ to make such a request, the General Assembly asked the ICJ, first, to establish whether the decolonization of Mauritius had been lawfully completed when, after the excision of the Chagos Islands, the country gained independence; and, second, to determine the legal consequences arising from the UK's continued administration of the archipelago.[94] The ensuing opinion, rendered in February 2019, was not very favourable to the UK. Unconvinced that the Mauritian representatives had freely consented to the detachment of the Chagos Islands in 1965, the Court found that the process of decolonization of Mauritius was not lawfully completed when the country acceded to independence in 1968. Consequently, the ICJ concluded, the UK administration of the archipelago is unlawful and the islands should be returned to Mauritius.

In a way that is hardly reconcilable with its professed adherence to the international rule of law and respect for the ICJ, the UK chose to defy the opinion rather than taking credible steps to align with it. It was only in November 2022, that is, more than three years since the opinion was rendered, that the UK acquiesced to open negotiations with Mauritius.[95] This marked a significant change in direction, which, however, cannot undo the reputational damage suffered by the UK as a result of its direct challenge to the authority of the Court. This is particularly true in the

[92] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, ICJ Reports 1951, p. 15, at p. 19; ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, p. 16, at p. 24, para. 32; and ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, ICJ Reports 1975, p. 12, at p. 37, para. 72.

[93] Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, GA Resolution of 30 November 2012, UN Doc. A/RES/67/1, para. 31.

[94] General Assembly Resolution of 22 June 2017, UN Doc. A/RES/71/292.

[95] Statement made in the House of Commons by James Cleverly, Secretary of State for Foreign, Commonwealth and Development Affairs, 3 November 2022, at https://questions-statements.parliament.uk/written-statements/detail/2022-11-03/hcws354.

light of the type of arguments that the UK employed to reject the findings of the ICJ. Firstly, the UK challenged the validity of the advisory opinion arguing that the ICJ was not entitled to provide it; and, secondly, it claimed that the character of the pronouncement meant that Britain was under no obligation to act in conformity therewith. The next two sections will examine the merits of these two arguments as well as their implications for the UK's self-image as a country supportive of both the ICJ and the international rule of law.

5.1 Circumventing the Requirement of Consent for International Adjudication

The fundamental principle according to which a State 'is not obliged to allow its disputes to be submitted to judicial settlement without its consent'[96] has potential ramifications for the advisory function of the ICJ. In particular, a problem may exist when a request for an advisory opinion overlaps with a dispute between two States and at least one of them does not consent to the involvement of the Court. This complication was first acknowledged in 1923 by the PCIJ, which, in declining to give an opinion on the status of Eastern Carelia, noted that to answer the question put to it would be tantamount to deciding a dispute between Finland and Russia without Russian consent.[97] It is precisely on this ground that the UK based its main criticism of the *Chagos* opinion. Building on the principle whereby considerations of judicial propriety may lead the ICJ to refuse to give an advisory opinion in the absence of an interested State's consent,[98] the UK argued that the Court should have used its discretion not to render this opinion for it concerned a bilateral sovereignty dispute to which the British government had not consented.[99] In this sense, by choosing to respond to the General Assembly's request, the Court allowed Mauritius to circumvent the principle of consent which lies at the heart of its jurisdiction, undermining the legitimacy of its own pronouncement.

In reality, things are not as straightforward as the UK would want them to be. The ICJ has indeed affirmed that 'the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character'.[100] However, it has also clarified that this would not prevent it from giving an opinion on a question related to an inter-State dispute as long as the latter also has a multilateral dimension which falls within the sphere of competence of the requesting organ. For example, in 1974 the Court was asked by the General Assembly to determine the validity of Morocco and Mauritania's territorial claims over Western

[96] ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, ICJ Reports 1975, p. 12, at pp. 24–25, paras. 32–33; ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion of 30 March 1950, ICJ Reports 1950, p. 65, at p. 71.

[97] PCIJ, *State of the Eastern Carelia*, Advisory Opinion of 23 July 1923, PCIJ Series B no. 5.

[98] ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, ICJ Reports 1975, p. 12, at p. 25, paras. 32–33.

[99] UK Statement, Summary Record of the 9th meeting of the Sixth Committee of the UN General Assembly, 13 November 2020, UN Doc. A/C.6/75/SR.9, paras. 101–103.

[100] ICJ, *Western Sahara*, Advisory Opinion of 16 October 1975, ICJ Reports 1975, p. 12, at p. 25, para. 33.

Sahara. Although the latter was at the time governed by Spain, the ICJ felt it appropriate to reply to the General Assembly's request in the absence of Spanish consent because the legal controversy at the heart of the opinion was 'located in a broader frame of reference than the settlement of a particular dispute'.[101] In particular, the Court attached great importance to the fact that the General Assembly had previously dealt with the situation of Western Sahara 'in the exercise of its functions concerning the decolonization of the territory'.[102] Accordingly, it highlighted that the purpose of its opinion was not to solve an inter-State dispute but, rather, to assist the requesting body in carrying out its institutional duties.

In *Western Sahara*, the ICJ also shed light on the nebulous reasoning of its predecessor in *Eastern Carelia*, explaining that the decisive factor in that opinion was not the absence of Russia's consent as such, but, rather, the fact that the objection to the Court's involvement came from a State, Russia, which at the time was neither a party to its Statute nor a member of the League of Nations.[103] In *Western Sahara*, by contrast, the ICJ noted that, by being a party to its Statute and a member of the UN, Spain had 'in general given its consent to the exercise by the Court of its advisory jurisdiction'.[104] In this way, the ICJ distanced itself from a rigid interpretation of the Eastern Carelia principle that would view State consent as a strict precondition for the exercise of its advisory jurisdiction, promoting, instead, a more elastic approach to requests for opinions somehow related to inter-State disputes.[105]

Consistent with the position taken in *Western Sahara*, in 2004 the Court rendered an opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory despite the fact that Israel had not consented to its jurisdiction. In particular, the Court noted that Israel's objection could not prevent its involvement in the matter because its opinion was requested 'on a question which [was] of particularly acute concern to the United Nations, and one which [was] located in a much broader frame of reference than a bilateral dispute'.[106] Equally importantly, given the General Assembly's earlier involvement in the question of Palestine, the Court considered that its advice was needed to assist the requesting organ in the exercise of its functions.[107]

It follows that the Court's decision to render an opinion in *Chagos* is fully aligned with its reasoning in earlier opinions. In both *Western Sahara* and the *Wall*, the ICJ did not consider that to respond to the request of the General Assembly would have the effect of circumventing the principle of consent to judicial settlement and, accordingly, chose not to exercise its discretion to decline to give an opinion on that ground. In a similar vein, in *Chagos* the Court did not deny the existence of a dispute between the UK and Mauritius but, in keeping with its jurisprudence, it

[101] Ibid., at p. 26, para. 38.

[102] Ibid., para. 39.

[103] Ibid., para. 30.

[104] Ibid.

[105] Lalonde (1979), pp. 80–100.

[106] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, at p. 159, para. 50.

[107] Ibid., para. 49.

attached greater significance to two facts: first, the fact that its opinion was sought on a matter, i.e. decolonization, which was of particular concern to the UN; and, second, the fact that the purpose of its advice was not to resolve a territorial dispute between two States but, rather, to guide the General Assembly 'in the discharge of its functions relating to the decolonization of Mauritius'.[108]

It is also worth noting that while it is true that Article 65 of its Statute confers on the Court a wide discretion to give or refuse an opinion, the ICJ has delimited the potential scope of this discretion by emphasising that its reply to a request 'represents its participation in the activities of the [United Nations], and, in principle, should not be refused'.[109] Thus, in line with what Rosalyn Higgins has described as a robust commitment to protect its right to give advice,[110] the ICJ has never, in the exercise of this discretionary power, declined to respond to a request for an advisory opinion.

In conclusion, it could be said that the UK sought to push back against a jurisprudential trend that has legitimised the Court's involvement, in an advisory capacity, in legal questions related to inter-State disputes. Having failed to persuade the Court of the merits of its argument, however, the UK should have acknowledged the ICJ's decision and taken steps to align with it. Instead, in a move that clashes with its declared support for the ICJ and the international rule of law, it chose to challenge both the authority of the Court and the legitimacy of its pronouncement.

5.2 The Legal Effects of Advisory Opinions

On the 22nd of May 2019, the UN General Assembly considered a draft resolution introduced by Senegal on behalf of the Group of African States concerning the consequences of the *Chagos* opinion. Starting from the premise that 'respect for the Court and its functions, including in the exercise of its advisory jurisdiction, is essential to […] an international order based on the rule of law',[111] the draft resolution demanded that Britain withdraw from the Chagos Islands within a six-month period and called upon all States to cooperate with the UN to ensure the completion of the decolonization of Mauritius.[112] While several States expressed support for this initiative, urging the Assembly to uphold the rule of law and give effect to the opinion of the Court,[113] the UK sought to persuade a sufficient number of States to vote against the resolution in order to prevent its adoption. Yet, as it happened on the

[108] ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, p. 95, para. 86.

[109] ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion of 30 March 1950, ICJ Reports 1950, p. 65, at p. 71.

[110] Higgins (1995), p. 201.

[111] Advisory Opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, UN Doc. A/73/L.84/Rev.1 (17 May 2019), preamble.

[112] Ibid., paras. 3 and 5.

[113] For example, Argentina, Egypt, Seychelles, Mexico, Uruguay, Mauritius, Syria, Cyprus, Namibia, Mexico, Uruguay, Zimbabwe. 'General Assembly Welcomes International Court of Justice Opinion on Chagos Archipelago, Adopts Text Calling for Mauritius' Complete Decolonization', UN Meetings Coverage and Press Releases, 22 May 2019, at https://press.un.org/en/2019/ga12146.doc.htm.

occasion of the 2017 vote on the resolution requesting the advisory opinion to the ICJ, the British diplomatic efforts were unsuccessful. As only five States sided with the UK, the resolution was passed with 116 votes in favour and 56 abstentions.[114] After the adoption of the text, the UK reaffirmed that it had 'no doubt' about its sovereignty over the archipelago and declared its intention not to comply with the opinion for the reasons set out in its explanation of the vote. These were, first, the fact that the ICJ was not entitled to render the opinion in the absence of British consent; and, second, the fact that the UK was under no obligation to follow the advisory opinion because of both its limited 'legal weight' and non-legally binding character.

Having already dealt with the first objection in the previous section, the following discussion will focus on the UK's attempt to dismiss the legal significance of the opinion. There is an obvious problem with this. As established by Article 59 of the Statute of the ICJ, only States parties to *contentious* proceedings are obliged to comply with a judgment of the court. It is, therefore, unquestionable that advisory opinions are not binding on States. To say that, however, is not tantamount to saying that they lack legal value. As noted by former ICJ President, Hisashi Owada, advisory opinions 'serve as an authoritative declaration of the law in fields where the law has not been entirely free from ambiguity or has at least been subject to some controversy'.[115] Another former President of the Court, Abdulqawi Yusuf, similarly described advisory opinions as 'authoritative pronouncements' that 'provide legal clarity […] on specific principles and rules of international law'.[116] In other words, advisory opinions represent definitive statements of the law that concur to direct State behaviour on the international stage.[117] In this respect, it should be emphasized that in the *Chagos* opinion the Court not only found the UK conduct to be in violation of the right to self-determination, notably a rule of customary international law, but also specified that, as a result, its continued administration of the archipelago constitutes a wrongful act entailing international responsibility. Seen in this light, the UK's decision to ignore the opinion cannot but raise important doubts about its commitment to the advancement of both international law and the international rule of law.

Perhaps mindful of the reputational costs of being portrayed as a country openly defiant of the Court, the UK sought to nuance its position by making an (unconvincing) distinction between the legal weight of credible and less-credible advisory opinions. In particular, it maintained that what weakened the legal value of the *Chagos* opinion was its failure 'to give sufficient regard to a number of legal and material factual issues'.[118] Yet, this is not very different from saying that the opinion was flawed

[114] Ibid.

[115] Speech by H. E. Judge Hisashi Owada to the Legal Advisers of the United Nations Member States, 25 October 2011, at https://www.icj-cij.org/public/files/press-releases/9/16739.pdf.

[116] Speech by H. E. Mr. Abdulqawi A. Yusuf, on the occasion of the seventy-fourth session of the United Nations General Assembly, 30 October 2019, at https://www.icj-cij.org/sites/default/files/press-releases/0/000-20191030-STA-01-00-EN.pdf.

[117] See also Yasuaki (2020), p. 247.

[118] UK Statement on UN General Assembly Resolution A/RES/L.84/Rev.1, 22 May 2019, available at https://www.gov.uk/government/speeches/resolution-on-the-british-indian-ocean-territory.

because the Court did not endorse the objections advanced by the UK. From a rule of law perspective, there is an obvious problem with the suggestion that a State could determine the legal weight of a judicial pronouncement on the basis of its own preferences. That said, if one wanted to engage with the merits of the UK's claim it would be instructive to refer to a preliminary judgment issued in 2021 by a special chamber of the International Tribunal on the Law of the Sea. The judgment, which concerned the delimitation of the maritime boundary in the Indian Ocean between Mauritius and the Maldives, is of special relevance because two of the Maldives' preliminary objections to the jurisdiction of the tribunal related to the fact that the maritime area in question included the Chagos Archipelago. First, the Maldives argued that the existence of a dispute over the Chagos Islands between Mauritius and the UK made the latter an indispensable party to the proceedings. Second, the Maldives contended that before being able to delimitate the relevant maritime boundary the chamber would necessarily have to solve a sovereignty dispute, notably something which falls outside the scope of its jurisdiction. In rejecting these objections, the special chamber made two important remarks about the legal nature and effects of the *Chagos* opinion. First, it noted that the opinion carries no less weight and authority than a judgment because it was made with the same rigour and scrutiny.[119] Second, and as a result of the above, it held that the determinations made by the ICJ in the *Chagos* opinion 'have legal effect and clear implications for the legal status of the Chagos Archipelago'.[120] In light of all this, the special chamber dismissed the Maldives' preliminary objections on the basis that a dispute over the status of the Chagos Islands no longer existed since the ICJ definitively determined that under international law the archipelago belongs to Mauritius. This conclusion has been criticised for elevating advisory opinions to judicial decisions capable of 'alter[ing] the rights or obligations of international legal subjects'.[121] What matters here, however, is that in reaching this verdict the special chamber unequivocally endorsed the legal significance and authority of the opinion. In fact, even the Maldives, which sought to minimize the impact of that pronouncement on its border dispute, acknowledged that the Court's findings were 'not wrong or lacking in authority'.[122]

It follows that the UK's claim of entitlement to disrespect the *Chagos* opinion because of its limited legal weight and non-legally binding nature is not only legally questionable but also politically problematic as it stands in sharp contrast to its professed commitment to the ICJ and the international rule of law. To an important extent, this act of defiance provoked even more controversy as it amounted to

[119] ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. The Maldives)*, Preliminary Objections, Judgment, 28 January 2021, para. 203.

[120] Ibid., para. 246.

[121] Thin (2021).

[122] ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. The Maldives)*, Written Observations of the Republic of Maldives in Reply to the Written Observations of the Republic of Mauritius, 15 April 2020, para. 4.

an attempt by a former colonial power to prevent one of its former colonies from obtaining justice.[123]

6 Conclusions

This article has drawn attention to an important inconsistency between the UK's self-image as a country committed to the ICJ and its actual conduct *vis-à-vis* the Court. This inconsistency, it was argued, has broader implications for the country's ambition to be regarded as an advocate of the international rule of law given that access to international adjudication, particularly in relation to the most important judicial body of the UN, represents an important component of the rule of law at the international level. The UK itself endorses this notion of the international rule of law, depicting its acceptance of the obligatory jurisdiction of the ICJ as a sign of its broader commitment to that principle.

Against this background, this article has argued that, if the UK is serious about its pledge to the ICJ, it should be prepared to have the legality of its conduct scrutinized by that judicial body. Instead, the British declaration recognizing as compulsory the jurisdiction of the Court includes a number of far-reaching reservations that drastically limit the capacity of the ICJ to hear a dispute involving the UK. Put simply, the UK takes away with one hand what it gives with the other. In particular, despite pledging formal allegiance to the ICJ, the UK retains the right to withdraw and amend its declaration with immediate effect, a prerogative that allows it to virtually immunize itself from unwanted judicial scrutiny. While the existence of these clauses raises obvious doubts about the genuineness of the UK's commitment to the Court, this article has suggested that their legal validity could also be questioned in light of their incompatibility with the principle of good faith and the spirit of the optional clause system. Furthermore, the UK requires a six-month period of notice of a State's intention to initiate proceedings against it, despite the ICJ's verdict that notice of an intention to file a case is not required as a condition for the seising of the Court. It is hard to overstate the potential impact of this manoeuvring on the principle of access to justice. Combined with the instantly terminable and modifiable clauses discussed before, this requirement protects the UK from not only unwanted but also surprise litigation, with the consequence that the latter enjoys the absolute power to decide which disputes, to which it is a party, can actually be referred to the ICJ.

Given that most States, including, crucially, the other four permanent members of the UN Security Council, are not at all prepared to recognize the compulsory jurisdiction of the ICJ, it would be wrong to deprecate the UK's decision to only partially submit to the authority of the Court. Yet, to the extent that the UK wishes to present itself as a genuine supporter of the ICJ and the international rule of law, it should rethink the approach to its optional clause declaration, which is currently designed to evade, at its convenience, the jurisdiction of the Court. To remedy this situation, the UK should, first, reformulate its declaration

[123] Sands (2022).

so as to make it terminable and amendable only subject to a period of notice of at least 6 months; and, second, withdraw the prior notification requirement that unduly elevates the awareness of the intention of another State to bring a case against it as a requirement for the exercise of the Court's jurisdiction.

This article has also highlighted that the UK's recent defiant response to the ICJ's advisory opinion concerning the Chagos Islands has further damaged its reputation as a country committed to the international rule of law. The UK's attempt to present the Court's opinion as being both illegitimate and devoid of any legal effect was, at best, legally questionable. At another level, the consequent choice not to act in conformity with that pronouncement has degraded the country's moral standing and political credibility, affecting, in turn, its ability to lecture other States about their international legal obligations. To repair this damage and reposition itself as a country devoted to the international rule of law, the UK should take credible steps to align with the Court's findings, bringing its conduct into line with international law and placing the opinion at the centre of the recently opened negotiations with Mauritius.

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