

Evolving International Jurisprudence

Understanding the Role of the International Court of Justice

By Ariana Singhi



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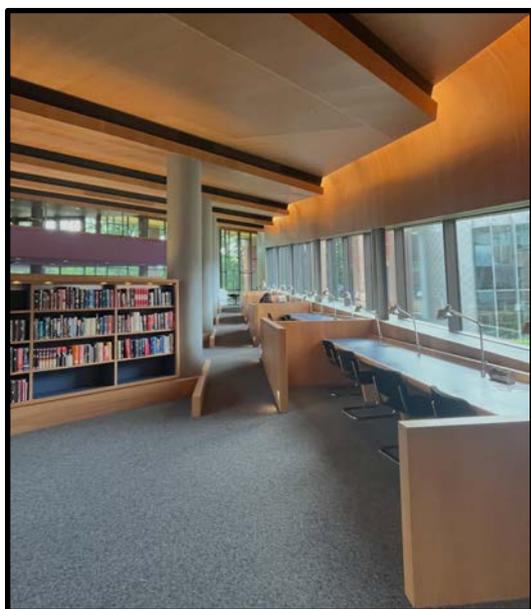
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The History of the International Court of Justice

The creation of the International Court of Justice in 1945 marked the culmination of centuries of attempts to resolve conflicts between states through peaceful means rather than war. Long before formal courts existed, societies across the world practiced mediation and arbitration — from Ancient India and the Islamic World to Greece, China and Medieval Europe. The 1794 Jay Treaty between the United States and Great Britain marked a turning point in modern arbitration, followed by the influential Alabama Claims case of 1872, which demonstrated arbitration’s effectiveness on the global stage. The Hague Peace Conferences of 1899 and 1907 institutionalized arbitration with the creation of the Permanent Court of Arbitration, housed in The Hague’s Peace Palace. Philanthropist Andrew Carnegie funded the construction of the Peace Palace under two conditions: that it include a public library, and that its furnishings be contributed collectively by various countries. After the First World War, these ideas took institutional form with the establishment of the Permanent Court of International Justice (PCIJ) under the League of Nations — the world’s first permanent international tribunal. Though its work was interrupted by the Second World War, the PCIJ laid the groundwork for its successor, the International Court of Justice, created in 1945 as part of the newly formed United Nations.



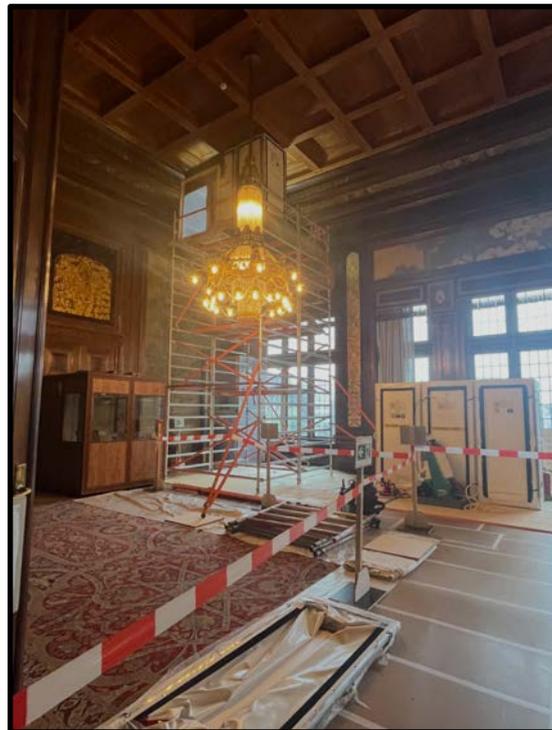
The Peace Palace Library — founded as a condition of Andrew Carnegie’s gift, it continues to serve as a leading resource on international law.



Architects’ original rendering of the Peace Palace



Gift from the Sultanate of Oman



The Japanese Room (under construction)

It owes its name to the superb silk tapestries on the walls given by the Japanese Government. In this room, you can also spot gifts from other countries: in the corners of the room you see impressive man-sized Chinese cloisonné temple vases on wooden pedestals donated by the last emperor of China.

Inside the ICJ: Structure, Role and Function

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations, established in 1945 under the UN Charter. It sits at The Hague, Netherlands, and is sometimes called the “World Court.” The ICJ is composed of 15 judges, each elected to a nine-year term by both the UN General Assembly and the Security Council, voting independently. Its primary purpose is to settle legal disputes between States and to give advisory opinions on legal questions referred to it by authorized UN organs and agencies. This means it plays two big roles:

- Contentious cases - where it issues binding judgments between countries that have accepted its jurisdiction. When two or more countries bring a legal disagreement before the ICJ, such as border disputes, treaty violations, or the use of force, the Court examines international law, interprets relevant treaties, and gives a binding judgment.
- Advisory opinions - where it gives non-binding but authoritative advice on legal issues for UN bodies like the General Assembly or Security Council, often on matters of global concern

Beyond individual cases, the ICJ serves as **guardian of international legality** as it upholds the rule of law in global affairs and discourages the use of force, as a **developer of international law**: Through its judgments and opinions, the ICJ helps clarify vague rules and contributes to the *evolution of customary international law*. Finally, it acts as **an advisor to the UN**: Its interpretations help guide UN organs in politically sensitive questions, ensuring their actions remain within the law



Cartoon illustration of the International Court of Justice bench (circa 2021–2024)

How Does it Operate?

A case begins when a state submits an application against another state. Both must recognize the ICJ’s jurisdiction. Written pleadings and oral arguments follow — often public, and occasionally spanning years. After hearings, judges deliberate in private and issue a majority opinion, often accompanied by separate or dissenting opinions that enrich the jurisprudence



The Green Room



The Red Room

The Green Room is used by judges to prepare for public hearings — it is normally where they put on their gowns. The Red Room is where judges meet before public sittings to discuss procedural or last-minute issues. It's a space for informal discussions and preparation before hearings.

The Question of Legitimacy: An Inside Perspective

One of the questions related to the court's role in issuing advisory opinions and their impact. The International Court of Justice (ICJ) issues advisory opinions under Article 65 of its Statute at the request of authorized UN organs and specialized agencies. Formally, these opinions are **non-binding**, but the Court itself stresses they carry “great legal weight and moral authority,” guiding UN decision-making and shaping state conduct. In practice, advisory opinions clarify contested areas of international law, legitimize institutional responses, and sometimes catalyze political change—even without coercive force.

Historically pivotal examples show how this “soft” authority operates. In **Namibia (1971)**, the Court held South Africa's continued presence unlawful and set out consequences for states—non-recognition and non-assistance. This equipped the Security Council and member states with a legal framework to pressure Pretoria. The opinion did not bind states as a judgment would, but it supplied a shared legal baseline that informed sanctions, diplomatic isolation, and UN practice.

In **Legal Consequences of the Construction of a Wall (2004)**, the Court found Israel's barrier in the Occupied Palestinian Territory contrary to international law and again articulated obligations of non-recognition and non-assistance for all states. The opinion's immediate compliance was limited, but it entrenched legal narratives about occupation, self-determination, and humanitarian law that continue to inform General Assembly resolutions, human rights reporting, and litigation strategies worldwide.

Kosovo (2010) illustrates another facet: the Court answered a narrow question—whether Kosovo's unilateral declaration of independence violated international law—finding it did not. Though politically contentious, the opinion influenced recognition debates by clarifying that general international law lacks a blanket prohibition on declarations of independence; it also became a citation touchstone in later self-determination controversies.

Most recently, **Chagos (2019)** shows advisory opinions' feedback loop with the General Assembly. After the ICJ concluded the decolonization of Mauritius was not lawfully completed and that the UK should end its administration of the archipelago, the General Assembly passed a resolution demanding withdrawal within six months—evidence of advisory opinions shaping UN organs' collective positions and expectations of state conduct.

Scholarly debate turns on advisory opinions' “non-binding” impact. One view sees them as *authoritative statements of law* that guide UN practice and contribute to customary international law formation by clarifying *opinio juris* and crystallizing rules. Another, more cautious view, treats them as persuasive authority whose impact depends on political uptake by states and UN bodies; here, the “effect” is mediated by institutional design and power politics rather than law alone. Both camps agree, however, that advisory opinions can be instruments of **preventive diplomacy**, supplying legal vocabulary that structures negotiations and restrains unilateralism.

Taken together, their force lies in *interpretive authority*, subsequent UN action, and states' desire to be seen as law-abiding, rather than in formal enforceability.

We discuss the role of the same with Mr Vahid Rezadoost, who has explored this issue in greater detail in his paper “The Legal Effect of ICJ Advisory Opinions”. We start with the synthesis of his paper and then share the interview with him to gain that perspective as well.

Synthesis of Paper: The Legal Effect of ICJ Advisory Opinions

Mr Rezadoost’s article examines one of the most debated issues in international law: whether the advisory opinions of the International Court of Justice (ICJ) carry legal effect despite their formally non-binding character. The author argues that although such opinions lack *de jure* binding force, they can nonetheless be *authoritatively definitive* statements of what international law *is*—a claim rooted in the Court’s unique position as the United Nations’ “principal judicial organ.”

Rezadoost begins by recalling Article 59 of the ICJ Statute, which limits the binding force of judgments to the parties in contentious cases. Advisory opinions, rendered at the request of UN organs, thus have no direct legal compulsion. Yet, as the article notes, the ICJ’s authority derives from its judicial status and the epistemic weight of its pronouncements. The author contrasts the traditional “persuasive only” view of advisory opinions with a richer conception of their *authority*—one that depends on who the “author” is rather than on formal consent.

The turning point of the paper is the 2021 ITLOS *Mauritius / Maldives* judgment. There, the Special Chamber treated the ICJ’s *Chagos* Advisory Opinion (2019) as an *authoritative pronouncement* resolving the sovereignty dispute between Mauritius and the UK. Without the UK’s consent, ITLOS nevertheless deemed Britain’s claim to the Chagos Archipelago a “mere assertion.” For Rezadoost, this marked a major doctrinal innovation: the Special Chamber effectively recognized the ICJ’s advisory determination as a “judicial given” capable of producing *opposable legal effects*.

To explain this, the author develops a dual framework of *de jure* and *de facto* authority. *De jure* authority creates binding obligations; *de facto* authority reflects socially recognized weight and interpretive influence.

Although ICJ advisory opinions lack *de jure* force, their *de facto* authority—grounded in the Court’s credibility—often makes them functionally equivalent to law. Using Roman distinctions between *potestas* (commanding power) and *auctoritas* (influence grounded in respect), Rezadoost argues that advisory opinions occupy the middle ground: “more than a piece of advice and less than a command.”

The paper then reconstructs how the Special Chamber’s narrative fused the *Chagos* Opinion and the subsequent UN General Assembly Resolution 73/295 into a single authoritative legal position—thus bypassing the usual *Monetary Gold* principle, which bars adjudication affecting an absent third state. By treating the ICJ’s findings as “givens,” ITLOS could proceed without UK consent. Rezadoost situates this within broader debates about “judicial givens,” *res interpretata*, and the shifting line between law and non-law.

Finally, the article explores implications for *legal policy*. States may increasingly use advisory-opinion requests as instruments of “lawfare,” converting political disputes into judicial narratives. The ICJ itself might respond with greater caution, wary of advisory opinions being re-used as binding law. Yet Rezadoost concludes that advisory opinions, by virtue of their epistemic and institutional authority, already serve as definitive articulations of international law—cementing the ICJ’s identity as a true “World Court.”

Interview with Vahid Rezadoost, Associate Legal Officer at the International Court of Justice
Author of Unveiling the ‘Author’ of International Law: The ‘Legal Effect’ of ICJ Advisory Opinions (2024)

Q: Over the years, how has the ICJ worked to build — and safeguard — its reputation as a legitimate and trusted forum for the peaceful resolution of disputes?

A: The ICJ has cultivated a reputation grounded not in enforcement but in prestige, procedural integrity, and moral authority. No state wants to be seen disregarding a judgment from the ICJ. The moral weight of the Court is significant — appearing before it places a state in the spotlight of international law and global scrutiny. Over time, the Court’s commitment to deliberation, neutrality, and legal reasoning has helped preserve its legitimacy. Its judgments are rarely ignored — not because states are forced to comply, but because they are expected to, and because noncompliance carries reputational costs on the international stage.

Q: Have there been moments in history when that legitimacy was seriously tested — and what did the Court learn from them?

A: Yes — one of the most pivotal moments came in the South West Africa cases during the 1960s. Ethiopia and Liberia brought a case against South Africa, arguing it had violated its obligations under the League of Nations mandate over what is now Namibia. In a deeply controversial decision, the ICJ ruled in favor of South Africa. The judgment drew sharp criticism, especially from newly independent states, and raised concerns about Western political influence on what was supposed to be a neutral judicial body. In the aftermath, the Court experienced a long stretch of inactivity — for nearly a decade, no new contentious cases were filed. The Court had to work to gain its legitimacy once again.

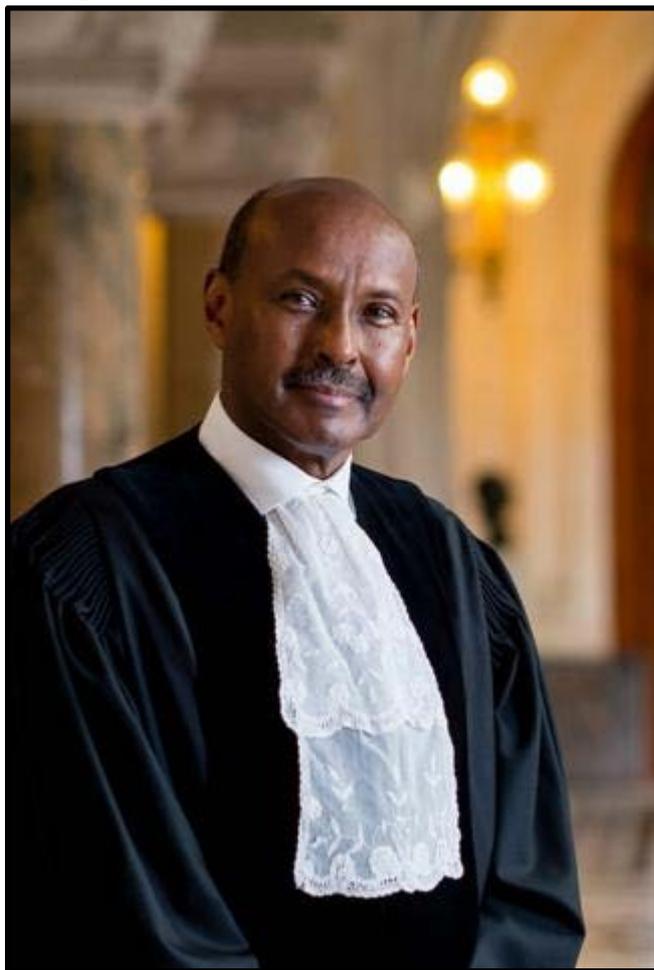
Q: In the absence of binding enforcement mechanisms, do the Court’s judgments still carry weight on the international stage?

A: This is one of the most fascinating aspects of the ICJ’s authority. While it’s true that the Court’s advisory opinions are formally non-binding, they often carry substantial legal and normative weight — rivaling that of binding rulings in practice. A powerful example is the Mauritius v. Maldives maritime boundary case before the International Tribunal for the Law of the Sea (ITLOS). In its judgment, the Tribunal relied on the ICJ’s advisory opinion on the Chagos Archipelago, treating it not as a suggestion, but as an authoritative pronouncement of international law. The ICJ’s legitimacy, then, lies not in its ability to compel, but in its ability to define — to shape how international law is understood, interpreted, and applied. It’s also important to acknowledge that no court, anywhere in the world, enforces its own rulings with an army or police force. Even domestic courts depend on broader systems of trust and institutional cooperation. In that sense, the ICJ’s model is consistent with how judicial power works globally.



Depiction of Hugo Grotius (Father of International Law) in the ICJ Library

Judges of the World Court: In Their Own Words



Interview with Judge Abdulqawi Yusuf

Judge Yusuf, who served as President of the ICJ from 2018 to 2021, is a distinguished scholar and diplomat from Somalia. He is widely respected for advancing legal pluralism and increasing the representativeness of international legal institutions. His career includes pivotal roles at UNESCO, UNIDO, and the African Union, and his scholarship often reflects on the legitimacy and inclusivity of international law.

Interview with Judge Abdulqawi Ahmed Yusuf, *Former President of the International Court of Justice*

Q: What inspired your path to international law and eventually the ICJ?

Judge Yusuf: I never had—nor did I ever plan—a direct path to international law or to the ICJ. I saw an opportunity at a certain point in life, and I seized it because I thought it was interesting and intellectually rewarding. In many ways, my career unfolded organically, shaped by curiosity and by the doors that opened along the way.

Q: How do you approach the profound responsibility and moral weight of decisions that impact nations and generations?

Judge Yusuf: Quietly, calmly, and thoughtfully. I try to remain focused on the law, on the facts of the case, and on identifying solutions that may come closest to justice. The weight of such decisions is undeniable, but it must be carried with composure and a clear sense of duty.

Q: In what ways has your perspective on global justice evolved over your years at the Court?

Judge Yusuf: I have always been a partisan of progressive and socially grounded global justice. My time at the Court has only deepened that conviction: justice must serve humanity, not only States.

Q: What principles or qualities do you believe give the ICJ its legitimacy as the world's highest court?

Judge Yusuf: Objectivity, independence, and integrity—alongside the overwhelming trust of UN Member States. The Court's legitimacy derives from its reputation for fairness, its rigorous adherence to the law, and the confidence of the international community in its impartiality.

Q: Given that the ICJ relies on state cooperation rather than enforcement powers, what strategies have proven most effective in encouraging compliance with its rulings?

Judge Yusuf: Compliance is based on the consent of States, which is always given to the Court in advance. States never appear before the Court without first accepting its jurisdiction, and this is precisely why its judgments are almost always respected and complied with. In those rare cases of non-compliance, it is the UN Security Council that bears responsibility for ensuring enforcement.

Q: What advice would you offer young professionals aspiring to work in international justice?

Judge Yusuf: Only one advice: study very seriously and in an in-depth manner international law, and work hard to attain the highest scholarly understanding of its rules and principles, as well as its history and development. International justice requires more than passion—it demands mastery.

Q: What emerging global challenge do you believe deserves greater attention from international legal scholars?

Judge Yusuf: State security is, at its core, about the security of human beings and the protection of nationals in their territory. It is therefore not inherently incompatible with human rights. The ultimate balance between the two depends on the particular circumstances of each case, and this is an area that deserves far more nuanced legal scholarship.

Q: Has any particular case significantly challenged or shaped your judicial philosophy?

Judge Yusuf: One fundamental principle stands out: a State cannot use its domestic laws to breach its international obligations. That principle has been reaffirmed in many contexts, and it continues to guide my judicial reasoning.

Q: What institutional improvements could strengthen the ICJ's effectiveness and impact in the 21st century?

Judge Yusuf: The ICJ's strength lies in the fact that international law is the common language of the members of the international community. It allows States, despite their differences, to engage with one another within a shared legal framework. Of course, there are divergences and nuances in how States interpret or advance their positions, but when these disputes escalate, they must be resolved through judicial or other peaceful means. To strengthen the Court's effectiveness, we must reinforce confidence in this system, encourage greater recourse to judicial settlement, and ensure that international law continues to evolve as a tool for dialogue, stability, and peace.

Q: To what extent do cultural or legal traditions shape judicial reasoning at the ICJ?

Judge Yusuf: Different legal traditions—such as civil law and common law—do influence judicial reasoning, and ideological or cultural approaches may also have an effect on individual judges. Yet, international law always serves as the shared language that bridges those differences. It allows the international judiciary to reach common understandings even on the most legally controversial matters.

Judges of the World Court: In Their Own Words



Interview with Judge Dalveer Bhandari

Judge Bhandari has served on the ICJ since 2012 and is one of India's most prominent jurists. His legal career spans decades — from the Supreme Court of India to international arbitration panels. At the ICJ, he is known for emphasizing equitable access to justice, global cooperation, and the evolving role of international law in balancing state sovereignty with universal principles.

A conversation with Judge Dalveer Bhandari following the ICJ's July 2025 Climate Advisory Opinion.

Q: The Court has just delivered a unanimous Advisory Opinion on climate change. It's a monumental moment. From your perspective on the bench, what is the core significance of what the Court has done today?

Judge Bhandari: The core significance is that the Court has authoritatively placed the climate crisis within a firm legal framework. We have clarified that states have specific obligations, derived from multiple sources of international law, to address this threat. The unanimity of the decision sends a powerful message about the urgency and legitimacy of this issue.

Q: The Opinion details the obligations states have. One key principle discussed is the "polluter pays" principle. How did the Court integrate this established environmental concept into its reasoning?

Judge Bhandari: The Court acknowledged the principle, recognizing its presence in the broader landscape of international environmental law. In my view, while the Opinion could have more explicitly embedded it as a central pillar of accountability, it implicitly affirms its logic. By discussing state responsibility for environmental harm, the Opinion lays the groundwork for the principle's application.

Q: A major part of the ruling focuses on human rights. The Opinion states that a clean environment is "inherent" in the enjoyment of other rights. What is the practical effect of framing it this way?

Judge Bhandari: This framing powerfully links climate change to immediate, legally protected human rights like the right to life and health. The practical effect is that a state's failure in its climate obligations can now be more directly challenged as a human rights violation. This connection is a crucial step forward in the legal protection of individuals and communities from environmental harm.

Q: The Court was also asked about the legal consequences for states that breach these obligations. Can you elaborate on what the Opinion says about remedies like cessation and restitution?

Judge Bhandari: The Court outlines the general legal consequences under the law of state responsibility, such as the duty to cease wrongful acts and provide restitution. The Opinion provides a crucial legal foundation. Building on that, one could interpret "cessation" in this context to mean discontinuing specific practices that drive emissions. Similarly, "restitution" could be understood to encompass active measures like rehabilitating ecosystems.

Q: Finally, on compensation – given the vast and complex nature of climate damages, what guidance does the Opinion offer?

Judge Bhandari: The Opinion establishes the principle of full reparation for injury. In cases where precise damage is difficult to ascertain, the Court's jurisprudence allows for compensation to be determined equitably. This is a vital point for vulnerable states. The legal framework opens the door for the international community to consider practical tools such as claims commissions or a special fund to manage compensation and support equitable solutions.

Case Analysis: Understanding the Chagos Archipelago Advisory Opinion (2019)

Research conducted with mentorship from Mr. Vahid Rezadoost, Associate Legal Officer at the International Court of Justice.

The Chagos Archipelago Advisory Opinion, formally known as Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, was delivered by the International Court of Justice (ICJ) on 25th February 2019. It was a response to a request from the UN General Assembly (UNGA).

Historical Background

The Chagos Archipelago was a dependency of Mauritius since the 1814 Treaty of Paris, when France ceded it to the United Kingdom. In 1965, prior to Mauritian independence in 1968, the United Kingdom detached the Chagos Archipelago from Mauritius and established it as the British Indian Ocean Territory (BIOT). The United Kingdom leased the largest island, Diego Garcia, to the United States for a military base. The indigenous Chagossian population was forcibly removed and relocated to Mauritius and the Seychelles. Mauritius consistently challenged the United Kingdom's sovereignty over the archipelago and sought its return to complete its decolonization.

The UNGA's Request and the ICJ's Core Findings

In 2017, the UNGA referred a request to the ICJ seeking an advisory opinion on the decolonisation process of the Chagos Archipelago. The request posed two questions:

- (i) whether the process of decolonisation of Mauritius had been lawfully completed*
- (ii) what the legal consequences arising from the continued administration by the UK of The Chagos Archipelago are.*

The ICJ found that the process of decolonization of Mauritius was **not lawfully completed** when it attained independence in 1968 because the detachment of the Chagos Archipelago was not based on the free and genuine expression of the will of the people.

The Court concluded that the UK's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the **international responsibility of that State**. The Court held that the UK has an obligation to bring to an **end its administration of the Chagos Archipelago** as rapidly as possible.

Crucially, although the ICJ refrained from making an explicit pronouncement on sovereignty, its legal reasoning was firmly grounded in the premise that the Chagos Archipelago forms an integral part of Mauritius's territory. As Judge Donoghue observed in her dissenting opinion, even though the Court avoided using the term "sovereignty," its conclusions effectively imply that the United Kingdom is under an obligation to relinquish sovereignty to Mauritius.

The Legal Effect: The Mauritius/Maldives Judgment

The ICJ's non-binding advisory opinion was treated by another international tribunal, the International Tribunal for the Law of the Sea (ITLOS) Special Chamber, in the Mauritius/Maldives case (2021). Mauritius and the Maldives sought to delimit their maritime boundary. The Maldives objected, arguing that a sovereignty dispute over the Chagos Archipelago between Mauritius and the UK still existed. Since the UK was not a party to the case, adjudicating the matter would violate the Monetary Gold principle, which prevents international courts from ruling on the rights of an absent third state without its consent.

The Special Chamber's Innovative Ruling: The ITLOS Special Chamber dismissed the Maldives' objection. It did so by attributing definitive legal effect to the ICJ's Advisory Opinion. It distinguished between the "binding character" and the "authoritative nature" of an ICJ advisory opinion.

It stated that while advisory opinions are not binding, "judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the United Nations." Consequently, it found that the determinations in the Chagos Advisory Opinion do have legal effect.

The Chamber concluded that the UK's sovereignty claim had been reduced to a "mere assertion" and that the dispute had effectively "disappeared" due to the authoritative pronouncement of the ICJ.

Final Insights:

This ITLOS ruling underscores the profound influence of the ICJ's words, in advisory opinions as well: even when its opinions are not legally binding, they shape international legal understanding and practice with near-judicial force. The Mauritius/Maldives judgment demonstrates that the ICJ's interpretations can, in effect, redefine the legal landscape—transforming advisory guidance into a source of concrete legal authority within the international system.

Unveiling the ‘author’ of international law — The ‘legal effect’ of ICJ’s advisory opinions

Vahid Rezadoost *

ABSTRACT

While it is universally accepted that the advisory opinions rendered by the International Court of Justice (ICJ or Court) are not binding as such, scholarly discourse continues to ponder upon whether these opinions can confer any definitive legal effects. The scope of the legal implications stemming from such opinions is considerably broad, encompassing statements of solely evidentiary significance, determinations demanding due consideration, through to authoritative ‘givens’ that are beyond contestation. Examples elucidating these diverse interpretations permeate both academic literature and international practice with the most recent example being the International Tribunal for the Law of the Sea (ITLOS) Special Chamber’s Mauritius/Maldives Judgment, wherein the findings presented in the Chagos Advisory Opinion were treated as authoritative pronouncements of international law with opposable legal effects. This article posits a departure from the mainstream standpoint, contending that while the ICJ’s advisory determinations are non-binding, they are capable of being authoritatively definitive in declaring what international law is in a specific context. The article also suggests that the authority vested in a judicial pronouncement, determining the content of international law, may go beyond its bindingness contingent upon the stature of the authoring entity.

INTRODUCTION

In a consent-based system of international adjudication, the determinations rendered by international courts and tribunals generally possess binding effects solely upon the disputing parties involved in the proceedings. Thus, pursuant to Article 59 of the ICJ’s Statute: ‘The decision of the Court has no binding force except between the parties and in respect of that particular case.’ This provision, however, governs only the contentious decisions of the Court. By contrast, advisory opinions of the ICJ, as such, have no binding force. Based on these fundamental understandings, one could assume that a dispute cannot be deemed resolved in a binding manner through an advisory opinion.¹ The Court itself alluded to this,

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¹ cf H Thirlway, ‘Advisory Opinions’ in *Max Planck Encyclopedias of International Law* (Bruylant 2006) para 2: ‘An advisory opinion is not ... strictly speaking, a method of settlement of international disputes.’

for instance, in *Legality of the Threat or Use of Nuclear Weapons*, where it is stated: 'The purpose of the advisory function is not to settle—at least directly—disputes between States, but to offer legal advice to the organs and institutions requesting the opinion.'²

Within the realm of international courts and tribunals, an advisory opinion is defined as an answer provided by an international court or tribunal in response to a request made by an authorized body, aimed at obtaining clarification on a legal matter.³ Specifically, in the context of advisory opinions rendered by the ICJ, certain international organs possess the power to seize the ICJ and solicit an interpretation pertaining to an issue of international law that arises in the course of the organ's activities. By doing so, the Court is empowered to shed light on the judicial dimensions of the activities undertaken by such organs.⁴ As the 'principal judicial organ of the United Nations',⁵ the ICJ thus contributes to the advancement and application of international law at an institutional level.

The debatable impact of advisory opinions stems from their inherently non-binding character. According to a literal interpretation, if a pronouncement is classified as 'advisory', it implies that the recipient possesses the prerogative to deviate from it under all circumstances. Nonetheless, it is essential to acknowledge that the persuasive influence of advice, in addition to the inherent power of the advice itself, hinges on the authority of the advisor—the author.⁶ Indeed, as theorized elsewhere,⁷ 'relative normativity' in international law is inescapable, serving as a straightforward reflection of reality. Consequently, advisory determinations rendered by various international courts and tribunals may carry divergent degrees of authority contingent upon their respective authors. In this regard, the author assumes a dual role, not only as the originator of the pronouncement but also as the epistemic supporter thereof, addressing the target audience.

The unquestionable authoritative status of pronouncements issued by the ICJ, whether in the context of contentious cases or advisory opinions, requires no extensive elaboration. Nevertheless, the ramifications of this authority in each case remain a subject of debate. From a purely formalistic standpoint, the mere fact that advisory determinations lack binding force is sufficient to argue that they carry no definitive legal consequences. However, a more sophisticated view may lead to the conclusion that although the advisory opinions are not binding *per se*, they may indeed influence the international legal system as subsidiary means for the determination of rules of international law. In this respect and certain legal effects of the advisory opinions, one may note, *inter alia*, the binding nature of the 'contents' of advisory opinions when the Court interprets constitutive texts internal to the UN,⁸ the role of advisory opinions in developing international law,⁹ and their potential impact on the doctrine of *res judicata*.¹⁰

² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, 236.

³ J Salmon (ed), *Dictionnaire de droit International Public* (Bruylant 2001) 116.

⁴ R Kolb, *International Court of Justice* (Hart Publishing 2013) 1020.

⁵ art 1 of the ICJ Statute and art 92 of the UN Charter.

⁶ F Zarbiyev, 'Saying Credibly What the Law Is: On Marks of Authority in International Law' (2018) 9 *Journal of International Dispute Settlement* 291, 297: 'If authority is "the right to speak credibly," who has such a right is a matter of social recognition' (Footnote omitted).

⁷ U Fastenrath, 'Relative Normativity in International Law' (1993) 4 *European Journal of International Law* 305, 306.

⁸ See eg, *Conditions of admission of a State to Membership in the United Nations*, ICJ Reports 1947/48, 57ff and *Competence of the General Assembly for the Admission of a State to the United Nations*, ICJ Reports 1950, 4ff. See Kolb (n 5) 1098.

⁹ For instance, in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court held that reservations to treaties were not prohibited, even if there was no express provision on reservations in the Convention, and that States could attach reservations to the treaty if they were compatible with its object and purpose. Thus, the Court declared that the *object and purpose test* was the 'new law'. See A Bianchi and F Zarbiyev, *Demystifying Treaty Interpretation* (CUP 2024) 122.

¹⁰ P d'Argent, 'Article 65' in Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2019) 1783, 1809–10.

In addition, as highlighted by the International Law Commission's projects on the identification of customary international law and subsidiary means for the determination of rules of international law, 'judicial decisions' under Article 38(1)(d) of the ICJ Statute, as subsidiary means for the determination of rules of law, include 'advisory opinions'.¹¹ Accordingly, the ILC considers parts of the *Chagos Advisory Opinion* as 'de facto precedent' in the *Mauritius/Maldives Judgment*.¹² Similarly, the *Institut de Droit International*, in its Resolution concerning Precedents and Case Law (Jurisprudence) in Interstate Litigation and Advisory Proceedings, suggested that advisory opinions can set precedent in international law.¹³

Moreover, the Court's role within the international legal system has given rise to the notion that the determinations of the 'World Court' cannot be easily dismissed. Even during the era of the PCIJ, when the Court did not serve as the principal judicial organ of the League of Nations, the advisory determinations were considered not as 'an ordinary advice, similar to that which the Council could request from a committee of jurists, for example, and which it would then be free to set aside at will in order to substitute a different opinion on the same point'.¹⁴ The reason for this idea was that the advice emanated from a judicial finding issued by the highest international court.¹⁵ In accordance with this perspective, the authority of advisory opinions did not conflict with their non-executory and non-binding nature.¹⁶

Drawing from the same conceptual framework, the advisory determinations of the ICJ have similarly been characterized as being 'necessarily authoritative' and providing a 'definitive legal solution'.¹⁷ Consequently, it has been asserted that following the issuance of an advisory opinion by the ICJ, the UNGA, for instance, is precluded from expressing agreement or disagreement with the Court's *legal* standpoint. Instead, as a political entity, the United Nations General Assembly (UNGA) may make decisions based on considerations of a political or practical nature that appear most suitable.¹⁸ Nonetheless, it remains unchanged that, according to this perspective, the advisory determinations rendered by the Court hold authoritative status as an embodiment of international law. In this context, the Court's pronouncements 'tend to be equated with *international law itself*',¹⁹ regardless of whether they possess binding force. Indeed, de Visscher's analysis of the authority of the PCIJ's advisory determinations remains relevant, *mutatis mutandis*, to the ICJ, when he stated that 'if the Council bases its recommendation to the Parties (Article 15(4) [of the Covenant of the League of Nations]) on legal criteria and does so within the context of the questions referred to the Court, it can, in fact, do nothing other than apply the conclusions of the advisory opinion given'.²⁰ This is because '[e]ven deprived of binding force and, as such, not enforceable through Article 94, para. 2 of the Charter, advisory opinions are juridical legal acts attributable to the UN and they embody the official legal position of the organization on the

¹¹ Draft conclusions on identification of customary international law (2018), A/73/10, 150, para 5; First Report on Subsidiary Means for the Determination of Rules of International Law, A/CN.4/760, 2023, 93–94, para 280.

¹² *ibid* 93, para 279.

¹³ Precedents and Case Law (Jurisprudence) in Interstate Litigation and Advisory Proceedings, Session d'Angers, 2023, para 1.

¹⁴ Ch de Visscher, 'Les avis consultatifs de la Cour permanente de Justice internationale' in 26 *Collected Courses of the Hague Academy of International Law* (Brill 1929) 27.

¹⁵ *ibid*.

¹⁶ cf G Scelle, 'Règles générales du droit de la paix', in 46 *Collected Courses of the Hague Academy of International Law* (Brill 1933) 581.

¹⁷ I Kerno, 'L'Organisation des United Nations et la Cour internationale de Justice' in 78 *Collected Courses of the Hague Academy of International Law* (Brill 1951) 529–30.

¹⁸ M Dubisson, *La Cour internationale de Justice* (LGDJ (Librairie générale de droit et de jurisprudence) 1964) 329 (stating that it seems the most correct from a legal point of view). cf G Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale. Étude des notions fondamentales de la procédure de la Cour internationale et des moyens de leur mise en œuvre* (1967) 83.

¹⁹ Zarbiyev (n 6) 300.

²⁰ de Visscher (n 14).

legal questions answered by the Court'.²¹ In other words, an advisory opinion 'is as authoritative a statement of the law as a judgment rendered in contentious proceedings'.²² Notwithstanding the aforementioned aspects, until recently, the practical effect of the Court's advisory findings had been primarily limited to their persuasive value. In relevant cases,²³ various international bodies, particularly international courts and tribunals, including the Court, took them seriously and duly considered them. However, a notable development in favour of bolstering the authority of ICJ advisory opinions emerged, not from the Court itself, but from a chamber operating within the domain of the law of the sea. Thus, the ITLOS Special Chamber ('Special Chamber') has taken a notable stride towards establishing more tangible consequences stemming from the Court's advisory function. This development was evident in *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, where the Special Chamber, while acknowledging the existence of a dispute between Mauritius and the UK concerning sovereignty over the Chagos Archipelago, determined that the dispute no longer persisted due to the authoritative pronouncement of the ICJ in the *Chagos* Advisory Opinion.²⁴ This 'creative approach'²⁵ allowed the Special Chamber to categorize the UK's claim as a 'mere assertion',²⁶ even though the UK had never consented to having this dispute resolved by the ICJ or any other courts or tribunal and continued to assert its sovereignty over the Chagos Archipelago.

What is truly groundbreaking in this particular case is that the Special Chamber did not concur with the *Chagos* Advisory Opinion; it simply concluded that the dispute had *already* disappeared.²⁷ Indeed, according to the perspective of the Special Chamber, the Advisory Opinion functioned as an authority that transcended the specific content it contained, aligning with Raz's notion of content-independent authority.²⁸ In this context, the authoritative pronouncement must be adhered to not solely due to the perceived soundness or agreeability of its content, but primarily because it emanates from a distinct 'author' with recognized authority.²⁹ It should be noted that the *Mauritius/Maldives* Judgment also references the 'rigor' and 'scrutiny' of the ICJ's Advisory Opinion.³⁰ However, it does not elaborate on these qualitative aspects, implying that, in the view of the Special Chamber, the legal effect of the Advisory Opinion derived primarily from the fact that it was issued by the Court, irrespective of its content.

The legal consequences of the *Chagos* Advisory Opinion in the *Mauritius/Maldives* Judgment, while admired by some,³¹ have also been met with criticism.³² The core of these

²¹ d'Argent (n 10) 1783, 1808.

²² H Lauterpacht, *Decisions of Municipal Courts as a Source of International Law* (H Milford 1929) 185.

²³ More specifically, two advisory opinions received more attention: *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975) 12 ('*Western Sahara*') and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136 ('*Wall*').

²⁴ *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Preliminary Objections, International Tribunal for the Law of the Sea (ITLOS), Case No 28, 28 January 2021, 61–62 ('*Mauritius/Maldives* Judgment').

²⁵ J-M Thouvenin, 'The Jurisdiction of the Court' in C Espósito, K Parlett and C Harris (eds), *The Cambridge Companion to the International Court of Justice* (CUP 2023) 123, 146.

²⁶ *Mauritius/Maldives* Judgment 71.

²⁷ cf S Thin, 'The Curious Case of the "Legal Effect" of ICJ Advisory Opinions in the Mauritius/Maldives Maritime Boundary Dispute' (*EJIL:Talk!*, 5 February 2021).

²⁸ J Raz, *The Morality of Freedom* (OUP 1986) 35–37.

²⁹ Zarbiyev (n 6) 294.

³⁰ *Mauritius/Maldives* Judgment 61.

³¹ For eg, Wolfrum considered the finding of the *Mauritius/Maldives* Judgment regarding the *Chagos* Advisory Opinion a 'positive development'. R Wolfrum, 'Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law' in *Collected Courses of the Hague Academy of International Law* (Brill 2021) 451.

³² See, for instance, Thin (n 27); FS Eichberger, 'The Legal Effect of ICJ Advisory Opinions Redefined? The Mauritius/Maldives Delimitation Case—Judgment on Preliminary Objections' (2021) 22 *Melbourne Journal of International Law* 383, 394. M Lando, 'Advisory Opinions of the International Court of Justice in Respect of Disputes' (2023) 61 *Columbia Journal of Transnational Law* 67, 127. cf J McNally, 'The Metamorphosis of Soft Law in Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) (Preliminary Objection)' (2023) 28 *Australian*

critical evaluations revolves around the alleged *binding legal effect* ascribed by the Special Chamber to the Advisory Opinion. However, it appears that in order to comprehensively analyse the Judgment, one must embrace the notion of authority that extends beyond bindingness,³³ particularly concerning the Court's determinations, in a manner that allows other courts and tribunals to 'tak[e] their cue from the ICJ'.³⁴ In any case, the Special Chamber's innovative approach to the legal effect of advisory determinations rendered by the ICJ can be regarded as a noteworthy departure from the traditional understanding of advisory opinions or as further evidence of the tendency to equate ICJ findings—even those lacking binding force—with what the international law is.

Within this contextual framework, this article commences by providing an elucidation of the factual and legal backdrop concerning the Chagos Archipelago dispute, alongside an examination of the pertinent issues presented before various international courts and tribunals. Subsequently, cautioning against the conflation of 'bindingness' and 'authoritativeness', and drawing upon the conceptual framework of *de jure* and *de facto* authority in international law, this article will explore the implications of this distinction in interpreting the pronouncement of the Special Chamber. Following this, an analysis will be conducted of the Special Chamber's narrative regarding the *Chagos* Advisory Opinion, with particular emphasis on its 'inference' of Mauritius' sovereignty over the Chagos Archipelago based on the Advisory Opinion. Subsequently, the repercussions of the Special Chamber's approach, characterized by considering the *Chagos* Advisory Opinion as a 'given', on the *Monetary Gold* principle will be assessed. Lastly, employing the concept of 'legal policy' in international law as a foundation, this article will scrutinize the policy considerations of both States and the ICJ when confronted with the Special Chamber's approach to the authority of ICJ advisory opinions.

THE 'LAST COLONY' BEFORE INTERNATIONAL COURTS AND TRIBUNALS

The Republic of Mauritius is a group of islands in the southwestern Indian Ocean. The main island of Mauritius is located about 2200 km southwest of the Chagos Archipelago, which consists of several islands and atolls, with Diego Garcia being the largest island in the southeast.³⁵ As per the Treaty of Paris of 1814, France officially relinquished Mauritius along with all its dependencies, including the Chagos Archipelago, to the UK.³⁶

From the time of the cession by France until 1965, the Chagos Archipelago remained under the administration of the UK as a dependency of Mauritius. However, in 1965, an agreement was reached between the UK and the colony of Mauritius, leading to the detachment of the Chagos Archipelago from Mauritius. The archipelago was subsequently declared as part of the British Indian Ocean Territory. Mauritius eventually gained its independence in 1968.³⁷

In 1966, the UK entered into an agreement with the USA to lease Diego Garcia for the purpose of establishing a military base. Consequently, the Chagos Islanders, primarily of Mauritian and Seychellois descent, were forcefully removed from their homes and relocated to Mauritius and the Seychelles. In this respect, the Chagos Islanders brought a claim against

International Law Journal 195, 203: 'By "daisy chaining" pieces of soft law such as Resolution 73/295 and the *Chagos Advisory Opinion*, the Special Chamber has given legal effect to otherwise non-binding instruments.'

³³ Zarbiyev (n 6) 292.

³⁴ Ph Sands, *The Last Colony: A Tale of Exile, Justice and Britain's Colonial Legacy* (Weidenfeld & Nicolson; Eerste editie 2022) 150.

³⁵ *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award, UNCLOS Arbitral Tribunal, Case No 2011-03, 18 March 2015, 13 ('MPA Award').

³⁶ *ibid* 14.

³⁷ *ibid* 19–21; *Mauritius/Maldives* Judgment 20.

the UK before the European Court of Human Rights (ECtHR) in 2012. However, their claim was ultimately unsuccessful due to a lack of standing.³⁸

In various international fora, however, Mauritius achieved a series of victories in asserting its sovereignty over the Chagos Archipelago or at least condemning the UK. These achievements varied in prominence, culminating in significant affirmations of its sovereign rights. These decisions can be listed in ascending order, each building upon the previous one: the MPA Award (2015) by an arbitral tribunal, the *Chagos Advisory Opinion* (2019) by the ICJ, and the *Mauritius/Maldives Judgments* (2021 and 2023) by the Special Chamber.

In 2010, Mauritius initiated legal proceedings against the UK under the UN Convention on the Law of the Sea (UNCLOS)³⁹ before an Annex VII Tribunal ('Tribunal'). The claim asserted that the establishment of a Marine Protected Area (MPA) around the Chagos Archipelago violated UNCLOS. Mauritius contended that the UK did not qualify as the 'coastal state' under UNCLOS, thereby rendering the establishment of the MPA unlawful. Although the Tribunal declined to exercise jurisdiction over the questions of the coastal state and sovereignty, it concluded that the UK's creation of the MPA breached Articles 2(3), 56(2), and 194(4) of UNCLOS.⁴⁰

In 2017, the UNGA referred a request to the ICJ seeking an advisory opinion on the decolonization process of the Chagos Archipelago. The request posed two questions: (i) whether the process of decolonization of Mauritius had been lawfully completed and (ii) what the legal consequences arising from the continued administration by the UK of the Chagos Archipelago are. In its Advisory Opinion, the ICJ did not address the sovereignty matter expressly but affirmed that 'the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State'.⁴¹ Furthermore, the ICJ held that 'the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible'.⁴²

Following the *Chagos Advisory Opinion*, the UNGA through its Resolution 73/295 'welcome[d]' and 'affirme[d]' the Advisory Opinion and, *inter alia*, demanded that the UK 'withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months from the adoption of the present resolution, thereby enabling Mauritius to complete the decolonization of *its territory* as rapidly as possible'.⁴³

In 2019, following the *Chagos Advisory Opinion* and Resolution 73/295, Mauritius initiated arbitral proceedings against the Maldives under Annex VII of the UNCLOS. After consultations facilitated by the President of the ITLOS involving representatives from Mauritius and the Maldives, a special agreement was reached between the two States in order to submit the dispute concerning the delimitation of their maritime boundary in the Indian Ocean to a special chamber of the ITLOS, as provided for under Article 15(2) of the ITLOS Statute. The Maldives raised several objections to the jurisdiction of the Special Chamber, *inter alia*, on the grounds that there was a sovereignty dispute over the Chagos Archipelago between Mauritius and the UK, which, according to the Maldives, the Special Chamber could not resolve. However, in its *Judgment on Preliminary Objections*, the Special Chamber stated that due to the 'authoritative'

³⁸ *Chagos Islanders v UK*, Decision, ECtHR, 35622/04, 11 December 2012.

³⁹ UNCLOS, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

⁴⁰ MPA Award 90 and 215.

⁴¹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports (2019) 95, 138 ('*Chagos Advisory Opinion*').

⁴² *Chagos Advisory Opinion*, 139–140 and 140.

⁴³ *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, UNGA Resolution 73/295, 73rd session, 83rd plenary meeting, UN Doc A/RES/73/295, 24 May 2019, paras 1–3 (Emphasis added).

determinations made in the *Chagos Advisory Opinion*, the sovereignty claim of the UK over the Archipelago had become a ‘mere assertion’.⁴⁴ Consequently, the Special Chamber affirmed that Mauritius now holds uncontested sovereignty over the Chagos Archipelago.⁴⁵ Furthermore, the Special Chamber emphasized that the expiration of the time-limit specified in the UNGA’s Resolution 73/295, without the UK complying with the demand for withdrawal, ‘further strengthen[ed]’ the Special Chamber’s determination regarding the UK’s claim to sovereignty over the Chagos Archipelago.⁴⁶ Following the jurisdictional phase, the Special Chamber proceeded to issue its *Judgment on the Merits* in 2023, which involved the delimitation of specific maritime areas between the two States.⁴⁷

Each of these decisions and instruments played a crucial role in solidifying Mauritius’ sovereignty claim. But the critical step in disposal of the sovereignty dispute, in the eyes of the Special Chamber, was the *Chagos Advisory Opinion* and its ‘legal effect’ in the proceedings between Mauritius and the Maldives. In doing so, the Special Chamber considered the advisory findings of the ICJ as ‘authoritative’ determinations of international law.

TWO CONCEPTS OF AUTHORITY IN THE ICJ ADVISORY OPINIONS

Interpretation breathes life into (international) law, as it acts as the voice that the law itself lacks. Interpreting the law involves making claims regarding its meaning. Thus, interpretation plays a vital role in shaping international law and is integral to the ongoing quest for what the international law is. In this context, the fundamental inquiries of what the law signifies and who holds the power to decide form the theoretical battlegrounds where the concept of authority takes form.⁴⁸ At its core, this notion revolves around determining whose interpretations hold significance and to what extent they carry weight.

Despite the historical tendency to use ‘authoritative interpretation’ and ‘authentic interpretation’ interchangeably—implying that those with the power to create laws also possess the authority to interpret them⁴⁹—there is now a clearer understanding of what authoritative interpretation entails. It refers to the legally bestowed competence to determine a precise meaning of the law.⁵⁰ At the same time, a very common, but sometimes misleading, idea about the authority of international judicial decisions is that what makes them authoritative is their binding nature. Therefore, if there is no binding nature, according to this ‘unarticulated assumption’,⁵¹ there is no authority at all, and the term ‘authoritative non-binding decision’ is an oxymoron. However, as Zarbiyev observes, ‘[a]uthority is not coextensive with formal juridical competence; it is a socially sanctioned *deference entitlement*’,⁵² especially when it comes to the authority to ascertain the content of international law pertaining to a specific point. This discussion holds significant importance in the examination of the legal ramifications arising from advisory opinions rendered by the ICJ.

⁴⁴ *Mauritius/Maldives Judgment* 71.

⁴⁵ *ibid* 72–73.

⁴⁶ *ibid* 68.

⁴⁷ *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, Merits, ITLOS, Case No 28, 28 April 2023.

⁴⁸ cf Gleider Hernández, ‘Interpretative Authority and the International Judiciary’ in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (OUP 2015) 166, 166; Ingo Venzke, ‘Authoritative Interpretation’ in *Max Planck Encyclopedia of International Procedural Law* (Oxford Public International Law 2018).

⁴⁹ Schwarzenberger, for instance, spoke of the authoritative interpretation as ‘the interpretation of the treaty by the parties themselves’. G Schwarzenberger, *International Law, vol I: International Law as Applied by International Courts and Tribunals* (Stevens and Sons Ltd 1957) 516 and 531.

⁵⁰ Venzke (n 48) para 2.

⁵¹ Zarbiyev (n 6) 292.

⁵² *ibid* 313 (Emphasis added). cf Ingo Venzke, ‘Between Power and Persuasion: On International Institutions’ Authority in Making Law’ (2013) 4 *Transnational Legal Theory* 354, 354.

According to a minimalist understanding, the ICJ advisory opinions are nothing more than advice,⁵³ while another account tries to empower them to such an extent that in effect, one cannot disregard the immediate legal effects of the judicial determinations made therein in other proceedings.⁵⁴ It is true that an advisory opinion has come to be viewed as an 'authoritative pronouncement on the law',⁵⁵ but one must also bear in mind that there are at least two concepts of authority—*de jure* and *de facto*—when it comes to the advisory opinions.

de jure authority as having binding legal effects

The concept of authoritative interpretation, when narrowly defined, is often equated with *de jure* authority, which refers to the legally granted competence of an entity or individual to establish a binding interpretation of the law.⁵⁶ Thus, Article 1131 of the North American Free Trade Agreement (NAFTA)⁵⁷ provides that 'an interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section'. Under this provision, the Free Trade Commission adopted a binding interpretation which concerned the fair and equitable treatment standard of investment protection as well as issues of confidentiality and public access to documents.⁵⁸ This notion was confirmed by the ILC's Draft conclusions and commentaries on subsequent agreements and subsequent practice in relation to the interpretation of treaties.⁵⁹

Shifting the discussion of authoritative interpretation to international courts and tribunals has led to some misconceptions. While some authors have portrayed international judicial decisions as authoritative interpretations in their own right,⁶⁰ in reality, there are significant distinctions between authoritative international judicial decisions and authoritative interpretations. Unlike authoritative interpretations, which derive their binding authority from the competence of a specific interpreter, the authority of international judicial decisions comes from the law being interpreted. In addition, an international judicial decision is legally binding only between the involved parties ('*autorité de la chose jugée*'), whereas a *de jure* authoritative interpretation 'binds all within the respective regime'.⁶¹

Within the framework of the UN, the UN Charter⁶² does not explicitly outline any provisions regarding its authoritative interpretation. Consequently, the UN organs and member States possess a degree of discretion in their choices of interpretation.⁶³ Despite being recognized as the 'principal judicial organ of the United Nations', the proposal to grant the ICJ the power to issue authoritative interpretations of the UN Charter was rejected during the drafting conference in San Francisco in 1944.⁶⁴ Nevertheless, the *de jure/de facto* dichotomy

⁵³ RY Jennings, 'Advisory Opinions of the International Court of Justice' in UNESCO (ed), *Boutros Boutros-Ghali Amicorum Discipulorumque Liber: Paix, Développement, Démocratie* (Bruylant 1998) 531, 532: 'The advice is simply advice and is not a binding decision of the Court.'

⁵⁴ *Abi-Saab* (n 19) 75: '*L'avis consultatif n'est pas un simple conseil, une consultation*;' Manley Hudson, 'The Effect of Advisory Opinions of the World Court' (1948) 42 *American Journal of International Law* 630, 630: '[ICJ advisory opinions are] [n]ot legal advice in the ordinary sense, not views expressed by counsel for the guidance of clients, but pronouncements as to the law applicable in given situations formulated "after deliberation by the Court."'

⁵⁵ R Jennings, R Higgins and P Tomka, 'General Introduction' in A Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2019) 3, 13.

⁵⁶ A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 515.

⁵⁷ NAFTA, 32 ILM 289, 1993 (entered into force 1 January 1994).

⁵⁸ NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 2001.

⁵⁹ Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, 2018, A/73/10, 25, paras 6 and 7.

⁶⁰ Schwarzenberger (n 50) 531.

⁶¹ *Venzke* (n 48) para 7.

⁶² *UN Charter*, 26 June 1945, 1 UNTS XVI.

⁶³ *Venzke* (n 48) para 33.

⁶⁴ Pollux, 'Interpretation of the Charter' (1946) 23 *British Yearbook of International Law* 54, 58. The only exception to this rule may be the power of the ICJ to rule on its own jurisdiction under art 36(6) of the ICJ Statute, which provides that 'in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court'.

can still be employed to enhance our comprehension of the legal effect of various decisions made by the ICJ.

The ICJ on several occasions declared that its advisory opinions do not have the *de jure* and binding authority. If fact, the advisory nature of the opinions is always contrasted by the ICJ to binding decisions. Thus, in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the ICJ stated that its opinion ‘is only of an advisory character: as such, it has no binding force’.⁶⁵ Similarly, according to the ICJ in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, ‘[t]hese opinions are advisory, not binding’.⁶⁶

In addition to the commonly recognized treaty practice exceptions that can render advisory opinions binding under certain arrangements,⁶⁷ the only exception to the normal advisory opinions’ non-bindingness is, according to some scholars as discussed earlier, the bindingness of the advisory opinion on the requesting organ to the extent that the organ is obligated or deliberately choose to apply *international law* rather than exercising non-legal discretion.

Based on the above, it can be concluded that ICJ advisory opinions, in and of themselves, do not possess binding, *de jure* authority. Consequently, these decisions by the ICJ do not impose obligations on a State, the violation of which could lead to the State’s responsibility, nor can such violations be brought before the United Nations Security Council (UNSC) under Article 94 of the UN Charter to seek recommendations or measures to enforce the decision.⁶⁸

In the *Mauritius/Maldives* Judgment, the Special Chamber expressly acknowledged this common knowledge to declare that an ICJ’s ‘advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment’.⁶⁹ This statement in the clearest way possible explains the status of ICJ advisory opinions in terms of *de jure* authority.

De Facto authority as *autoritas*

In addition to *de jure* authority, there exists a broader perspective on interpretative authority that focuses not solely on an actor’s formal competence but rather on the influence and importance that various interpretations hold in struggles over what the law means.⁷⁰ These interpretations possess *de facto* authority, indicating their ‘weight’ and significance in shaping the understanding of international law.

In this sense, resolutions of UNGA and UNSC, decisions of international courts and tribunals, and even pronouncements of quasi-judicial bodies such as General Comments made by the UN Human Rights Committee,⁷¹ while not strictly considered authoritative

⁶⁵ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory opinion, 30 March 1950 (first phase), ICJ Reports (1950) 221, 71.

⁶⁶ *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, 15 December 1989, ICJ Reports (1989) 177, 188.

⁶⁷ Voir G Bacot, ‘Réflexions sur les clauses qui rendent obligatoires les avis consultatifs de la Cour Permanente de Justice internationale et de la Cour internationale de Justice’ (1980) 84 *Revue Générale de Droit International Public* 1027, 1027; R Ago, ‘“Binding” Advisory Opinions of the International Court of Justice’ (1991) 85 *American Journal of International Law* 439, 439.

⁶⁸ Ch Tams, ‘Article 94’ in A Zimmermann and C Tams (eds), *The Statute of the International Court of Justice: A Commentary* (OUP 2019) 234, 236; d’Argent (n 10) 1783, 1808: ‘Advisory opinions are non-binding and do not constitute ‘decision[s]’ within the meaning of Article 94, para. 1 of the Charter and Article 59 of the Statute.’

⁶⁹ *Mauritius/Maldives* Judgment, 61.

⁷⁰ Venzke (n 48) para 8.

⁷¹ For instance, in *Ahmadou Sadio Diallo, Republic of Guinea v Democratic Republic of the Congo* (‘*Diallo*’), the ICJ declared that the Human Rights Committee ‘has built up a considerable body of interpretative case law’, and that the ICJ ‘should ascribe great weight to the interpretation adopted by this independent body that was established’. *Diallo*, Judgment, 30 November 2010, ICJ Reports (2010) 639, 664. Also, in the context of advisory proceedings, in *Wall*, the ICJ attributed the same authority to the interpretations of the Human Rights Committee. *Wall*, 179–181.

interpretations, often carry considerable weight in the interpretive process for determining what the law is in the international domain. The significance of these instruments, however, varies depending on the level of authority granted to their authors by the epistemic communities of international law—'[t]he *ensemble* of actors involved in the dynamic processes whereby our knowledge of international law—that is, the understanding of what the international law is and how it works—is formed and shaped'.⁷² Thus, for example, in its Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ famously and for the first time held that when a treaty itself is silent on reservations, reservations are allowed provided they are compatible with the treaty's 'object and purpose'.⁷³ The Court's finding on this point was subsequently codified in Article 19 (c) of the 1969 Vienna Convention on the Law of Treaties (VCLT).⁷⁴ This *res interpretata* effect of the ICJ's decisions is well recognized.

However, it should be noted that *de facto* authoritative determinations do not possess the power to compel the relevant subjects to comply with them, even if they are accorded 'great weight' by the relevant actor. This was evident, for example, in *Diallo*, where the ICJ acknowledged the importance of assigning 'great weight' to the interpretation of the International Covenant on Civil and Political Rights adopted by the Human Rights Committee. Nonetheless, the ICJ explicitly noted that it was 'in no way obliged ... to model its own interpretation of the Covenant on that of the Committee'.⁷⁵ More importantly, in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the ICJ rejected an interpretation made by the Committee on the Elimination of Racial Discrimination regarding discrimination based on nationality.⁷⁶ These pronouncements highlight that, in view of the Court, different actors are not obligated to automatically adhere to the *de facto* authoritative determinations within or without the UN system.

In the context of ICJ decisions, the distinction between *de jure* and *de facto* authority can be illustrated through the analysis of ICJ judgments in contentious cases. As per Article 59 of the ICJ Statute, the judgments are only legally binding 'between the parties and in respect of that particular case'. Therefore, the determinations found in the operative part of a judgment possess *de jure* authority and binding legal effect for the parties involved (*res judicata*). However, beyond this specific binding discourse, the interpretations and lines of reasoning contained within the judgment have broader implications, as they contribute to the establishment and advancement of normative expectations within the realm of international legal proceedings. Therefore, it would not be an overstatement to assert that 'international courts and tribunals have the capacity of establishing reference points that others can hardly escape'.⁷⁷ In this context, it is not the *de jure* authority of the judgment, but rather its *de facto* authority, which operates outside the realm of legal bindingness, that shapes the jurisprudential role of the ICJ and generates influential arguments about what the law is in international relations. These arguments, in conjunction with the *de facto* authority of the ICJ, possess the potential to establish what can be referred to as 'judicial givens', from which it becomes exceedingly difficult for others, including international courts and tribunals, to deviate. It should be noted that while *res judicata* holds binding force solely between the parties

⁷² A Bianchi, 'Epistemic Communities' in J d'Aspremont and S Singh (eds), *Concepts for International Law—Contributions to Disciplinary Thought* (Elgar Publishing 2019) 251, 256.

⁷³ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports (1951) 15, 22.

⁷⁴ VCLT, 23 May 1969, 1155 UNTS 331.

⁷⁵ *Diallo* 664.

⁷⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)*, Judgment, 4 February 2021, ICJ Reports (2021) 71, 104.

⁷⁷ Venzke (n 48) para 76.

involved in the proceedings and with regard to the specific case at hand, ‘judicial givens’ extend beyond the parties and the case. However, these ‘judicial givens’ are not binding—in the sense of creating direct enforceable rights and obligations for the subjects of the legal system. At any rate, the authority and significance attributed to the ‘judicial givens’ naturally vary depending on their origin and the circumstances surrounding each individual case.

However, as opposed to *de facto* authoritative determinations of the political organs, judicial *de facto* determinations by international courts and tribunals come increasingly close, ‘almost indistinguishable, to the *de jure* authoritative interpretations’.⁷⁸ Thus, international judicial bodies establish a jurisprudence of their own for the sake of ‘consistency, certainty and predictability’⁷⁹ and ‘legitimate expectations’⁸⁰ of the parties. Such jurisprudential determinations gradually become revered and the departure from them generates negative concerns. As an example, in the context of the WTO system, when a panel deviated from its previous precedent, the Appellate Body expressed profound concern regarding the Panel’s decision to depart from ‘well-established Appellate Body jurisprudence’,⁸¹ which has provided clarity on the interpretation of the same legal issues.

Due to the blurred distinction between *de jure* and *de facto* authority in the realm of judicial determinations, while ICJ opinions are advisory and thus not *per se* binding, they are often treated as such.⁸² In fact, there is no doubt that advisory opinions are products of a judicial activity performed by the ICJ—a pure judicial organ. It follows that there is no substantial difference between the ICJ’s contentious and advisory determinations in terms of the application of international law, and ‘resolving’ the issues before the Court in an authoritative manner,⁸³ particularly when distinguishing between a ‘determination’ and the ‘decision’ *stricto sensu* (*dispositif*) of the ICJ.⁸⁴ And since ICJ determinations stem from the principal judicial organ of the UN, they somehow elevate to *the* authoritative interpretation of international law, even if they are found in an advisory opinion.

Borrowing the Roman law concepts of the *auctoritas* of the Senate and the *potestas* of the magistrates,⁸⁵ ICJ advisory determinations are similar to the *auctoritas*—a construct which is ‘more than a piece of advice and less than a command—a piece of advice that cannot easily be disregarded’.⁸⁶ This ‘deferential attitude’ towards the determinations by the ICJ can be explained against the backdrop of ‘tradition’, which ‘plays a major role in determining the attitudes of a social group towards “authority.”’⁸⁷ In this sense, authority is a means in order to redistribute argumentative forces.

In the *Mauritius/Maldives* Judgment, because of these complicated layers of authoritative determinations, the Special Chamber seems to oversimplify the matter when it declared:

⁷⁸ *ibid* para 67.

⁷⁹ *Prosecutor v Aleksovski*, Appeal Judgment, ICTY Appeals Chamber, 24 March 2000, Case No IT-95-14/1-A, para 97.

⁸⁰ *Japan—Taxes on Alcoholic Beverages*, Appellate Body Report, WT/DSS/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996, para 14.

⁸¹ *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, Appellate Body Report, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008, para 162.

⁸² Venzke (n 48) para 37.

⁸³ *Abi-Saab* (n 19) 76: ‘L’*énoncé de la Cour qu’est l’avis ne diffère pas fondamentalement, quant à la valeur intrinsèque de son contenu, d’un arrêt émis par cette même Cour, en ce sens que l’un et l’autre représentent un énoncé judiciaire faisant autorité et tranchant les questions soumises à la Cour*’ (Emphasis added). This has been referred to as ‘ruling through advice.’ See J Contesse, ‘The Rule of Advice in International Human Rights Law’ (2021) 115 *American Journal of International Law* 367, 371.

⁸⁴ G Abi-Saab, ‘De révolution de la Cour internationale: réflexions sur quelques tendances récentes’ (1992) 96 *Revue Générale de Droit International Public* 273, 273, now in M Kohen and MJ Langer (eds), *Le développement du droit international. Réflexions d’un demi-siècle* (PUF (Presses Universitaires de France) 2013) 243, 255. cf d’Argent (n 10) 1809: ‘[F]or the UN, issues made clear in an advisory opinion are substantially the same as matters having been ‘decided’ by the Court ... The legal issues clarified by the Court are, from a positivist perspective, “the law.”’

⁸⁵ Th Mommsen, *Römisches Staatsrecht* (CUP 2010) [1888] vol 3, 1034.

⁸⁶ Venzke (n 48) 369.

⁸⁷ A Bianchi, ‘The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle’ in A Bianchi, D Peat and M Windsor (eds), *Interpretation in International Law* (OUP 2015) 34, 41.

203. ... [J]udicial determinations made in advisory opinions carry no less *weight* and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of international law.

...

205. ... [Therefore,] The Special Chamber considers that ... determinations [by the ICJ in the *Chagos* Advisory Opinion] do have *legal effect*. (Emphasis added)

As previously elucidated, the notion of 'weight' pertains to the *de facto* authority of a determination, whereas the 'legal effect' of a determination, *prima facie*, invokes thoughts of *de jure* authority, which corresponds to a binding determination.⁸⁸ Yet, the Special Chamber explicitly rejects the notion of deriving binding pronouncements from the ICJ Advisory Opinion.⁸⁹ Whether intentionally or not, the drafting of the Judgment of the Special Chamber exists in a state of ambiguity, straddling *de jure* and *de facto* authority.

In other words, it is true that when it comes to 'weight' and '*de facto* authority' of judicial determinations,⁹⁰ 'international courts and tribunals have the capacity of establishing reference points that others can *hardly* escape',⁹¹ but that does not mean that there is no longer a dispute, and that a claim—UK's claim in the instant case—becomes a 'mere assertion', as declared by the Special Chamber.⁹²

One, however, can recognize the predicament that the Special Chamber was confronted with in this case. On the one hand, all evidence clearly indicated Mauritius' sovereignty over the Chagos Archipelago. Thus, following the issuance of the *Chagos* Advisory Opinion and the subsequent Resolution 73/295 by the UNGA, the UN published an updated world map that explicitly depicted the Chagos Archipelago as part of Mauritius.⁹³ Given these circumstances, the Special Chamber's decision casting doubts on the sovereignty of Mauritius over the Chagos Archipelago would have essentially been a stillborn pronouncement.

On the other hand, the Special Chamber could not simply treat the advisory findings of the ICJ as ordinary *de facto* determinations to be merely *taken into account*. If it had done so, it would have implied that the Special Chamber could not proceed with the case, as the territorial sovereignty dispute cannot be categorized as a dispute 'concerning the interpretation or application' of the UNCLOS under its Article 288(1). As will be explained, this constituted the second jurisdictional objection raised by the Maldives and accepting it would have meant disregarding the *fait accompli* outlined earlier.

SPECIAL CHAMBER'S NARRATIVE OF THE CHAGOS ADVISORY OPINION

International courts and tribunals not only establish facts and apply legal rules when deciding cases, but also strive to construct a narrative that persuades the audience of the coherence between their decisions and the law that already is in existence. The storytelling

⁸⁸ Terms such as 'the *de facto* binding "legal effect" of the advisory opinion' (Eichberger (n 32) 400) are products of the amalgamation of these two distinct concepts of authority.

⁸⁹ *Mauritius/Maldives* Judgment 61–62.

⁹⁰ It is worth mentioning that in the *Mauritius/Maldives* Judgment, the Special Chamber used both 'weight' and 'authority' to justify the legal effect of the *Chagos* Advisory Opinion. As Venzke mentions, '[a] common vocabulary to describe the influence of interpretations ... is that of 'weight'. Since the interpreters enjoy authority, their interpretations have weight.' See Venzke (n 48) para 71.

⁹¹ *ibid* para 8 (Emphasis added).

⁹² *Mauritius/Maldives* Judgment 71.

⁹³ UN Geospatial, 'Map of the World' UN <<https://www.un.org/geospatial/content/map-world>> accessed 01 January 2024.

function of judicial bodies is aimed at being seamless and organic, ensuring that the decisions align with the most authoritative statements of law. The narrative serves as the framework within which the story is encapsulated or the backdrop against which the story unfolds.⁹⁴ In this context, every story is inherently told from a particular perspective.⁹⁵ This fundamental observation directs our attention to the narrative provided by the ITLOS Special Chamber, detailing the various phases of the Chagos saga, since it is crucial to consider this narrative when evaluating the Special Chamber endorsed authority of the advisory opinions issued by the ICJ.

The Special Chamber fortified the *Chagos* Advisory Opinion by incorporating and consolidating the non-binding Advisory Opinion and Resolution 73/295. This amalgamation resulted in the establishment of a legally opposable pronouncement, affirming that sovereignty over the Chagos Archipelago resides exclusively with Mauritius.⁹⁶

In one view, the *MPA* Award, which sidestepped the issue, played a crucial role in shaping the outcome, arguably on par with Resolution 73/295. Had the *MPA* Award determined that the UK maintained its claim over the archipelago, according to this view, it is possible that the UNGA would not have sought the Advisory Opinion initially.⁹⁷ Hence, by mitigating the impact of the *MPA* Award, the Special Chamber created an additional opportunity to underscore and maximize the significance of the Advisory Opinion and the subsequent UNGA Resolution 73/295.

In addition, the Special Chamber upheld the endorsement of the UNGA in expanding the scope of the ICJ Advisory Opinion by transforming what were essentially two interconnected yet separate bilateral disputes into a multilateral framework. It bears noting that the original dispute concerned sovereignty between Mauritius v. UK on one hand, and Mauritius v. Maldives on the other. The UNGA demonstrated attention in framing the questions at hand as relating to decolonization on a broader scale, rather than rendering a legal determination in a dispute between two conflicting UN Member States. Thus, through the involvement of the UNGA and the ICJ, Mauritius successfully rallied the support of all UN member States in the decolonization efforts concerning the Chagos Archipelago.⁹⁸ In this context, some may argue that while Mauritius initially presented its case to the UNGA and ICJ, emphasizing a judicial determination on *decolonization* rather than sovereignty, it appeared inconsistent in the subsequent *Mauritius/Maldives* case by asserting that the *sovereignty* issue had already been settled by the Advisory Opinion. On the other hand, Mauritius' strategy in the *Mauritius/Maldives* case can be seen as a logical extension of the ICJ's underlying determination in the *Chagos* Advisory Opinion proceedings, which was, in some ways, foreseeable.⁹⁹

In any event, taking into account the issue of decolonization and the dispute in a broader context, the ICJ refrained from making a direct statement on the matter of sovereignty and instead explicitly observed that the UK failed to lawfully complete decolonization. Due to

⁹⁴ A Bianchi, *International Law Theories* (OUP 2016) 292.

⁹⁵ P Brooks, 'Narrative Transactions-Does the Law Need a Narratology?' (2006) 18 *Yale Journal of Law & the Humanities* 1, 28.

⁹⁶ Calling the resulting product—regarding the sovereignty over the Chagos Archipelago—a 'binding rule,' as some did, may not be conceptually accurate. See CD Gaver, 'Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Case No. 28. Judgment. Special Chamber of the International Tribunal for the Law of the Sea, January 28, 2021' (2021) 115 *American Journal of International Law* 519, 524. At any rate, what the ITLOS Chamber achieved was deducing opposable *legal effects* from the Advisory Opinion.

⁹⁷ Gaver *ibid* 524.

⁹⁸ *Mauritius/Maldives* Judgment 67; Gaver (n 96) 524–25.

⁹⁹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Mauritius 1 March 2018: The fact that Mauritius has for decades sought to bring the colonisation of the Chagos Archipelago to an end 'does not make the dispute a "bilateral" one: although plainly any ongoing unlawful colonisation will give rise to a sovereignty dispute between the State whose territory is colonised and the administering power, this does not remove the matter from the advisory jurisdiction of the Court.'

the ICJ's approach in handling the case, some casted certain doubts as to whether the Court acknowledged Mauritius' acquisition of sovereignty over Chagos upon its independence.¹⁰⁰ Nevertheless, while the ICJ refrained from explicitly ruling on the sovereignty of the Chagos Archipelago, its determinations were grounded in the notion that sovereignty belongs to Mauritius. And as some opined,¹⁰¹ as a result of the ICJ's Advisory Opinion, the UK's claim of sovereignty over the Chagos Archipelago appears to be built on precarious grounds.

It has been suggested that in rendering the *Chagos* Advisory Opinion, the ICJ carefully avoided pronouncing directly on the sovereignty issue and therefore the Special Chamber must not have inferred from the Advisory Opinion determinations that were not explicitly decided upon therein.¹⁰² In addition, according to this view, the Special Chamber's treatment of the Advisory Opinion is at odds with its treatment of the *MPA* Award: When interpreting the *MPA* Award, the Special Chamber gave preference to the express statement of the tribunal that it would not exercise jurisdiction over the sovereignty issue, over making inferences from its application of UNCLOS Articles that generally only apply to coastal states.¹⁰³ The relevant statements of the Special Chamber are as follows:

[T]he fact that the Arbitral Tribunal found that it had jurisdiction to consider the fourth submission of Mauritius and concluded that the United Kingdom had breached its obligations under the Convention does not mean that the Arbitral Tribunal recognized the United Kingdom as the coastal State with respect to the Chagos Archipelago, as the Maldives argues. On the contrary, in addressing the first submission of Mauritius, the Arbitral Tribunal made it clear that it lacked jurisdiction to determine who has sovereignty over the Chagos Archipelago.¹⁰⁴

However, this analysis fails to fully recognize the fundamental distinction between a necessary basis for a determination and a possible basis for a determination over which a tribunal explicitly declares no jurisdiction. With regard to the *Chagos* Advisory Opinion, the Special Chamber indicated its agreement with Mauritius' assertion that 'decolonization always implicates sovereignty'.¹⁰⁵ It also acknowledged Mauritius' argument that references to Mauritius' 'territorial integrity ... including the Chagos Archipelago' and the 'decolonization of its territory' in the *Chagos* Advisory Opinion¹⁰⁶ imply that the ICJ already considered that 'Mauritius alone is sovereign over all of its territory, including the Chagos Archipelago'.¹⁰⁷ Conversely, concerning the *MPA* Award, the Special Chamber was not of the opinion that the finding of a breach by the UK under the UNCLOS necessarily implies that the UK is a coastal State in relation to the Chagos Archipelago. Instead, according to the Special Chamber, the arbitral tribunal was able to reach such a determination against the UK because the UK's declaration of the *MPA* was deemed incompatible with its obligations under the Convention, 'without prejudice to the question of sovereignty over the Chagos

¹⁰⁰ Eichberger (n 32) 394.

¹⁰¹ Ch Monaghan, 'Reflections on the UK's Assertion of Sovereignty over the Chagos Archipelago in the Wake of the Chagos Advisory Opinion' in T Burri and J Trinidad (eds), *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion* (CUP 2021) 144, 157–58.

¹⁰² Eichberger (n 32) 394.

¹⁰³ *ibid* 12–13.

¹⁰⁴ *Mauritius/Maldives* Judgment 42.

¹⁰⁵ *ibid* 48. To use the words in the Dissenting opinion of Judge Donoghue attached to the *Chagos* Advisory Opinion, '[t]he questions of decolonization and sovereignty cannot be separated.' *ibid* 265.

¹⁰⁶ *Chagos Advisory Opinion* 137–39 (Emphasis added).

¹⁰⁷ *Mauritius/Maldives* Judgment 49. After mentioning the determinations by the ICJ in the *Chagos* Advisory Opinion, the Special Chamber went on to declare that 'this can be interpreted as suggesting Mauritius' sovereignty over the Chagos Archipelago.' *ibid* 54.

Archipelago'.¹⁰⁸ In other words, while 'decolonization always implicates sovereignty', the Special Chamber did not consider that the establishment of a breach under UNCLOS automatically entails being a coastal state. If there were no other plausible explanation for the finding of a breach by the UK under the Convention, aside from considering the UK as a coastal state, then the Special Chamber had no choice but to 'infer'¹⁰⁹ this determination from the MPA Award, just as it did in the case of the *Chagos* Advisory Opinion.

Moreover, to some,¹¹⁰ it may seem contradictory that the ICJ deliberately refrained from making a direct pronouncement on the issue of sovereignty and explicitly stated that it would not do so, yet it addressed the sovereignty question in passing.¹¹¹ The answer to this problem can be found in the preceding explanation regarding the essential basis of decolonization. In fact,

[t]he Court notes that the questions put to it by the General Assembly relate to the decolonization of Mauritius. The General Assembly has not sought the Court's opinion to resolve a territorial dispute between two States. Rather, the purpose of the request is for the General Assembly to receive the Court's assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius.¹¹²

However, if one concurs with the Special Chamber's perspective that the only legally justifiable approach to support the pronouncements made in the *Chagos* Advisory Opinion is to recognize Mauritius as the sovereign over the Chagos Archipelago, then the only valid interpretation of the Advisory Opinion would be that the ICJ first determined Mauritius' sovereignty as an essential part of its judicial function in order to decide upon the legal question on decolonization. This approach to the judicial function is not unprecedented in ICJ jurisprudence. In *Preah Vihear*, where the ICJ was called upon to decide solely on the issue of sovereignty over the Temple of Preah Vihear region, the Court emphasized that '[t]o decide this question of territorial sovereignty, the Court must have regard to the frontier line between the two States in this sector Maps',¹¹³ and that 'the Court can only give a decision as to the sovereignty over the Temple area after having examined what the frontier line is.'¹¹⁴ Hence, it is entirely justified for the ICJ to consider matters that may not fall explicitly within its mandate if resolving these issues is essential for adjudicating the claims brought before it. In fact, what the Special Chamber did in the *Mauritius/Maldives* Judgment was to infer the necessary underlying arguments of the *Chagos* Advisory Opinion—arguments that were not explicitly stated—through which the ICJ could answer the UNGA's legal question on decolonization.

This interpretation of the *Chagos* Advisory Opinion is supported by, *inter alia*, Judge Donoghue's dissenting opinion according to which the requested question placed before the Court 'the lawfulness of past United Kingdom conduct, the present-day consequences of that conduct for the rights of that State and the adjudication of sovereignty over territory'. The Court gives a comprehensive answer ...'.¹¹⁵ As she rightly pointed out, the *Chagos* Advisory Opinion 'avoids references to sovereignty. Yet the Court's pronouncements can only mean

¹⁰⁸ *ibid* 42.

¹⁰⁹ According to the Special Chamber, '[w]hile the process of decolonization has yet to be completed, Mauritius' sovereignty over the Chagos Archipelago can be *inferred* from the ICJ's determinations.' *Mauritius/Maldives* Judgment 73 (Emphasis added).

¹¹⁰ Eichberger (n 22) 394.

¹¹¹ *Chagos* Advisory Opinion 117–18 and 129.

¹¹² *ibid* 117.

¹¹³ *Temple of Preah Vihear (Cambodia v Thailand)*, Judgment, 15 June 1962, ICJ Reports (1962) 6, 14.

¹¹⁴ *ibid* 22.

¹¹⁵ *Chagos* Advisory Opinion, Dissenting opinion of Judge Donoghue, 265.

that it concludes that the United Kingdom has an obligation to relinquish sovereignty to Mauritius,¹¹⁶ and this is why she considered that 'the Advisory Opinion has the effect of circumventing the absence of United Kingdom consent to judicial settlement of the bilateral dispute between the United Kingdom and Mauritius regarding sovereignty over the Chagos Archipelago.'¹¹⁷

IMPLICATIONS FOR THE MONETARY GOLD PRINCIPLE

The principle of consent in international judicial proceedings dictates that an international court or tribunal cannot make decisions concerning a State unless that State willingly accepts the jurisdiction of the adjudicative body. Thus, the ICJ can 'exercise jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned.'¹¹⁸ It follows that if, in a case between two parties accepting the Court's jurisdiction, the interests of a third State would constitute 'the very subject-matter' of the dispute, the ICJ cannot in principle exercise its jurisdiction over the dispute without the consent of that third State. This is commonly referred to as the 'indispensable third party' or 'Monetary Gold' principle, as it was first introduced and applied in the case of *Monetary Gold Removed from Rome in 1943*.¹¹⁹

Chagos ICJ advisory opinion and UK's absence in ITLOS proceedings

During the ITLOS Special Chamber proceedings, the Maldives raised its initial objection, asserting that the Special Chamber lacked jurisdiction due to the UK being an indispensable party to the case. Invoking the *Monetary Gold* principle, the Maldives contended that the UK's rights would be implicated as the Special Chamber would need to address sovereignty over the Chagos Archipelago to delimit the maritime boundary. Moreover, the Maldives' second objection was that the Special Chamber lacked jurisdiction to adjudicate the dispute because deciding on Mauritius' claims necessitated resolving the issue of sovereignty over the Chagos Archipelago, which fell outside the scope of the Special Chamber's mandate. Citing legal precedents such as the *MPA Award*, the *South China Sea Arbitration*,¹²⁰ and *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*,¹²¹ the Maldives argued that disputes involving territorial sovereignty did not fall under the category of disputes 'concerning the interpretation or application of this Convention' as defined in Article 288(1) of the UNCLOS.¹²²

The Special Chamber drew a connection between the two objections, indicating that if an ongoing dispute between the UK and Mauritius regarding the sovereignty of the Chagos Archipelago persisted, accepting jurisdiction to delimit between Mauritius and the Maldives could inadvertently involve incidental adjudication of this sovereignty dispute. Moreover, the UK could only be considered an indispensable party if a sovereignty dispute still existed. Consequently, the Special Chamber's decision on the initial two preliminary objections

¹¹⁶ *ibid.*

¹¹⁷ *ibid* 261 (Emphasis added).

¹¹⁸ *Legality of Use of Force (Serbia and Montenegro v Germany)*, Provisional Measures, Order, 2 June 1999, ICJ Reports (1999) 422, 429.

¹¹⁹ *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment, 15 June 1954, ICJ Reports (1954) 19.

¹²⁰ *South China Sea Arbitration (Philippines v China)*, Award on Jurisdiction and Admissibility, UNCLOS Arbitral Tribunal, Case No 2013-19, 29 October 2015.

¹²¹ *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russia)*, Award Concerning the Preliminary Objections of Russia, UNCLOS Arbitral Tribunal, Case No 2017-06, 21 February 2020 ('*Coastal State Rights*').

¹²² *Mauritius/Maldives* Judgment 53.

hinged upon the crucial determination of the validity of the premise asserting Mauritius' sovereignty over the Chagos Archipelago.

Regarding this crucial determination, as emphasized by the Special Chamber, the 'core premise' of the Maldives' first two objections was the contention that the sovereignty dispute remained unresolved.¹²³ Put simply, had the Special Chamber determined that the sovereignty dispute had already been settled, it would have rendered the two objections raised by the Maldives irrelevant—this was precisely what the Special Chamber determined by rejecting Maldives' claims regarding the previous decisions in relation to the Chagos Archipelago, as described below.

In relation to the *MPA Award*, the Special Chamber acknowledged that the tribunal had indeed recognized the existence of a sovereignty dispute between the UK and Mauritius. However, it dismissed the Maldives' claim that the Award could have a *res judicata* effect on a matter where the tribunal explicitly declined to exercise jurisdiction. Consequently, the Special Chamber reached the conclusion that the *MPA Award* did not provide any definitive determination on the existence of a dispute between the UK and Mauritius regarding the Chagos Archipelago.

In relation to the *Chagos Advisory Opinion*, the Maldives *inter alia* contended that even if the ICJ had issued advice regarding the sovereignty dispute, *quod non*, the Advisory Opinion would not hold any binding authority.¹²⁴ In response, Mauritius countered that while an advisory opinion may not be binding in a strict sense, it does carry legal effects¹²⁵ and presents an 'authoritative statement of the law'¹²⁶ that States are obligated to adhere to. Mauritius went so far as to assert that ICJ advisory determinations are recognized as 'binding and dispositive statements of the law by other international courts and tribunals'.¹²⁷ To support this claim, Mauritius referred to two cases from the Court of Justice of the European Union (CJEU), namely *Council of the European Union v. Front Polisario and Organisation juive européenne*¹²⁸ and *Vignoble Psagot Ltd v. Ministre de l'Economie et des Finances*,¹²⁹ where the CJEU acknowledged the ICJ's determinations in two advisory opinions, respectively, concerning *Western Sahara* and *Wall* as being 'conclusive'.¹³⁰

The Special Chamber found that the UK's assertion of sovereignty over Chagos was contrary to the ICJ's ruling that the UK's ongoing administration of Chagos constituted an unlawful act of continuous nature.¹³¹ Most importantly, the Special Chamber made a distinction between 'binding character' of ICJ advisory opinions on one hand, and their 'authoritative nature'.¹³² Thus, for the Special Chamber, it is necessary

to draw a distinction between the *binding character* and the *authoritative nature* of an advisory opinion of the ICJ. An advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. However, judicial determinations made in advisory opinions carry *no less weight and authority* than those in judgments because they

¹²³ *Mauritius/Maldives Judgment* 32.

¹²⁴ *ibid* 20.

¹²⁵ *ibid* 60.

¹²⁶ *ibid*.

¹²⁷ *ibid*.

¹²⁸ *Council of the European Union v Front Polisario (Case C-104/16P)*, Judgment, CJEU, 21 December 2016, paras 104–06.

¹²⁹ *Organisation juive européenne and Vignoble Psagot Ltd v Ministre de l'Economie et des Finances (Case C-363/18)*, Judgment, CJEU, 12 November 2019, paras 35, 48, 56.

¹³⁰ *Mauritius/Maldives Judgment* 60.

¹³¹ *ibid* 53.

¹³² *ibid* 61.

are made with the same rigour and scrutiny by the "principal judicial organ" of the United Nations with competence in matters of international law.¹³³

In addition, according to the Special Chamber, while the CJEU did not suggest that an ICJ advisory opinion is 'binding', it accorded 'due importance'¹³⁴ to the legal and factual determinations put forth by the ICJ in its advisory opinions. Finally, the Special Chamber considered that the determinations made in the *Chagos* Advisory Opinion have 'legal effect'.¹³⁵

Against the backdrop of these complicated arguments, the Special Chamber fundamentally determined that the legal effect of the *Chagos* Advisory Opinion is that Mauritius has sovereignty over the Chagos Archipelago and UK's claim to this effect is but a 'mere assertion'.¹³⁶ Consequently, rejecting the first two preliminary objections of the Maldives, the Special Chamber suggested that the application of the *Monetary Gold* principle is deemed irrelevant within the context of these proceedings.¹³⁷

In the final analysis of the *Monetary Gold* principle in this case, the Special Chamber found it 'inconceivable that the UK, whose administration over the Chagos Archipelago constitutes a wrongful act of a continuing character and thus must be brought to an end as rapidly as possible, and yet who has failed to do so, can have any legal interests in permanently disposing of maritime zones around the Chagos Archipelago by delimitation',¹³⁸ which was a logical implication of the prior finding of the Special Chamber that the UK lost any sovereign right over the Chagos Archipelago following the ICJ's determinations in the Advisory Opinion.

Judicial 'givens' as an exception to the *Monetary Gold* principle

In the case of *Monetary Gold Removed from Rome in 1943*,¹³⁹ where the *Monetary Gold* principle was introduced and applied for the first time, the ICJ faced a dispute submitted by Italy against the UK and the US. However, before resolving this dispute, the ICJ needed to determine the international responsibility of Albania, which had not consented to participate in the proceedings.¹⁴⁰ As a result, the ICJ declined to exercise jurisdiction to adjudicate the case.¹⁴¹

Nonetheless, the *Monetary Gold* principle does not mean that the ICJ must always decline jurisdiction when a third party is absent. In certain cases, where the issue involving a third party is considered a 'given'¹⁴² through a *res judicata* decision between the same parties¹⁴³

¹³³ *ibid* (Emphasis added).

¹³⁴ *ibid* 62.

¹³⁵ *ibid*.

¹³⁶ *ibid* 71.

¹³⁷ According to the Special Chamber, only 'if a sovereignty dispute over the Chagos Archipelago exists, the United Kingdom may be regarded as an indispensable party and the Monetary Gold principle would prevent the Special Chamber from exercising its jurisdiction.' *ibid* 31.

¹³⁸ *ibid* 73.

¹³⁹ *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgment, 15 June 1954, ICJ Reports (1954) 19.

¹⁴⁰ *ibid* 32: 'In the present case, Albania's interests would be not only affected by a decision, but would form the very subject-matter of the decision.'

¹⁴¹ *ibid*: 'The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely that the Court can only exercise jurisdiction over a State with its consent.'

¹⁴² On 'givens' as exceptions to the *Monetary Gold* principle generally, see T Thienel, *Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs: Die Monetary Gold-Doktrin* (Duncker & Humblot GmbH 2016) 327–36; M Paparinskis, 'Procedural Aspects of Shared Responsibility in the International Court of Justice' (2013) 4 *Journal of International Dispute Settlement* 295, 312.

¹⁴³ Where there is already a *res judicata* decision between State A and State C (third State), and now the proceedings are underway between State A and State B, the ICJ cannot simply take cognizance of the *res judicata* existing between the parties from the first decision in its decision on the subsequent case and draw the necessary conclusions for the new subject-matter of the dispute without making a new determination. Rather, it would have to justify a new *res judicata* in the relationship between the parties to the third-State issue. cf Thienel (n 142) 328.

or a binding instrument,¹⁴⁴ the *Monetary Gold* principle does not apply, allowing the ICJ to exercise jurisdiction.¹⁴⁵ Thus, in the *Mauritius/Maldives* Judgment, if an international court or tribunal in a binding manner had adjudicated upon the sovereignty dispute in favour of Mauritius, the Special Chamber would have unequivocally declared that the *Monetary Gold* principle does not apply due to the absence of the UK, because of the binding and opposable decision of the international adjudicative body. However, prior to the Special Chamber's Judgment, there was no legally binding decision, possessing the *res judicata* effect, regarding the determination of the rightful sovereignty over the Chagos Archipelago.

'Givens' might also apply to an express acknowledgement of the breach by the third State itself. In *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*, the ICJ noted that the US recognized that executing any of the Mexican nationals mentioned in the Court's provisional measures order, without the necessary review and reconsideration as mandated by the *Avena* Judgment, would amount to a violation of its obligations under international law.¹⁴⁶ However, in *Mauritius/Maldives*, the lack of an admitted breach by the UK regarding Mauritius' sovereignty over the Chagos Archipelago meant that this aspect was not a point of discussion.

'Givens' might also come into play—as was the case in *Mauritius/Maldives*—when authoritative instruments determine certain issues relevant to the case. In *East Timor*, for example, the ICJ was seized to determine whether Australia had the right to enter into a continental shelf treaty with Indonesia instead of Portugal, the former administering power for Timor. In this scenario, the Court would have needed to examine the circumstances under which Indonesia, an absent indispensable third party, acquired and maintained control over Timor.¹⁴⁷ In response to this, Portugal argued that the resolutions of the UNGA and the UNSC had already determined the status of East Timor, and therefore, the *Monetary Gold* principle did not apply. In response, the ICJ rejected the reading of Portugal of the resolutions' content and thus declared that 'they cannot be regarded as "givens" which constitute a sufficient basis for determining the dispute between the Parties.'¹⁴⁸ However, the ICJ in principle accepted that in such cases, the *Monetary Gold* principle would not apply, and the determinations can be potentially regarded as 'givens'.¹⁴⁹

In *Mauritius/Maldives*, Mauritius contended that the *Chagos* Advisory Opinion put an end to the sovereignty dispute over the Chagos Archipelago.¹⁵⁰ This time, the alleged 'given' was not based on determinations of the political organs, such as UNGA or UNSC, but a judicial organ—the principal judicial organ of the UN. Contrariwise, the Maldives put forth the perspective that even if the *Chagos* Advisory Opinion contained determinations regarding the sovereignty of Mauritius over the Chagos Archipelago, such advisory opinions by the ICJ are not legally binding on States and cannot override the application of the *Monetary Gold* principle. According to the Maldives, a dispute between Mauritius and the UK still existed

¹⁴⁴ In situations involving binding resolutions, it has been suggested that the ICJ would only consider taking note of resolutions from other UN organs without issuing its own decision and relying on those resolutions if the ICJ itself were bound by them. However, if the ICJ is not bound by these resolutions, it retains the authority to independently determine the content and outcome of the resolutions. See *ibid* 332.

¹⁴⁵ *Coastal State Rights*, paras 174–78.

¹⁴⁶ *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States of America) (Mexico v United States of America)*, Request for the Indication of Provisional Measures, Order, 16 July 2008, ICJ Reports (2008) 311, 330.

¹⁴⁷ *East Timor (Portugal v Australia)*, Judgment, 30 June 1995, ICJ Reports (1995) 90, 102 and 105.

¹⁴⁸ *ibid* 104.

¹⁴⁹ Papaniskis (n 142) 311–12. In *East Timor*, Judge Shahabuddeen opined that 'the Court would be barred by the *Monetary Gold* principle from acting even if Portugal's interpretation of the resolutions were correct' (Separate Opinion of Judge Shahabuddeen 124) (Emphasis in original). However, as Papaniskis mentions, 'the Court did not follow this path, arguably replacing a formula of procedural safeguards with or at least subjecting it to a rule based on the very different premise of clarity of the substantive issue' (Papaniskis (n 142) 316). cf Thienel (n 142) 331.

¹⁵⁰ *Mauritius/Maldives* Judgment 28.

regarding sovereignty.¹⁵¹ At any rate, by ascribing authoritative legal effects to the *Chagos* Advisory Opinion, the Special Chamber dismissed the arguments put forth by the Maldives and deemed the sovereignty dispute between Mauritius and the UK as effectively 'disappeared'—to employ the term used by the ICJ in cases of mootness¹⁵²—due to the Advisory Opinion.¹⁵³

Dealing with UNGA resolutions, the arbitral tribunal in *Coastal State Rights* suggested that 'givens' may serve as an exception to the application of the *Monetary Gold* principle when there is an instrument that provides for *binding* determination.¹⁵⁴ The tribunal did not believe that the resolutions cited by Ukraine could be interpreted as prohibiting the recognition of the existence of a dispute over Crimea's territorial status. The tribunal argued that to suggest otherwise 'would be incompatible with the proper exercise of its *judicial function*'.¹⁵⁵

Essentially, for the arbitral tribunal, the absence of formal binding determinations or prior judicial 'givens' would render it unjustifiable to consider a determination as a 'given'. Therefore, if determinations arise from a *judicial* decision-making process—whether it is explicitly stated in the operative part of a judgment, in *obiter dicta*, or even if it is a necessary determination to reach a final decision in contentious or advisory proceedings—'after deliberation by the Court', considering the determination as a 'given' would not be incompatible with the proper exercise of the tribunal's judicial function. Stated differently, while any authoritative determination has the potential to be regarded as a 'given', those originating from non-judicial bodies may be incongruous with the judicial function performed by a particular international court or tribunal.

In fact, in *Mauritius/Maldives*, the Special Chamber was confronted not only with the 'clear and consistent UN practice'¹⁵⁶ regarding Mauritius sovereignty over the Chagos Archipelago but also suggested that the ICJ advisory determinations were '*judicial givens*'. In this sense, the 'given' was not the result of a political action but an outcome of a judicial decision-making process in which the law and the facts were judicially determined in an authoritative manner. This can be read in line with what the arbitral tribunal in *Larsen v. Hawaiian Kingdom* ('*Larsen Award*') stated, or did *not* state, regarding the *Monetary Gold* principle: '[I]f the legal finding against an absent third party could be taken as a given (for example, by reason of an *authoritative* decision of the UNSC on the point), the principle may well not apply.'¹⁵⁷ Thus, the *Larsen Award*, referring to an *authoritative*—not *binding*—decision, may be regarded as providing support for the conclusions reached by the Special Chamber.¹⁵⁸ Interestingly, the *Larsen* pronouncement appears to contrast with Australia's position in *East Timor*,¹⁵⁹ where one of Australia's counsel was the president of the *Larsen* tribunal.¹⁶⁰

The consideration of the *Chagos* Advisory Opinion in the Special Chamber's treatment might bring about a discussion on the concept of 'givens' as part of 'common knowledge'.

¹⁵¹ *ibid* 43.

¹⁵² *Nuclear Tests (Australia v France)*, Judgment, 20 December 1974, ICJ Reports (1974) 253, 271: '[T]he Court concludes that, the dispute having *disappeared*, the claim advanced by Australia no longer has any object' (Emphasis added).

¹⁵³ *Mauritius/Maldives* Judgment 71.

¹⁵⁴ *Coastal State Rights*, paras 174–78.

¹⁵⁵ *ibid* para 177 (Emphasis added).

¹⁵⁶ M Paporinskis, 'Long Live Monetary Gold *Terms and Conditions Apply*' (2021) 115 AJIL Unbound 154, 158.

¹⁵⁷ *Lance Paul Larsen v The Hawaiian Kingdom*, Arbitral Award, 5 February 2001, para 11.24 (Emphasis added).

¹⁵⁸ cf B McGarry and N Zargarinejad, 'All that Glitters is Not *Monetary Gold*: Indispensable Parties and Public Interest Litigation before International Tribunals' in J Bendel and Y Suedi (eds), *Public Interest Litigation in International Law* (Routledge 2023) 137, 152.

¹⁵⁹ *East Timor (Portugal v Australia)*, CR 1995/8, 18, para 19: 'The very idea of judicial settlement would be meaningless if the Court had to take as gospel truth what one of the parties to a dispute submitted to it as being not just "givens" but "legal givens" even though they emanated from the Security Council' (Emphasis added).

¹⁶⁰ The *Larsen* tribunal consisted of Gavan Griffith, Christopher J Greenwood, and James Crawford (President of the Tribunal).

Thus, in *Oil Platforms*, Judge Simma observed that ‘the role of Iraq in impeding the freedom of commerce and navigation between the US and Iran certainly does not constitute the subject-matter of the dispute. Moreover, any finding by the Court as to Iraq’s behaviour would only rely on common knowledge and there would be no need for additional evidence (ie, proving that, because of the war, Iraq, like Iran, contributed to the deterioration of the shipping conditions in the Gulf). For this reason, the present case would not have fallen within the restrictive ambit of the doctrine of the “indispensable third party.”¹⁶¹ Contrary to certain interpretations,¹⁶² it appears that Judge Simma’s reference to ‘common knowledge’ in *Oil Platforms* pertained to evidentiary matters rather than the exception of ‘givens’ in relation to the *Monetary Gold* principle.

Considering the findings of international adjudicative bodies when the result is not formally binding, definitive judicial determinations for future reference have also been observed in other international tribunals. In *Phillips*, the Iran-US Claims Tribunal (‘IUSCT’ or ‘Tribunal’) was confronted with a unique situation, where after the issuance of only the English version of an award by the IUSCT, the claimant and respondent arrived at a settlement agreement, presented it to the tribunal, and requested that an award on agreed terms be issued on the basis thereof. According to the settlement agreement, *inter alia*, the English version of the Award shall be deemed by the parties as null and void and of no effect whatsoever. Accordingly, the Tribunal rendered an award on agreed terms based on that settlement and declared that ‘[w]hereas the English Version was filed ... [i]n the present unusual circumstances where [the] Award ... has neither been filed in Persian nor notified to the Escrow Agent, the Tribunal is prepared to accept this Settlement Agreement as it fulfils the requirements for the issuance of an Award on Agreed Terms.’¹⁶³ At the IUSCT, one view was that one must take into account Article 34 of the Tribunal Rules, according to which, ‘[i]f, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms ...’ (emphasis added). According to this view, the issuance of the Award on Agreed Terms signified that no final award had yet been issued, since ‘if an award had been issued, the Joint Request of the Parties would not have fulfilled the requirements for issuance of an award on agreed terms.’¹⁶⁴ Contrariwise, the other view opined that although the Tribunal had not completed the ministerial actions required of it with respect to the Award, ie, issuance of the Persian version of the award, and notification to the Escrow Agent for purposes of payment from the Security Account and its proceedings were not completed, ‘[t]hose actions ... cannot change the fact that Award 425-39-2 is the Award that was rendered by the Tribunal following its prolonged deliberations, and it remains the definitive statement of the Tribunal’s conclusions and reasoning with respect to this Case.’¹⁶⁵ There is no doubt that the procedural aspects of the *Phillips* award were not completed, and in this case, ‘[n]otification to the Escrow Agent for payment from the Security Account was delayed, presumably until the filing of the Persian version of the award pursuant to

¹⁶¹ *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, 6 November 2003, ICJ Reports (2003) 161, Separate Opinion of Judge Simma, at 360.

¹⁶² Paparinskis (n 142) 312; Thienel (n 142) 324.

¹⁶³ *Phillips Petroleum Company Iran v The Islamic Republic of Iran, the National Iranian Oil Company*, 29 June 1989, Award No 425-39-2, 21 Iran-US Claims Tribunal Reports 285, 286.

¹⁶⁴ *Phillips Petroleum Company Iran v The Islamic Republic of Iran*, 10 January 1990, Award No 461-39-2, 21 Iran-US Claims Tribunal Reports, Separate Opinion of S K Khalilian 294, 296–297 (Emphasis in original).

¹⁶⁵ *Phillips Petroleum Company Iran v The Islamic Republic of Iran*, 10 January 1990, Award No 461-39-2, 21 Iran-US Claims Tribunal Reports, Separate Statement of G H Aldrich 293, at 294. (Emphasis added).

Article 17 of the Tribunal Rules.¹⁶⁶ Subsequently, in *Petrolane*, the IUSCT cited the *Phillips Award*,¹⁶⁷ and after an objection to the citation, the Tribunal found that '[t]he citation was correct and was to an Award rendered by the Tribunal, albeit one rendered in English only.'¹⁶⁸ In fact, the Tribunal admitted that whereas the *Phillips* award is not formally made in the sense of Article 34 of the Tribunal Rules, the determinations therein constitute definitive judicial determinations¹⁶⁹ to such an extent that they can be incorporated into the tribunal's precedent.

LEGAL POLICY CONSIDERATIONS AND INTERACTIONS OF STATES AND THE ICJ

Nowadays, it is widely acknowledged—particularly following Guy Ladreit de Lacharrière's articulation of the concept of '*politique juridique extérieure*'¹⁷⁰ in international law, embraced mostly by international legal scholarship—that States rely on legal policy considerations¹⁷¹ to guide their actions, interpretations, and applications of international legal rules to specific factual situations.¹⁷² On the other hand, the judicial/legal policy of the ICJ is still underdeveloped in the literature, although there are few writings on the subject.¹⁷³

The extent to which one attributes authority to advisory opinions of the ICJ can influence States' adoption of divergent legal policies aimed at, *inter alia*, lobbying for the request of an advisory opinion to advance their national interests. Moreover, the varying levels of legal effect associated with advisory opinions can shape States' legal policies regarding their degree of participation in advisory proceedings. Simultaneously, the ICJ itself may adopt particular stances regarding the authority and legal effects of its own advisory determinations.

Foreign legal policy of States: Lawfare through ICJ advisory opinions

In addition to the conventional methods of interpreting and applying international law, States, in their international legal engagements, may be influenced by factors including their

¹⁶⁶ Ch Brower, 'The Iran-US Claims Tribunal' in *Collected Courses of the Hague Academy of International Law* (Brill 1990) 215, fn 370; SK Khalilian, 'The Place of Discounted Cash Flow in International Commercial Arbitrations Awards by Iran-US Claims Tribunal' (1991) 8 *Journal of International Arbitration* 31, 31, fn 6.

¹⁶⁷ *Petrolane, Inc and The Islamic Republic of Iran*, 14 August 1991, Award No 518-131-2, 27 Iran-US Claims Tribunal Reports 64, 81.

¹⁶⁸ *Petrolane, Inc and The Islamic Republic of Iran*, 25 November 1991, Decision No DEC 101-131-2, 27 Iran-US Claims Tribunal Reports 264, 264–65 (Emphasis added).

¹⁶⁹ V Rezaadoost, 'Translation: Iran-United States Claims Tribunal (IUSCT)' in *Max Planck Encyclopedia of International Procedural Law* (forthcoming) paras 25–28.

¹⁷⁰ Guy de Lacharrière, *La politique juridique extérieure*, IFRI, Economica, collection enjeux internationaux, Paris (1983).

¹⁷¹ This may include not only plausible international legal arguments but also 'demonstrably rubbish' and 'bullshit' justifications in a precise scholarly sense. See F Zarbiyev, 'Of Bullshit, Lies and "Demonstrably Rubbish" Justifications in International Law' (*Vöelkerrechtsblog*, 18 March 2022) <<https://voelkerrechtsblog.org/of-bullshit-lies-and-demonstrably-rubbish-justifications-in-international-law/>> accessed 01 January 2024.

¹⁷² See eg, A Pellet, 'Le Sage, le Prince et le Savant (A propos de 'La politique juridique extérieure' de Guy de Lacharrière)' (1985) 112 *Journal du Droit International* 407, 407; J Combacau, 'Science du droit et politique dans l'enseignement du droit international. A propos de: G de Lacharrière, "La politique juridique extérieure"' (1984) 88 *Revue Générale de Droit International Public* 980, 980; M Virally, 'Réflexions sur la Politique Juridique des Etats' in G Cottureau (eds), *Guy Ladreit de Lacharrière et la politique juridique extérieure de la France, Mélanges G. de Lacharrière* (Masson 1989) 394, 394–402; R Kolb, *Réflexions sur les Politiques Juridiques Extérieures* (Masson 2015).

¹⁷³ The scholarly discourse on the influence of policy considerations in the jurisprudence of the ICJ is noticeably lacking. As highlighted by Abi-Saab, the concept of 'judicial policy' is not commonly explored in French literature. See G Abi-Saab, 'La métamorphose de la fonction juridictionnelle internationale' in *Unité et diversité du droit international: Ecrits en l'honneur du professeur Pierre-Marie Dupuy* (Brill 2014) 377, 391, fn 16. Limited francophone works addressing this topic include Abi-Saab (n 84) 249–63, and (although in English) PM Dupuy, 'The Judicial Policy of the International Court of Justice' in F Salerno (ed), *Il ruolo del Giudice Internazionale nell'evoluzione del diritto internazionale e comunitario* (1995) 61, 61–82. Additionally, Kolb's monograph on the ICJ offers valuable insights on this concept. See Kolb (n 5) 1142–43. It is worth noting that the scarcity of literature on this subject is even more pronounced in English literature. For one of the exceptions in English that touch upon this topic, see G Schwarzenberger, *International Law as Applied by International Courts and Tribunals, Vol IV: International Judicial Law* (1986) 348–69. For an updated review of the topic, see V Rezaadoost, 'The Legal Policy of the International Court of Justice: A Conceptual Framework' (2024) 28 *Asian Yearbook of International Law* (forthcoming).

own hegemony as well as that of other States.¹⁷⁴ Consequently, States carefully consider whether international judicial dispute resolution mechanisms are more favourable or if they should altogether forsake such means and opt for diplomatic dispute settlement mechanisms.

In practice, the divergences in legal policy considerations among States can be substantial. For example, the USA has demonstrated an increasing inclination to distance itself from international judicial bodies, and international institutions in general. This trend is evident through various actions, such as the withdrawal from the Paris Agreement in 2017,¹⁷⁵ the departure from the UN Human Rights Council in 2018,¹⁷⁶ the withdrawal from the Optional Protocol concerning the Compulsory Settlement of Disputes to the Vienna Convention on Diplomatic Relations in 2018,¹⁷⁷ which concerned the jurisdiction of the ICJ, and the withdrawal from the 1955 Treaty of Amity¹⁷⁸ with Iran in 2018,¹⁷⁹ which occurred amidst two proceedings initiated by Iran before the ICJ under the provisions of the Treaty.¹⁸⁰ Additionally, the USA has been blocking the functioning of the World Trade Organization's Appellate Body for a number of years.¹⁸¹ On the contrary, there are States that actively embrace international adjudication as a fundamental component of their long-term international legal policy, rather than as a temporary choice. A noteworthy example is Nicaragua, which has strategically incorporated the ICJ into its foreign legal policy¹⁸² following the landmark *Nicaragua* Judgment.¹⁸³ Since that decision, Nicaragua has consistently relied on the ICJ to resolve a majority of its disputes with neighbouring countries, demonstrating a commitment to the Court's jurisdiction and its role in international dispute settlement.

In this context, the Special Chamber's *Mauritius/Maldives* Judgment holds immense implications for States concerning their approach towards the ICJ as well as other international courts and tribunals. In fact, the Judgment will not only motivate States to actively seek advisory opinions on contentious matters but also empower them to strategically employ these opinions in subsequent proceedings.¹⁸⁴ Consequently, we may anticipate an upsurge in requests for advisory opinions from the ICJ, encompassing not only general or abstract matters—such as the *Nuclear Weapons* Advisory Opinion—but also increasingly focusing on more concrete issues, potentially including bilateral disputes between States—such as the *Wall* or *Kosovo* Advisory Opinions. In this context, one may reasonably question whether the advisory opinion route is shifting towards becoming a straightforward dispute settlement mechanism, contrary to the idea that the purpose of the advisory function is not

¹⁷⁴ For a fresh review of the legal policy of States before the ICJ, see R Kolb, 'La politique juridique des états face à la Cour internationale de Justice: quelques réflexions générales' in F Couveinhes-Matsumoto (ed), *Les Etats face aux juridictions internationales: une analyse des politiques étatiques relatives aux juges internationaux: actes de la 2e Journée de droit international de l'ENS* (Pedone 2019) 73–84.

¹⁷⁵ *Digest of United States Practice in International Law*, 2017, 547–48.

¹⁷⁶ *Digest of United States Practice in International Law*, 2018, 172–76.

¹⁷⁷ *ibid* 113.

¹⁷⁸ *Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran*, 15 August 1955, 284 UNTS 93 ('Treaty of Amity').

¹⁷⁹ *Oil Platforms* (n 161) 112–13.

¹⁸⁰ *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, Application instituting proceedings, 14 June 2016; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Application instituting proceedings, 16 July 2018.

¹⁸¹ J Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) 22 *Journal of International Economic Law* 297, 297.

¹⁸² A Pellet, 'Introduction from the Podium' in ES Obregon and B Samson (eds), *Nicaragua Before the International Court of Justice. Impacts on International Law* (Springer 2018) 15.

¹⁸³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment, 27 June 1986, ICJ Reports (1996) 14.

¹⁸⁴ Eichberger (32) 394.

to directly resolve disputes between States,¹⁸⁵ and that an advisory opinion is not, strictly speaking, a method for settling disputes.¹⁸⁶

Moreover, in the future, States may exhibit an increased tendency to refer to advisory opinions, including those from the ICJ or the ITLOS, regardless of the opinions' age, with the aim of exhuming the determinations of the opinions and extracting their 'legal effects'. Such utilization could occur in various contexts, such as international legal proceedings or diplomatic mechanisms for resolving disputes.

The innovative approach adopted by the Special Chamber may extend beyond advisory opinions to encompass other findings of judicial bodies. Specifically, in cases where judicial determinations have been established by an international judicial body but cannot be binding due to jurisdictional limitations, other international proceedings can readily identify them as binding. In *Oil Platforms*, although the central issue revolved around the use of force, the Court's jurisdiction was restricted to peripheral matters. Consequently, through what Thirlway termed as 'judicial gymnastics',¹⁸⁷ the Court exercised 'its freedom to select the ground upon which it will base its judgment',¹⁸⁸ brought forward the prohibition of the use of force. In this case, involving the US' bombing of Iranian oil platforms, Iran had sought the Court to find that the USA had breached Article X(1) of the 1955 Iran-US Treaty of Amity, which provides that 'Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation.' Conversely, the USA denied any breach of Article X and relied on Article XX, paragraph 1(d) of the Treaty, which allows measures necessary to protect the essential security interests of the party taking those measures. The USA argued that the attacks were justified as acts of self-defence under this provision. According to the USA, the first question for the Court to consider was whether the US attacks were justified under Article XX, paragraph 1(d) as actions necessary to protect its essential interests, rather than whether they constituted a breach of Article X(1). Taking into account its judicial function within the UN system, the Court considered that the real issue at the time of the attacks was the right to self-defence, not the Treaty of Amity.¹⁸⁹ Against this background, the Court reversed the order of procedure, and first concluded that the US' actions could not have been considered as self-defence, and only subsequently found that the US' actions had not breached Article X.¹⁹⁰

In this case, the Court found that the actions taken by the US against the oil platforms 'cannot be justified as measures necessary to protect the essential security interests of the United States of America ... as interpreted in the light of international law on the use of force'.¹⁹¹ The Special Chamber's judgment has undoubtedly increased the vigilance of States regarding such determinations. States will now exercise greater caution to ensure that these determinations can be given legal effect in other proceedings.

ICJ's judicial policy in advisory opinions: Towards judicial caution?

The approach adopted by the Special Chamber, which grants greater authority to ICJ advisory determinations compared to the prevailing understanding thus far, carries potential implications for future proceedings involving advisory opinions of the ICJ.

¹⁸⁵ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, 236.

¹⁸⁶ Thirlway (n 1).

¹⁸⁷ H Thirlway, *The Law and Procedure of the International Court of Justice. Fifty Years of Jurisprudence* (OUP 2013) 1698.

¹⁸⁸ *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)*, Judgment, 28 November 1958, ICJ Reports (1958) 55, 62.

¹⁸⁹ A Orakhelashvili, 'The International Court and "its Freedom to Select the Ground Upon Which it Will Base its Judgment"' (2007) *S6 International and Comparative Law Quarterly* 171, 176.

¹⁹⁰ *Oil Platforms* 178–81.

¹⁹¹ *ibid* 218.

It is evident that the ICJ adopts different approaches towards advisory opinions compared to contentious cases. Within the framework of judicial policy discourse, when addressing disputes that are binding and directed to the States involved, the ICJ exercises caution in refraining from making bold legal pronouncements. This approach, commonly referred to as judicial caution, aims to ensure prudence in such cases. In contrast, in advisory proceedings where the Court's findings are not binding *per se*, the ICJ is inclined to exercise greater judicial activism, issuing statements of principle, and contributing to the further development of the law. Thus, the Court in advisory opinions tends to show 'a very dynamic way of interpreting the law ... so as to favour the efficiency of actions undertaken by the United Nations without paying a too formalistic tribute to the individual will of member States.'¹⁹² This attitude can be understood in light of the institutional place of the Court 'within the United Nations' as its 'principal judicial organ'.

If one considers that although ICJ advisory opinions are not binding but they have 'legal effects', as the Special Chamber did, one is left but wondering whether there is a notable difference between advisory and contentious determinations made by the Court. In fact, for the Special Chamber, this is the 'legal effect' of the *Chagos* Advisory Opinion that acted as a decisive factor in rejecting the main part of Maldives' preliminary objections and converted the claim of UK into a 'mere assertion'. In this sense, some¹⁹³ have raised the possibility that the amplification of the role of advisory opinions could potentially empower individual States and the UNGA to request and endorse additional ICJ advisory opinions. In this view, this in turn may enable the authorization of binding outcomes that would otherwise be limited by the UN Charter and a strict interpretation of the UNGA's powers and responsibilities.

However, what holds greater significance for the ICJ's judicial policy is the Court's potential reluctance towards this progression. The ICJ generally prefers that other stakeholders in the international legal community, including other international courts and tribunals, acknowledge its findings and take them seriously. Nevertheless, the Court may aim for its rulings to be viewed as highly persuasive arguments in the decision-making process rather than as legally definitive factors determining the outcome of a particular case. In essence, the ICJ desires to be regarded as the 'skeptron-holder' in international law while maintaining its manoeuvrability,¹⁹⁴ in order to exercise its '*juris dictio*' and state the law.¹⁹⁵ This enables the Court to actively contribute to the development of international law through its advisory opinions.

Against this background, it appears unlikely that the Court would embrace the prospect of elevating its advisory opinions to the status of authoritative determinations with conclusive legal effects. The Court is likely to remain silent on this finding by the Special Chamber and may choose not to acknowledge it at all. In any case, in order to mitigate any potential inappropriate utilization of the ICJ by States or judicial bodies, the Court may exercise increased caution in the future when providing definitive conclusions in advisory opinions, particularly in cases involving concrete disputes. This analysis is in line with the Separate

¹⁹² Dupuy (n 173) 65. He continues, 'concerning the advisory jurisdiction, the Court acts from an institutional, ie, a somewhat vertical position, and helps the Organization of which it is part, in achieving its goals and performing its functions as efficiently as possible. In the other case, that of contentious jurisdiction, this competence of the Court is subject to acceptance by the Parties. The judges must then show at least their desire to respect scrupulously the terms of this free State agreement.' *ibid* 66.

¹⁹³ Gaver (n 85) 525.

¹⁹⁴ For an examination of the metaphor of skeptron, see P Bourdieu, *Language and Symbolic Power* (1991) 9, and for its application within the field of international law, see Bianchi, 'On the Skeptron—Visions of Authority in International Law' in *The Construction of Authority in International Law*, Faculty of Law, University of Durham, UK, 25–26 April 2017 (Unpublished).

¹⁹⁵ Dupuy (n 173) 66.

and Dissenting Opinion of Judge Oxman appended to the Special Chamber's Judgment, according to which acknowledging the invitation to consider the territorial dispute as resolved based on the Advisory Opinion and UNGA action poses the potential risk of complicating the ICJ's exercise of discretion regarding future requests for advisory opinions.¹⁹⁶ This implication contradicts one of the principal functions of ICJ advisory opinions, as explained above.

In addition, the non-circumvention principle might direct the ICJ to invoke its so-called 'discretion'¹⁹⁷ in order to avoid answering a question asked by a competent organ of the UN. As the ICJ stated in *Western Sahara*:

In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent ... If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute would afford sufficient legal means to ensure respect for the fundamental principle of consent to the jurisdiction.¹⁹⁸

Therefore, given the recent developments, the ICJ may now approach this matter with increased gravity, aiming to safeguard the principle of State consent in order to effectively fulfil its functions concerning advisory proceedings. Indeed, while the ICJ has previously demonstrated its inclination to address broader issues in advisory proceedings involving bilateral ramifications, such as in *Wall*,¹⁹⁹ the Court's approach may be influenced by how other international courts and tribunals perceive and interpret its advisory determinations. However, it is apparent that certain aspects of the ICJ's approach would unavoidably be influenced by its assessment of the relative significance it assigns to the public interest of the international community in contrast to the private interests of sovereign States.

CONCLUSION

Advisory opinions of the ICJ are not binding as such. This is beyond dispute. However, there is ongoing debate regarding whether these opinions can possess any definitive legal effects. The legal impact of such opinions varies, ranging from statements that hold mere evidentiary value, to determinations that must be duly considered, and to authoritative 'givens' that cannot be disputed. Instances of these different interpretations can be found in scholarly works and international practice, with the most recent example being the Special Chamber's *Mauritius/Maldives* Judgment. In the instant case, the determinations made in the *Chagos*

¹⁹⁶ *Mauritius/Maldives* Judgment, Separate and Dissenting Opinion of Judge *ad hoc* Oxman 12–13.

¹⁹⁷ G. Abi-Saab, 'On Discretion—Reflections on the Consultative Function of the International Court of Justice' in L. Boisson de Chazourmes and Ph. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (CUP 1999) 36, 36ff.

¹⁹⁸ *Western Sahara* 25. The Court reiterated this perspective in *Wall* 157–58, and *Chagos* Advisory Opinion 117.

¹⁹⁹ *Wall* 159: 'The object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions. The opinion is requested on a question which is of particularly acute concern to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute. In the circumstances, the Court does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.'

Advisory Opinion, because of its *res deliberata* effect,²⁰⁰ were regarded as authoritative pronouncements of international law with opposable legal effects.

It appears that the Special Chamber applied international law, which had already been authoritatively pronounced by the ICJ, in order to resolve the dispute at hand. Recognizing this necessitates affirming the distinction between ‘binding legal effect’ and ‘authoritative legal effect’, with the latter encompassing a broader concept.²⁰¹ Equating the two leads to misconceptions in both theory and practice of international law.²⁰² Despite the widespread acceptance of this distinction among commentators, they often perceive the latter as merely a cosmetic construct when it comes to concrete consequences.

Embracing the concept of ‘givens’ as an exception to the *Monetary Gold* principle, particularly when it pertains to non-binding yet authoritative determinations, necessitates the avoidance of the ‘jurisprudence of boundaries’,²⁰³ which tends to draw lines between ‘law’ and ‘non-law’ based solely on the idea of formal sources. Shifting away from a traditional positivist understanding of international law,²⁰⁴ this new perspective transcends the ‘rule-based’ conception of the international legal system and embraces international law as a ‘process’. In this sense, the Special Chamber’s Judgment unearths the idea that the epistemic authority of the advisory opinions makes the distinction between binding and non-binding authority in many cases a ‘false dichotomy’ and a cleavage that an international court or tribunal may ‘banish from existence’.²⁰⁵

Considering advisory determinations of the ICJ as ‘the law’ in concrete terms represents a significant advancement towards constitutionalism and a more concrete realization of the ICJ as the ‘World Court’.²⁰⁶ This notion recalls what Judge Jennings, as President of the ICJ, alluded to in his final address to the UNGA: ‘There can be only one principal judicial organ of the United Nations, as there is normally only one supreme court of any legally well-ordered community.’²⁰⁷ Adopting this perspective, considering the ICJ determinations merely as a secondary source of international law under Article 38(1)(d) of the ICJ Statute²⁰⁸ would be an understatement. ICJ determinations are not merely ‘subsidiary means for the determination of rules of law’; they represent, in the view of the Court, the very essence of what the law *is*—the *juris dictio* function of the Court.²⁰⁹ In this context, it is not only that international law is based on legal arguments; international law *is* an ‘argumentative practice’²¹⁰ acknowledged by the relevant actors. Whether the ICJ and/or other international courts and tribunals will embrace this emerging trend remains to be seen and will be subject to analysis by the *episteme* of international law and vicissitudes of the discipline’s presuppositions.

²⁰⁰ JM Thouvenin, ‘On Different Res: Res Judicata, Res Interpretata, Res Praescripta (or Indicata), Res Deliberata’ (2023) 65 Japanese Yearbook of International Law 270, 270.

²⁰¹ Paparinskis (n 142) 312, fn 102: ‘The qualification “authoritative” probably includes “binding” but is not limited to it.’

²⁰² Zarbiyev (n 6) 314: ‘[A]ny account of international law limited to formal legal entitlements would be not only conceptually impoverishing, but also empirically distorting.’

²⁰³ Bianchi (n 72) 24–30.

²⁰⁴ B Simma and A Paulus, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Contexts: A Positivist View’ (1999) 93 American Journal of International Law 302, 303 and 307 (advocating for a ‘modern’ and ‘enlightened’ positivism).

²⁰⁵ R Higgins, *Problems and Process: International Law and How We Use It* (CUP 1994) 10.

²⁰⁶ This corresponds with the third meaning of the ‘World Court’ explained by Abi-Saab in G Abi-Saab, ‘The International Court as a World Court’ in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (M. Nijhoff 1996) 3, 12–14.

²⁰⁷ Address to the Plenary Session of the UNGA by Judge Robert Jennings, President of the International Court of Justice, October 1993.

²⁰⁸ Eichberger (n 32) 398.

²⁰⁹ PM Dupuy, ‘L’unité de l’ordre juridique international, Cours général de droit international public’ in *Collected Courses of the Hague Academy of International Law* (M. Nijhoff 2002) 475.

²¹⁰ M Koskeniemi, ‘Methodology of International Law’ in *Max Planck Encyclopedia of Public International Law* (OUP 2007) para 1.

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