

Consent and the Rule of International Law: *the evolving role of international tribunals in an unstable world*

Thank you for the invitation to join you this evening ... I begin with the standard disclaimer: The views expressed are my own – I am not here to speak on behalf of the International Tribunal for the Law of the Sea (referred to as 'ITLOS').

Margaret and I exchanged emails on possible topics for this evening's presentation. At the time I was mulling over an ominous reflection that I read:

"There is no inevitable march of progress in history or law. Everything that has been achieved can be rescinded, forgotten, tossed away".¹

In our exchanges Margaret mentioned that one member of the Lincoln's Inn Group was of the view that "we are at something of a crisis point for international tribunals."

Continued respect for the authority of international law and those who seek to uphold the rule of law is certainly not assured. *Everything that has been achieved [over the past century] can be rescinded, forgotten, tossed away.*

The 1899 Convention for the Pacific Settlement of International Disputes is widely seen as an inflection point towards the establishment of a permanent international court.² The 20th century saw the progressive development of international rules-based frameworks to govern State conduct and the establishment of standing courts and tribunals to hold States to account. The report of the subcommittee charged with the preparation of a draft chapter on a new court at the 1945 San Francisco Conference observes:

A long road has been traveled in the effort to enthrone law as the guide for the conduct of states in their relations one with another. A new milepost is now to be erected along that road. In establishing the International Court of Justice, the United Nations hold before a war-stricken world the beacons of Justice and Law and offer the possibility of substituting orderly judicial processes for the vicissitudes of war and the reign of brutal force.³

¹ Isabel Hull "Anything can be rescinded" (2018) 40(8) London Review of Books 25 at 26.

² E.g. David D. Caron, War and International Adjudication: Reflections on the 1899 Peace Conference, *The American Journal of International Law*, Vol. 94, No. 1 (Jan., 2000), pp. 4-30.

³ The United Nations Conference on International Organization, Restricted Doc. 913 (English) IV/1/74(1) June 12, 1945, Commission IV Judicial Organization Committee 1, International Court of Justice, Report of The Rapporteur (Nasrat Al-Farsy, Iraq) of Committee IV/1, Documents of the United Nations Conference on International Organization, San Francisco, 1945, Volume XIII Commission IV Judicial Organization, p.381 at p.393.

The proliferation of specialized courts and tribunals addressing new areas of international regulation that were traditionally regarded as purely domestic matters has propelled international judgments and advisory opinions into kitchen table conversations and parliamentary debates.

International judgments and opinions are no longer drafted solely to be understood by government officials, practising attorneys and academia. They are meant to be intelligible to a broader set of interested stakeholders; oral hearings are followed online and, in some instances have even been televised on international cable networks. Increased attention has brought unwelcome controversy as demonstrated in the imposition of sanctions against judges and officials of the International Criminal Court. On their swearing-in judges of the ICC solemnly undertake to exercise their powers as judges "honourably, faithfully, impartially and conscientiously".⁴

Sir Thomas More, in whose honour we are gathered here this evening, had an acute sensitivity to the demands of conscience. "Indeed, [the observation has been made that] from More's first differences with [King] Henry [VIII] until his beheading, the events of his life reflect the decline and violent remodelling of the existing legal order. ... 'Thomas More's trial was a turning-point in English constitutional history'."⁵ It is possible that we are now at a turning point in the conduct of States in their relations one with another.

I have entitled my presentation, "Consent and the Rule of International Law: *the evolving role of international tribunals in an unstable world*".

The role of consent is central to the jurisdiction of international tribunals; I will explore this in the context of both contentious and advisory jurisdictions.

In contentious matters, much of the focus will be on the scope of a tribunal's supplemental jurisdiction which may allow for broader scrutiny in complex cases involving issues outside of its jurisdiction that are substantially related to the original claim it already has authority to decide. This is of particular relevance in mixed disputes where various aspects of a dispute may be pursued in different fora so as to make maximum use of available channels for compulsory third-party dispute settlement.

⁴ See "ICC – Swearing-in Ceremony", <https://www.icc-cpi.int/news/icc-swearing-ceremony>

⁵ Oliver Moore, "Sir Thomas More's Final Years: Silence, Silencing, and Constitutional Change," *Law and Humanities* 2, no. 1 (2008): 75-98 at 75.

In the advisory jurisdiction, the authority of the requesting agency and matters of judicial propriety are the central concerns. Consent is assessed through a different prism. The implications of this are evaluated taking into consideration that, although non-binding, judicial pronouncements made in advisory opinions carry no less weight and authority than those in judgments. As such, they circumscribe States' ability to self-assess the legality of their own actions.⁶

In examining these issues, we will review the jurisprudence of ITLOS, arbitral tribunals established under Annex VII of the UN Convention on the Law of the Sea (referred to as 'UNCLOS') and the International Court of Justice (referred to as the 'ICJ').

➤ **Consent**

The jurisdiction of international tribunals is based on consent, whether express or inferred. In contentious cases, jurisdiction may be accepted ad hoc or conferred by treaty in relation to a range of possible future disputes. Consent to the court's jurisdiction extends to both incidental proceedings and its supplementary jurisdiction. The terminology used in the jurisprudence is not always consistent so allow me to clarify my use of these terms.

The "inherent jurisdiction" of the court is the power to exercise which is a necessary condition of any court of law being able to function at all,⁷ and is the conceptual source of a court's jurisdiction in incidental proceedings, such as prescribing provisional measures or determining counter-claims.⁸ A court's "supplemental jurisdiction" derives from the effective exercise of the judicial function. It refers to the power of the court to make such findings of fact or ancillary determinations of law as are necessary to resolve the dispute before

⁶ See also Myrto Stavridi, "The Advisory Function of the International Court of Justice: Are States Resorting to Advisory Proceedings as a "Soft" Litigation Strategy?", Princeton University - Journal of Public and International Affairs, available at: <https://jpia.princeton.edu/news/advisory-function-international-court-justice-are-states-resorting-advisory-proceedings-%E2%80%9Csoft%E2%80%9D> (arguing that when an international court "pronounces on a dispute between states, states' ability to self-assess the legality of their actions and control the narrative they present to other states and their domestic audiences is restricted as a third party that enjoys wide legitimation puts forth an authoritative interpretation of international law as applied in the specific circumstances.")

⁷ Northern Cameroons (Cameroon v UK), 1963 ICJ 15, 103 (Dec 20, 1963) (separate opinion of Judge Fitzmaurice).

⁸ Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Cambridge: Grotius Publications, 1986), p. 542; quoted in Islam Attia, "Revisiting Jurisdiction of UNCLOS Courts and Tribunals over Ancillary Sovereignty Disputes," *Journal of Territorial and Maritime Studies (JTMS)* 10, no. 2 (Summer/Fall 2023): 5-26 at p.18; see also *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253 at pp. 259-60.

it.⁹ To appropriate the language of Judge Donoghue, former President of the ICJ,

While respondent States should not be required to litigate international disputes on the merits where there is no valid jurisdictional basis to do so, the Court also owes it to applicant States to hear and adjudicate all cases fully where jurisdiction does exist.¹⁰

The jurisdiction of ITLOS or any other court or tribunal referred to in UNCLOS, is confined to “any dispute concerning the interpretation or application of this Convention.”¹¹ As observed by the UNCLOS Annex VII Arbitral Tribunal in the South China Sea case, “[t]he nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention.”¹²

Many here may be familiar with the Chagos MPA Arbitration. The Chagos MPA Arbitration concerned Mauritius’ challenge to the UK’s declaration of a marine protected area (that is an ‘MPA’) around the Chagos Archipelago in April 2010. The UNCLOS Annex VII arbitral tribunal found that it lacked jurisdiction over Mauritius’ First Submission which asserted that the United Kingdom was not entitled to declare an “MPA” as it is not the “coastal State” for the purposes of UNCLOS. The Annex VII tribunal determined that the “real issue” of the claim concerned the assertion of sovereignty over the Chagos Archipelago.¹³ It stated that while it did “not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention[, t]hat, however, is not this case”.¹⁴ Two of the five members of the Annex VII tribunal dissented.¹⁵

⁹ See also Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland, Award of 18 March 2015, RIAA, Vol. XXXI, p. 359, at , p. 90, para 220 (‘Chagos MPA Award’).

¹⁰ Judge Joan E. Donoghue President of the International Court of Justice, “Consent by States to the Jurisdiction of the International Court of Justice”, Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI), 24 September 2021, at p.8.

¹¹ UNCLOS, Art. 288(1); but note that Art. 288(2) confers jurisdiction in relation to any “dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement.”

¹² The South China Sea Arbitration between the Republic of the Philippines and the People’s Republic of China, Award on Jurisdiction and Admissibility of 29 October 2015, RIAA, Vol. XXXIII, pp. 1-152, at p 58, para. 150.

¹³ See Chagos MPA Award, at p.88, para 212.

¹⁴ Chagos MPA Award, at p.90, para 221.

¹⁵ See Chagos MPA Award (Dissenting and concurring opinion of Judges Kateka and Wolfrum), at para17.

The Annex VII tribunal, however, unanimously found that it had jurisdiction to determine that the Lancaster House Understandings was binding on the UK and conferred rights on Mauritius that were enforceable under UNCLOS. The “Lancaster House Undertakings” is the 23 September 1965 provisional agreement on the part of Mauritius [represented by the then Premier, Sir Seewoosagur Ramgoolam and his colleagues] to the detachment of the Archipelago in exchange for the then UK Secretary of State recommending certain actions by the United Kingdom to the Cabinet. It arguably supports Mauritius’ claim to sovereignty over Chagos while providing for its temporary detachment. The reason that the Annex VII tribunal found that it had jurisdiction to examine the Lancaster House Undertakings was that it was treated as an ancillary matter in resolving the dispute between the Parties with respect to the manner in which the MPA was declared,¹⁶ on which UNCLOS imposes certain procedural obligations.

The exercise of supplemental jurisdiction by courts and tribunals is always controversial and the Chagos MPA Arbitration is no exception. It has been observed that although the Annex VII tribunal did not hold that the provisions of the Lancaster House Undertakings were “breached,” still it made a significant decision that these external undertakings are “binding” on the UK, relying on the principle of estoppel, without ruling on the validity of Mauritian consent.¹⁷ The undertakings provided for:¹⁸

- (a) the return of the Chagos Archipelago to Mauritius when no longer needed for defence purposes;
- (b) preservation of the benefit of any minerals or oil discovered in or near the Chagos Archipelago for the Mauritius Government; and
- (c) assurances that fishing rights in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable.

The UNCLOS Annex VII tribunal in the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, referred to the Chagos decision in affirming the bounds of its supplemental jurisdiction. In order to address a number of claims submitted by Ukraine it would have been necessary to decide “which State is sovereign over Crimea and thus the ‘coastal State’ within the meaning of provisions of the Convention invoked by Ukraine.”¹⁹ The

¹⁶ See Chagos MPA Award, at p.114, paras. 293-294; p. 163, paras. 417-419; p. 202, para. 507.

¹⁷ Islam Attia, “Revisiting Jurisdiction of UNCLOS Courts and Tribunals over Ancillary Sovereignty Disputes,” *Journal of Territorial and Maritime Studies (JTMS)* 10, no. 2 (Summer/Fall 2023): 5-26 at p.13.

¹⁸ See Chagos MPA Award, pp.178-179, para. 448.

¹⁹ Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russian Federation) (Preliminary Objections) 21 February 2020, at para 195.

Annex VII tribunal, like that in the Chagos MPA Arbitration, was of the view that “the Parties’ dispute regarding sovereignty over Crimea is not a minor issue ancillary to the dispute concerning the interpretation or application of [UNCLOS].”²⁰

The establishment of jurisdiction based on consent limits the role of international law in maintaining international peace and security. As a result, the means through which consent to the jurisdiction is secured continues to evolve. Increasingly, States are invoking compromissory clauses of multilateral treaties to have tribunals determine aspects of a much larger dispute with a reluctant Respondent. Countries have had recourse to the dispute settlement clauses of the International Convention on the Elimination of All Forms of Racial Discrimination (that is, the “CERD”), the Terrorist Financing Convention (the full title of which is “the International Convention for the Suppression of the Financing of Terrorism”), the Convention on the Prevention and Punishment of the Crime of Genocide, and UNCLOS.

The attempt to “shoehorn” claims – to use ICJ Judge Abraham’s term²¹ – or “stuff those claims”²² – to use the language of Judge Yusuf – into the framework of multilateral treaties that have only a tangential relationship to matters addressed in the compromissory clause has been characterised as modern “judicial warfare”. A key factor of most of these cases is that that while the proceedings are instituted as a bilateral dispute, they concern *erga omnes*

²⁰ Ibid. The tribunal concluded that it lacked jurisdiction over several aspects of the dispute, and in the interest of procedural fairness called upon “Ukraine to revise its Memorial so as to take full account of the scope of, and limits to, the Arbitral Tribunal’s jurisdiction as determined in the [Preliminary Objections] Award, before the Russian Federation is called upon to respond in a Counter-Memorial.” *Id.*, at para. 198.

²¹ Allegations of genocide under the Convention on the prevention and punishment of the crime of genocide (Ukraine v. Russian Federation: 32 states intervening) preliminary objections, 2 Feb 2024 Preliminary Objections, Judgment, (‘Ukraine v Russia Genocide case’) (partially dissenting opinion of Judge Abraham) I.C.J. Reports 2024, p. 360, at p. 456, para. 19 (asserting that “[a]ll this can be explained by the fact that Ukraine sought to shoehorn its dispute with the Russian Federation into the framework of the Genocide Convention, within which this dispute cannot fall.”)

²² Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan) Preliminary Objections Judgment (12 Nov 2024), (Dissenting Opinion of Judge Yusuf), at para. 1 (noting that “[a]s I pointed out in a declaration regarding an earlier phase of this case: “A regrettable tendency seems to have developed, whereby any State that fails to find a valid basis of jurisdiction of the Court for its claims, but still wishes to bring a case before it, tries to stuff those claims into the framework of CERD” ; or, I should add, some other conventions that have hardly anything to do with the real dispute between the parties. This case is typical of such a tendency. The Court should have used this opportunity to reject the practice of using CERD as a “fourre-tout” for jurisdictional purposes and upheld the objections of Azerbaijan.”)

obligations which, “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection”.²³

The nature of *erga omnes* obligations implicates standing,²⁴ but does not confer jurisdiction on a court or tribunal that is not otherwise competent to exercise the judicial or arbitral function in the case.²⁵ Where jurisdiction is established, as the proceedings raise issues of global concern, a number of States have sought to intervene.²⁶ The public hearings, orders and judgments in incidental proceedings all assist in shaping the diplomatic discourse about the international illegitimacy of State conduct²⁷ even before a judgment is rendered on the merits, which may be several years later.

Some judges have suggested that the Court should discourage such practices through more conservative rulings. Judge Abraham in the *Ukraine v. Russia Genocide* case (with 32 States intervening) rationalized that “the decision that the Court is called upon to make will most likely be frustrating for the Parties and rather futile in its effects; at a time when the Court is very busy, it was a further reason for it not to engage in a largely meaningless exercise”.²⁸

²³ See also *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, at p.32, para. 33.

²⁴ See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ('Wall Advisory Opinion') (separate opinion of Judge Higgins) I. C. J. Reports 2004, p. 136 at p. 216, para. 37.

²⁵ E.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia) Preliminary Objections*, I.C.J. (12 November 2024), p.19, at para. 48 (“The Court observes that this is not the first time that it has been requested to pronounce on the relationship between the nature of obligations and the scope of its jurisdiction. In the case concerning *East Timor (Portugal v. Australia)*, the Court made clear that “the *erga omnes* character of a norm and the rule of consent to jurisdiction are two -different things” (*East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29). In the case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, the Court further clarified that “the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute...” (Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 32, para. 64.) That position has been consistently upheld by the Court with regard to the question of jurisdiction.”)

²⁶ Note that 32 States intervened pursuant to Article 63 of the ICJ Statute in the *Ukraine v. Russia Genocide* case, and eleven in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar: 11 States intervening)* while 13 States, thus far, have filed declarations pursuant to Article 63 and/or requested for permission to intervene pursuant to Article 62 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*.

²⁷ See also British Institute of International and Comparative Law, ‘Reflections on the South Africa v. Israel Case at the International Court of Justice’ (9 February 2024), intervention of Professor Tams; available at:

https://www.biicl.org/documents/177_reflections_on_the_south_africa_v.pdf

²⁸ *Ukraine v. Russia Genocide* case (partially dissenting opinion of Judge Abraham), at para18.

It remains within the discretion of any court to decline an application to institute proceedings. It is well established that

[i]t is the act of the Applicant which seises the Court but even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. ... The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.²⁹

There are few instances where the duty of the court to maintain its judicial character has formed the basis of a decision to decline to adjudicate upon the merits of the claim. The Northern Cameroons case, from which I just quoted, is an example. The ICJ determined that no judgment on the merits in this case could satisfy the essentials of the judicial function; a "[c]ourt's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties"³⁰. The Court noted that even if it were to uphold all of Cameroon's contentions against the United Kingdom, its judgment would have no practical effect: the United Kingdom had no power to redress Cameroon's complaints concerning the union of the Northern Cameroons with Nigeria. This was the decision of the UN General Assembly which terminated the UK's Trusteeship Agreement over its former Trust Territory. That decision would not be invalidated by any judgment on the merits.

"Whether making pronouncements in disposing of contested cases or responding to requests for advisory opinions, the Court is exercising a judicial function. That function is circumscribed by inherent limitations [I]t is always a matter for the determination of the Court whether its judicial functions are involved."³¹

➤ **Contentious vs advisory jurisdiction**

The issue of consent is fundamental in establishing a court's jurisdiction in contentious proceedings. However, the lack of consent of any State will only constitute a ground for declining to give an advisory opinion when requested

²⁹ Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C. J. Reports 1963, p. 15 at p. 29.

³⁰ Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C. J. Reports 1963, p. 15.

³¹ Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C. J. Reports 1963, p. 15 at p. 30.

by a competent body if, in the circumstances of a given case, considerations of judicial propriety oblige the Court to refuse an opinion.³² ICJ jurisprudence suggests that the giving of an advisory opinion would be incompatible with the Court's judicial character "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."³³ However, there is no instance in which the Court has so found; the ICJ has never declined to give an advisory opinion on the basis of judicial propriety.³⁴ Rather, the Court has emphasized that a request for an advisory opinion should not in principle be refused except for 'compelling reasons';³⁵ that the Court's Opinion is given not to the States, but to the organ which is entitled to request it; and the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization.

Recently, in the Occupied Palestinian Territory Advisory Opinion, Judge Tladi observed:

"In my view, whatever discretion the Court may have, is extremely narrow — so narrow that the Court should stop being as indulgent with arguments concerning discretion as it has been in the past. ...If a request should, in principle, not be refused, and if a refusal requires the existence of a compelling reason (the threshold for which is, in fact, so high that this Court has never found a reason *compelling* enough to refuse a

³²See also Facundo M. Gomez Pulisich, "The Lack of Circumvention of the Principle of State Consent to Judicial Settlement in the Advisory Jurisdiction of the International Court of Justice," *Revue Belge de Droit International / Belgian Review of International Law* 53, no. 2 (2020): 560-601 at 570-572 (clarifying the decision of the PCIJ to decline the request formulated by the Council of the League of Nations in the Status of Eastern Carelia case).

³³ Western Sahara, I.C.J. Reports 1975, p. 25, para. 33; Wall Advisory Opinion, at p.158; see also Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I), p. 117, para. 85 ('Chagos Advisory Opinion'); Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024, at p.17, para. 34 ('2024 Occupied Palestinian Territory Advisory Opinion').

³⁴ See also H. Lauterpacht, *The Development of International Law by the International Court*, (London, Stevens and Sons Ltd, 1958), pp. 357-358 (observing that "[t]here seems to be no decisive reason why the sovereignty of States should be protected from a procedure, to which they have consented in advance as Members of the United Nations, of ascertaining the law through a pronouncement which, notwithstanding its authority, is not binding upon them").

³⁵ See also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 235, para. 14; Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, at p. 25, para. 71 ('SRFC Advisory Opinion'); Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion of 21 May 2024, at p.46, para. 111 ('ITLOS Climate Advisory Opinion').

request for an advisory opinion) then does the Court really have discretion in this matter?"³⁶

ITLOS has drawn on the language of the ICJ in stating that "[i]t is well settled that a request for an advisory opinion should not in principle be refused except for 'compelling reasons'"³⁷. Article 138 of the ITLOS Procedural Rules, like article 65(1) of the ICJ Statute, provides that the Tribunal *may* give an advisory opinion, and thus the Tribunal has a discretionary power to refuse to give an advisory opinion even if the conditions of jurisdiction are satisfied.³⁸ Some have questioned whether ITLOS should apply the ICJ "compelling reasons" standard? The term "compelling reasons" is contextual. The ICJ is the principal judicial organ of the UN; ITLOS bears no similar relationship with any entity. Therefore, what may constitute "compelling reasons" for ITLOS, may not for the ICJ.

The position with the Seabed Disputes Chamber of ITLOS is different. UNCLOS Article 191 states that:

The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council [of the International Seabed Authority] on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.

In the Area Advisory Opinion,³⁹ the Chamber declined to address submissions made by some of the participants in the proceedings that the use of the words "shall give" in article 191 of the Convention, when compared to the words "may give" in article 65(1) of the ICJ Statute, suggests that the Chamber, unlike the ICJ, has no discretion to decline a request for an advisory opinion once its jurisdiction is established. While it is true that the language of the Convention mandates a response in such circumstances, there are inherent limitations on the exercise of the judicial function that may constrain the nature of that response.

³⁶ 2024 Occupied Palestinian Territory Advisory Opinion (separate opinion of Judge Tladi) at para 8; see also Interpretation of 'Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory, Opinion, I. C. J. Reports 1950, p. 71; Western Sahara, I. C. J. Reports 1975, p. 24, para. 31; Wall Advisory Opinion, at p.158, para 47; Chagos Advisory Opinion, para. 65; 2024 Occupied Palestinian Territory Advisory Opinion, at p.16, para. 30.

³⁷ See SRFC Advisory Opinion, at p. 25, para. 71; ITLOS Climate Advisory Opinion, at p.46, para 111 (citing the SRFC Advisory Opinion, *ibid.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, at p. 235, para. 14).

³⁸ See SRFC Advisory Opinion, at p. 25, para. 71; Climate Advisory Opinion para 111.

³⁹ Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at pp. 26-27.

The distinct approach of a court or tribunal to matters brought before it in its advisory jurisdiction was cogently addressed in Judge Nolte's separate opinion in the 2024 Occupied Palestinian Territory advisory opinion. He explained that contentious proceedings are retrospective in nature. They are meant to resolve in a binding and final manner a dispute - the *res judicata* effect. In contrast, advisory proceedings are consultative and prospective. They are designed to provide guidance for the requesting organ's future conduct. As such, advisory opinions are a 'primer' for the initiation of new steps in a process that seeks to establish and maintain peace through law.⁴⁰ The conclusions made in advisory proceedings complement and facilitate, but do not replace, other procedures for the peaceful settlement of disputes.⁴¹

"Indeed, [Judge Nolte noted] this Court has emphasized that 'the legal position of the State which has refused its consent to the present proceedings is not 'in any way compromised by the answers that the Court may give to the questions put to it''".⁴²

This assertion has repeatedly been made by the Court in responding to requests for advisory opinions where States have raised objections.

In the Chagos Advisory Opinion the ICJ identified four general arguments advanced by participants as "compelling reasons" for the Court to exercise its discretion to decline to give the opinion.⁴³ The fourth concerned whether the questions asked relate to a pending dispute between two States which have not consented to its settlement by the Court.⁴⁴

The issues raised by the UN General Assembly request were assessed by the Court within the broader frame of reference of decolonization, in particular the series of resolutions adopted in the 1960s beginning with the General Assembly Declaration on Decolonization⁴⁵. The Court therefore did not consider that to

⁴⁰ Cf. *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, ('ICJ Climate Advisory Opinion'), (separate opinion of Judge Nolte), at para. 31 (expressing concern "that States will feel encouraged to pursue litigation which, if successful at all, may entail only symbolic legal consequences").

⁴¹ 2024 Occupied Palestinian Territory Advisory Opinion, (Separate Opinion of Judge Nolte), pp.1-3, paras. 3-6.

⁴² 2024 Occupied Palestinian Territory Advisory Opinion (Separate Opinion of Judge Nolte), p. 2, para 4 (added emphasis).

⁴³ See Chagos Advisory Opinion, at pp. 114-118, paras 67-91.

⁴⁴ See Chagos Advisory Opinion, at p. 117, para 89 (noting that "the fact that the Court may have to pronounce on legal issues on which divergent views have been expressed by Mauritius and the United Kingdom does not mean that, by replying to the request, the Court is dealing with a bilateral dispute"). See also Wall Advisory Opinion, at p. 159, para. 50.

⁴⁵ U.N. General Assembly resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples, 14 December 1960.

give the opinion would have the effect of circumventing the principle of consent.⁴⁶

Judge Donoghue dissented taking note of the comprehensive nature of the Court's response. She observed that

[t]he Advisory Opinion, like the request, avoids references to sovereignty. Yet the Court's pronouncements can only mean that it concludes that the United Kingdom has an obligation to relinquish sovereignty to Mauritius. The Court has decided the very issues that Mauritius has sought to adjudicate, as to which the United Kingdom has refused to give its consent.⁴⁷

The Advisory Opinion expressly states that the UK is responsible for the commission of an internationally wrongful act. Indeed, some Judges in their separate opinions made noteworthy pronouncements; for instance, that – and I quote –:

“Any treaty that conflicts with the right of the Mauritian people to exercise their right to self-determination with respect to the Chagos Archipelago is void. This has clear implications for the agreement between the United Kingdom/United States.”⁴⁸

Few would deny that pronouncements of international courts and tribunals have the potential to shift the general assessment of governments and other international actors about the legitimacy of State conduct. It has been noted that “[i]nternational law often has force in this way—by shaping how states respond to one another's actions. Hence, law can sometimes influence even those states determined to ignore it.”⁴⁹

⁴⁶ Chagos Advisory Opinion, at p.117, paras. 88-90. See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 24, paras. 33-34.

⁴⁷ Chagos Advisory Opinion, (Dissenting Opinion of Judge Donoghue) at p.265, paras. 18 & 19; See also Facundo M. Gomez Pulisich, "The Lack of Circumvention of the Principle of State Consent to Judicial Settlement in the Advisory Jurisdiction of the International Court of Justice," *Revue Belge de Droit International / Belgian Review of International Law* 53, no. 2 (2020): 560-601 at p. 598 (arguing that many parallels may be drawn between the approach taken by the ICJ in the Chagos Advisory Opinion and the Western Sahara Advisory Opinion, I.C.J. Reports 1975, p.12).

⁴⁸ Chagos Advisory Opinion, (Separate Opinion of Judge Sebutinde), at p.291, para. 45.

⁴⁹ Mariano-Florentino Cuellar and Oona A. Hathaway, "The International Court of Justice's Balancing Act: Tribunals exist in an unforgiving political environment, so even the principled ones must consider the practical aspects of their decisions", (published on January 26, 2024), available at: <https://carnegieendowment.org/posts/2024/01/the-international-court-of-justices-balancing-act?lang=en>

Judge Donoghue in her dissent in the Chagos Advisory Opinion expressed regret that “[t]he Court had not chosen, in the exercise of its discretion, to provide a more limited response to the Request (possibly reformulating the Request in order to do so). ... [so as to] provide[] legal guidance to the General Assembly without undermining the integrity of the Court’s judicial function.”⁵⁰

The Court in exercising its advisory jurisdiction is entitled to reformulate or interpret any question put to it. It must remain faithful to the requirements of its judicial character in responding to a request, and has exercised its discretion to depart from the language of questions posed where the question was not adequately formulated, or was unclear or vague, or where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the “legal questions really in issue”.⁵¹

➤ **Politicized Issues**

It may be questioned to what extent does remaining faithful to the requirements of its judicial character require a court or tribunal to decline to respond or adopt a more equivocal response where the matter before it is highly politicized? Judge Nolte recently cautioned that “States may challenge the very legitimacy of courts, particularly international courts, when these appear to unduly limit the exercise of States’ political and administrative discretion.”⁵²

Sir Thomas “More is renowned for having died for his principles, and yet, [it is observed that] for a man who showed little fear of death, he nonetheless remained at pains through years of cautious silence to avoid unnecessarily antagonising the king.”⁵³ -- When should the courts remain cautiously silent?

The point was made in the 1980 case concerning US Diplomatic and Consular Staff in Tehran that

“legal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and longstanding political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute,

⁵⁰ Chagos Advisory Opinion, (Dissenting Opinion of Judge Donoghue) at p.266, para. 22.

⁵¹ See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, at p.423, para. 50.

⁵² ICJ Climate Advisory Opinion, (Separate Opinion of Judge Nolte), at para. 32.

⁵³ Oliver Moore, “Sir Thomas More’s Final Years: Silence, Silencing, and Constitutional Change,” Law and Humanities 2, no. 1 (2008): 75-98, at p.81.

the Court should decline to resolve for the parties the legal questions at issue between them. ... [I]f the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.”⁵⁴

It has been observed that “Tribunals exist in an unforgiving political environment, so even the principled ones must consider the practical aspects of their decisions.”⁵⁵

-- There is some validity to the suggestion that international courts traditionally have not dealt with all controversial issues in the same manner.

The treatment of nuclear weapons in ICJ jurisprudence is noticeably different to matters of self-determination. This is true whether referring to cases in its contentious or advisory jurisdiction. It is noted that “[o]n each occasion when matters concerning nuclear proliferation have come before the ICJ it has found ways to avoid passing judgment”.⁵⁶

In the 1974 Nuclear Tests case, following public statements made by France, subsequent to the oral proceedings, that it would hold no further nuclear tests in the atmosphere in the South Pacific, the ICJ declared that it

... faces a situation in which the objective of the Applicant has in effect been accomplished, ...

Thus the Court finds that no further pronouncement is required in the present case. ... The object of the claim having clearly disappeared, there is nothing on which to give judgment.⁵⁷

The six dissenting judges were highly critical, questioning the propriety of the majority's actions. Sir Humphrey Waldock, in a joint dissenting opinion with three other dissenting colleagues, stated “In our view the basic premise of the

⁵⁴ United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3, at p.20, para 37.

⁵⁵ Mariano-Florentino Cuellar and Oona A. Hathaway, *supra* note 49.

⁵⁶ Diane Marie Amann, “Marshall Islands v. United Kingdom, India, Pakistan,” *American Journal of International Law* 111, no. 2 (April 2017): 439-446 at p.441 (suggesting that “[o]verall, the judgments signaled that at least in disputes implicating difficult issues of geopolitics, the Court likely will continue to apply a cautious standard to the question whether an application may advance to adjudication on the merits.”)

⁵⁷ Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p. 457, at p. 475, para. 55; p.477, para. 62; see also Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I. C. J. Reports 1995, p. 288 (dismissing New Zealand's attempt to reopen the matter and removing the request from the General List).

Judgment, which limits the Applicant's submissions to a single purpose, and narrowly circumscribes its objective in pursuing the present proceedings, is untenable.”⁵⁸

In the Nuclear Weapons Advisory Opinion the ICJ, by seven votes to seven, by the President's casting vote, found that the threat or use of nuclear weapons is neither authorized nor prohibited by international law.⁵⁹ Judge Higgins in her dissenting opinion stated that “the Court effectively pronounce[d] a non liquet”.⁶⁰ One commentator observed: “[t]he resulting decision reads as being on the verge of being at war with itself”.⁶¹

Two decades later, in 2016, a similarly divided Court rejected the cases brought by the Marshall Islands against several nuclear powers — including India, Pakistan, and the United Kingdom — on jurisdictional grounds, without considering the cases' merits.⁶²

The Court in (*Marshall Islands v UK*) by eight votes to eight, by the President's casting vote, upheld the UK's first preliminary objection to jurisdiction based on the absence of a dispute between the Parties. The late Judge Crawford in his dissenting opinion noted that⁶³

“This is the first time that the International Court of Justice (or its predecessor) has rejected a case outright on the ground that there was no dispute at the time the Application was lodged. In determining whether there was then a dispute, the Judgment imposes a new

⁵⁸ *Nuclear Tests (Australia v. France)*, Judgment (Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez De Arechaga and Sir Humphrey Waldock), I.C.J. Reports 1974, p. 253, at p.312, para. 3; see also *id.*, (Dissenting Opinion of Judge De Castro), at pp.374-375 (questioning the legal nature of the statements of the French authorities on which the Judgment relied); *id.*, (Dissenting Opinion of Judge Sir Garfield Barwick), at p.391 (challenging the decision of the Court to take account of public statements made by France subsequent to the oral proceedings without consulting with the Parties on the basis for its decision or reopening the oral proceedings, in light of the importance of the principle expressed in the maxim *audi alteram partem*).

⁵⁹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I. C.J. Reports 1996, p. 226 at p.238

⁶⁰ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (Dissenting Opinion of Judge Higgins), I. C.J. Reports 1996, p. 226, at p.583, para. 2; p.584, para. 7.

⁶¹ Mariano-Florentino Cuellar and Oona A. Hathaway, *supra* note 49.

⁶² See *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India)*, 2016 ICJ Rep. 255 (Oct. 5); *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 833.

⁶³ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, (Dissenting Opinion of Judge Crawford), *id.*, at p.1093, para. 1.

requirement of “objective awareness” But a requirement of objective awareness is not to be found in the case law of the Court.”

In all these cases the Court was, or was close to evenly divided. Clearly, these were difficult decisions.

Of the 30 requests for advisory opinions, setting aside those on administrative matters, the most frequent concern addressed by the ICJ is the right to self-determination: 4 advisory opinions on South West Africa/Namibia; 3 on the Palestinian-Israeli conflict; the Chagos advisory opinion; and to a degree, the Kosovo advisory opinion,⁶⁴ although the Court did not treat with the right to self-determination as it found that this was “beyond the scope of the question posed by the General Assembly”.⁶⁵

Where it has determined that the issue is one of self-determination (which the Court recently acknowledged to be a peremptory norm),⁶⁶ the Operative Part of an ICJ advisory opinion is formulated much like a judgment in contentious cases. It has pronounced upon States’ actions as in breach of international law, and specified the legal consequences flowing therefrom. It has called for specific steps to be undertaken, such as indicating that a State “is under an obligation to bring to an end its administration of [a territory] as rapidly as possible”⁶⁷ It has indicated to third States and UN Specialized Agencies measures that would constitute an appropriate response, and called for other international entities to cooperate towards this end.⁶⁸ This standard format was followed in the Chagos Advisory Opinion.

The General Assembly request for the Kosovo Advisory Opinion, as previously indicated, was not considered in the context of the General Assembly’s broad

⁶⁴ See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, (‘Kosovo Advisory Opinion’) I.C.J. Reports 2010, p. 403, at p. 438, para. 82 (noting that “[a] number of participants in the present proceedings have claimed, although in almost every instance only as a secondary argument, that the population of Kosovo has the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of “remedial secession” in the face of the situation in Kosovo.”)

⁶⁵ Kosovo Advisory Opinion, at p. 438, para. 83.

⁶⁶ 2024 Occupied Palestinian Territories Advisory Opinion, at p. 66, para 233 (affirming that “in cases of foreign occupation such as the present case, the right to self-determination constitutes a peremptory norm of international law”).

⁶⁷ E.g., Chagos Advisory Opinion, at p. 140, para. 183(4); 2024 Occupied Palestinian Territories Advisory Opinion, at p. 78, para. 285(4).

⁶⁸ E.g. Chagos Advisory Opinion, at p.140, para. 183; Wall Advisory Opinion, at p.201-202, para.163; 2024 Occupied Palestinian Territory Advisory Opinion, pp. 78-79, para. 183.

mandate on the right to self-determination.⁶⁹ Indeed, at the time of the request, it was the Security Council which had been actively seized of the matter.⁷⁰ The General Assembly request was formulated as a single question; “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”⁷¹ The operative paragraph of the advisory opinion was equally brief:

“THE COURT ... Is of the opinion that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law”⁷²

The phrasing of this sentence, in failing to identify the party named by the General Assembly as having adopted the unilateral declaration of independence, may be described as “cautious silence” – the strategy and principled choice of Sir Thomas More. The Court found that

“[t]he identity of the authors of the declaration of independence ... is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law. It would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly.”⁷³

The Court essentially reformulated the question that had been posed without explicitly stating so. Five of the fourteen judges who heard the case voted against the Court's decision to comply with the request for an advisory opinion; they thought this was necessary in order to “safeguard [the Court's] credibility in performing its functions”.⁷⁴

➤ **The implications of the Chagos Advisory Opinion**

Earlier this year I read the Hansard concerning the Defence Secretary's statement (on 22 May 2025) on the Diego Garcia Military Base and have noted

⁶⁹ See supra notes 64 & 65 and accompanying text.

⁷⁰ See also Kosovo Advisory Opinion, at p. 421, para. 43 (noting “that the fact that a matter falls within the primary responsibility of the Security Council for situations which may affect the maintenance of international peace and security and that the Council has been exercising its powers in that respect does not preclude the General Assembly from discussing that situation or, within the limits set by Article 12 [of the UN Charter], making recommendations with regard thereto.”)

⁷¹ Kosovo Advisory Opinion, at p. 407, para. 1.

⁷² Kosovo Advisory Opinion, at p.453, para 123.

⁷³ Kosovo Advisory Opinion, at p. 424, para. 52. The request for the Kosovo advisory opinion was adopted by the General Assembly by 77 votes to six, with 74 abstentions. The political motivations behind the request were evident in the General Assembly debate and participants interventions before the Court; see also Kosovo Advisory Opinion, (Dissenting Opinion of Judge Bennouna) at pp. 502-504, paras. 9-22.

⁷⁴ E.g. Kosovo Advisory Opinion, (Dissenting Opinion of Judge Bennouna) at p. 505, para. 25.:

the ongoing debate generated in response, in particular, the views expressed about international judicial pronouncements and the rule of international law, on the one hand, and respect for raw power in international relations, on the other.⁷⁵ The suggestion “that the International Tribunal for the Law of the Sea was ‘the most proximate’ international court or tribunal which could threaten the UK’s sovereignty over the Chagos,”⁷⁶ has inspired extensive commentary. The intensity of the debate warrants “cautious silence”.

The jurisdiction of ITLOS, as its name indicates, concerns maritime areas and the permissible activities therein, including scientific research and measures of conservation and exploitation. As regards the Chagos Archipelago, the designation of the “coastal State” with the exclusive right to construct and to authorize and regulate the construction, operation and use of installations and structures in the adjacent maritime areas in accordance with UNCLOS,⁷⁷ is now moot.

Philosophically, the suggestion that the weight of international law is only brought to bear through binding decisions in contentious cases overlooks the significance of authoritative pronouncements given in the context of advisory opinions in defining what States, international organizations, and other stakeholders accept as permissible conduct.

It has been suggested that the Chagos Advisory Opinion is one of the most consequential opinions of the ICJ. UNGA Resolution 73/295 which welcomed and affirmed the Court’s advisory opinion “[d]emanded that the United Kingdom of Great Britain and Northern Ireland withdraw its colonial administration from the Chagos Archipelago unconditionally within a period of no more than six months from the adoption of the present resolution, thereby enabling Mauritius to complete the decolonization of its territory as rapidly as possible;”⁷⁸ and called on all Member States,⁷⁹ the United Nations and all its specialized agencies,⁸⁰ and all other international, regional and

⁷⁵ E.g. Yuan Yi Zhu, Marcus Solarz-Hendriks, Tom Grant and Richard Ekins KC (Hon), “The Chagos Debacle: A Critique of The British Government’s Shifting Rationales, A Policy Exchange Research Note,” available at: <https://policyexchange.org.uk/publication/the-chagos-debacle/>

⁷⁶ E.g., Philip Loft and John Curtis, “2025 Treaty on the British Indian Ocean Territory/Chagos Archipelago,” Research Briefing, House of Commons, 8 September 2025, House of Commons Library, p. 27, available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-10273/>

⁷⁷ See also UNCLOS Arts. 2, 49, 60 & 80.

⁷⁸ See UNGA Resolution 73/295, operative paras. 1-3.

⁷⁹ Id., para. 5.

⁸⁰ Id., para 6.

intergovernmental organizations⁸¹ to support the decolonization of Mauritius as rapidly as possible, and to refrain from impeding that process by recognizing, or giving effect to any measure taken by or on behalf of, the "British Indian Ocean Territory" (BIOT).

The ITLOS Special Chamber in the Mauritius/Maldives delimitation case took into consideration the determinations of the ICJ in the Chagos Advisory Opinion in assessing the legal status of the Chagos Archipelago,⁸² and found that Mauritius is the "coastal State" for the purpose of delimiting the maritime areas around the Chagos Archipelago.⁸³

The UK was not party to the proceedings. In appropriate circumstances a court will decline to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings would not only be affected by a decision, but would form the very subject-matter of the decision.⁸⁴ This is the indispensable third-party doctrine and derives from the principle of consent which is the basis of a court's jurisdiction.

However, the Special Chamber found that the UK was not an indispensable third party to the proceedings between Mauritius and Maldives. It noted that it is inconceivable that the United Kingdom, 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.⁸⁵

The fact that the time-limit set by the General Assembly for withdrawal from the Chagos Archipelago had passed, further strengthened its findings.⁸⁶

The Special Chamber found that five key paragraphs⁸⁷ of the ICJ advisory opinion, "have unmistakable implications for the United Kingdom's claim to sovereignty over the Chagos Archipelago." Those paragraphs concerned the ICJ's determination:

⁸¹ *Id.*, para 7.

⁸² Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives In the Indian Ocean (Mauritius/Maldives) (Preliminary Objections), Judgment ('Mauritius/Maldives (Preliminary Objections) Judgment'), at p. 78, paras. 205-206.

⁸³ Mauritius/Maldives (Preliminary Objections) Judgment, at p. 82 paras 225-227.

⁸⁴ E.g., Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) Judgment of 26 November 1984, I.C.J. Reports 1984, p. 431, para. 88.

⁸⁵ Mauritius/Maldives (Preliminary Objections) Judgment, at p. 88, para. 247.

⁸⁶ See *id.*, p. 83, para. 229.

⁸⁷ See *id.*, pp. 71-72, paras. 177-182.

- that the UK's continued administration of the Chagos Archipelago is an unlawful act of a continuing character, entailing its international responsibility, and must be brought to an end as rapidly as possible;
- that "the United Kingdom, as the administering Power, [must] respect the territorial integrity of that country [Mauritius], including the Chagos Archipelago" – the reference to territorial integrity being significant, as it refers to the territorial 'oneness' or 'wholeness' of the sovereign State; and
- that "[t]he modalities necessary for ensuring the completion of the decolonization of Mauritius" were left with the UN General Assembly.⁸⁸

The Special Chamber observed that:

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 with competence in matters of international law.⁸⁹

It considered that the pronouncements of the ICJ on the UK's obligations with regard to the Chagos "do have legal effect".⁹⁰

An appreciation of the Special Chamber's statements may be gained from the reflections of D.W. Greig⁹¹ some 60 years ago:

[I]t is perhaps worth remembering that the notion of the binding nature of a judicial award has a different connotation under international law from what it has under municipal law. Municipal systems provide a "due process of law" for the enforcement of judgments, but the enforcement of the decisions of an international tribunal will usually depend on the political circumstances of the States involved and the attitudes of other interested parties. Thus, although it is only possible to talk of the obligation "to comply in good faith with the . . . decisions of the Court"

⁸⁸ Mauritius/Maldives (Preliminary Objections) Judgment, at p. 69, para. 173.

⁸⁹ *Id.*, at p. 77, para. 203.

⁹⁰ *Id.*, at p.78, para. 205.

⁹¹ D. W. Grieg, 'The Advisory Jurisdiction of the International Court and the Settlement of Disputes between States' (1966)15 *International and Comparative Law Quarterly* 325; see also Julia Gunn, "Advisory Opinions of the International Court of Justice: Uncovering Their Legal Status," *New Zealand Yearbook of International Law* 18 (2020): 85-113 at p.97; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 412 at pp. 428-429, para 53 (noting that while its previous "decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so. As the Court has observed in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), while '[t]here can be no question of holding [a State] to decisions reached by the Court in previous cases' which do not have binding effect for that State, in such circumstances '[t]he real question is whether, in [the current] case, there is cause not to follow the reasoning and conclusions of earlier cases' (Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 292, para. 28).")

expressed in Article 94 of the Charter in connection with decisions of the Court in contentious cases, the process of enforcement is, in the last analysis, the same as that applicable in order to ensure compliance with an opinion given by the Court in the exercise of its advisory jurisdiction.

As a consequence of the ICJ Chagos Advisory Opinion read together with General Assembly Resolution 73/295, the 27th Universal Postal Congress, held in August 2021, adopted a resolution that, among other things, formally acknowledges that, for the purposes of its activities, the Chagos Archipelago forms an integral part of the territory of Mauritius, and requires that the Universal Postal Union's (UPU) documentation does not include any references to the Chagos Archipelago as part of the "Overseas Territories of the United Kingdom of Great Britain and Northern Ireland".

Similarly, the UK's membership in the Indian Ocean Tuna Commission (IOTC) as a coastal State (on behalf of the BIOT / Chagos Archipelago) was challenged by Mauritius. This is distinct to its membership as a fishing State (replacing the EU as the competent body) post-BREXIT. The wording of the UK's post-BREXIT instrument (replacing the original instrument of acceptance) was ambiguous and did not indicate whether the instrument was deposited with respect to coastal and/or flag State status. The FAO and the FAO Director-General (as depositary of the IOTC Agreement) were implementing UNGA Resolution 73/295 and, therefore, recognised that 'the Chagos Archipelago forms an integral part of the territory of Mauritius'. At the IOTC Commission's annual session in 2023, according to the published summary, the UK committed to clarify the status of its membership before the end of the year; in May 2024 the decision was taken to defer the determination of the UK's status in the IOTC until the next session.⁹² The 29th session of the IOTC in April 2025 immediately preceded the formal signing in May of the UK/Mauritius Chagos agreement.

2022 Commentary on the Mauritius/Maldives delimitation decision of the Special Chamber to "recognise" and "take into consideration" the ICJ advisory opinion in assessing the legal status of the Chagos Islands asserts – and I quote:

"that this advisory opinion - which has also been endorsed by a GA resolution - is today an inescapable point of reference with respect to any decision concerning the legal status of the Chagos Islands: it has the

⁹² See IOTC-2024-S28-R[E], the Report of the 28th Session of the Indian Ocean Tuna Commission May 2024 reflects the decision to defer the determination of the UK's status in the IOTC until the next session.

authority to impose itself in the concrete case regardless of the jurisdiction resorted to and of the will of the parties involved.”⁹³

➤ **Concluding thought**

International courts are only one mechanism among many to promote adherence to international norms. They have maintained relevance through the rational and prudent application of existing legal frameworks to new challenges and the judicious treatment of complex cases. Historically, international courts played a marginal role in major geopolitical conflicts. That has changed with the increasing reliance on international tribunals within broader conflict-resolution strategies. This poses new challenges for international courts in exercising their judicial functions while closely guarding their judicial integrity.

Margaret MacMillan,⁹⁴ Professor Emeritus of International History at Oxford University, recalls that “[i]n the face of the Great Depression ... the world descended into the worst military conflict of the modern era.” She observes that

“[t]he international order today appears stronger and more resilient.”

“But the experience of the past is a reminder that the strength of institutions can be very hard to assess before they are directly challenged.”

“Great political and social changes often come as institutions are losing authority because people simply stop believing in their legitimacy.”

Growing attempts by dissatisfied constituencies to paint courts – international and domestic – as inherently subordinated to partisan considerations and global politics, arguably risks permanently eroding the international legal order which is already under severe strain.

I end my presentation there.

⁹³ Niccolo Lanzoni, "The Authority of ICJ Advisory Opinions as Precedents: The Mauritius/Maldives Case," *Italian Review of International and Comparative Law* 2, no. 2 (2022): 296-322 at p.317.

⁹⁴ Margaret MacMillan, "Stress Test." *Foreign Affairs*, January 7, 2025, available at: <https://www.foreignaffairs.com/united-states/stress-test-trump-margaret-macmillan>.