

SYMPOSIUM ON THE CONTOURS AND LIMITS OF ADVISORY OPINIONS

HOW DO STATES REACT TO ADVISORY OPINIONS? REJECTION, IMPLEMENTATION, AND WHAT LIES IN BETWEEN

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Advisory opinions of the International Court of Justice (ICJ) are non-binding and lack operative clauses requiring compliance. At the same time, they reflect the ICJ's views as to rights and obligations of states under international law. In that sense they are not different from binding judgments and generate expectations of implementation of the Court's determinations. Although some states may reject an opinion, others have pursued implementation through the requesting organ, or through alternative political and legal means. And although it is not always easy to ascertain the effect of an opinion on states' behavior, advisory opinions often have practical ramifications, even if they are not implemented.

The Legal Status of Advisory Opinions

Advisory opinions do not qualify as "decisions" under Article 59 of the ICJ Statute: they do not have parties and do not bind states. They do not have *dispositifs* (operative clauses). They contain "replies" to the questions asked. Whereas non-compliance with contentious cases may be brought before the Security Council under Article 94 of the United Nations Charter,¹ advisory opinions do not constitute decisions in the context of Article 94, as there is no party to the case required to comply with them. Therefore, there is also no party against whom the reply of an advisory opinion would be enforced. But that does not mean that they are void of legal significance.

Already in 1972, Judge Gros of the ICJ questioned whether the distinction between advisory opinions and binding judgments was overstated. Like judgments, advisory opinions are "judicial decisions"—subsidiary means for the determination of rules of law—within the meaning of Article 38 of the Statute of the ICJ.² Judge Gros argued that, aside from *dispositifs*, the Court's reasoning "in both cases, represents the Court's legal conclusions concerning the situation which is being dealt with, and its weight is the same in both cases: there are no two ways of declaring the law."³ In other words, though advisory opinions do not, formally speaking, alter a pre-existing legal situation, an advisory opinion contains the Court's analysis of rights and obligations of states under international law.

Furthermore, as seen below, an advisory opinion addressed to the requesting organ normally generates a post-opinion phase within that organ, which in turn can lead to further legal and political action by actors seeking

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¹ Although this has been a rarity, for such an instance see [UN Doc. S/18428](#) (Oct. 28, 1986).

² André Gros, *Concerning the Advisory Role of the International Court of Justice*, in [TRANSITIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP](#) 315 (Wolfgang Friedman, Louis Henkin & Oliver Lissitzyn eds., 1972).

³ *Id.* at 314–15.

implementation, internationally and domestically. In some situations, this can create political and legal pressure on states that have rejected the opinion, notwithstanding the fact that there is no formal “post-judgment” phase.

Though formally addressed to the requesting organs, advisory opinions may in reality primarily address the rights and obligations of particular states and other entities—recent examples include the *Wall* advisory opinion and the pending proceedings in the request concerning the policies and practices of Israel in the Occupied Palestinian Territory, the *Kosovo* case, and the *Chagos* advisory opinion. In such circumstances, there may be a greater expectation that the relevant states implement or comply with the opinion. Furthermore, implementation may also be easier to assess in situations requiring action from a limited number of states. Additionally, such expectations may reflect the rise in the prominence of principles such as the rule of law. Expectations may be even higher of states that regularly voice support for such principles.

State Acceptance or Rejection of Advisory Opinions

States’ reception of the advisory opinions of the Court has been inconsistent from the very beginning. Pursuant to the ICJ’s opinion in the *Reparations* case, Israel paid the United Nations compensation for the assassination of mediator Count Folke Bernadotte, and the secretary-general considered the matter settled.⁴ On the other hand, some member states continued to use admission to the United Nations as a political tool, ignoring the ICJ’s opinion in *Conditions for Admission*, that admissions should be considered solely on the basis of the criteria of Article 4 of the UN Charter.⁵ This resulted in another request for an advisory opinion from the General Assembly, asking if it could admit new members without a Security Council recommendation. The Court answered in the negative.⁶

In more recent examples, Israel rejected the Court’s advisory opinion regarding the illegality of its wall in the Occupied Palestinian Territories. The Supreme Court of Israel had occasion to consider the opinion shortly after it was delivered. Noting the non-binding nature of the opinion, the Supreme Court stated that, as the “highest judicial body in international law,” the “ICJ’s interpretation of international law should be given its full appropriate weight.”⁷ The Supreme Court, however, rejected the advisory opinion’s implications for its established methodology of examining the legality of each segment of the wall separately.⁸

In response to the *Chagos* advisory opinion, the United Kingdom reaffirmed its position on its sovereignty over the Archipelago, and its commitment to the obligations identified by the Tribunal in the binding award in the *Chagos Arbitration*, mainly to return the Archipelago to Mauritius once it is no longer needed for defense purposes.⁹ It further stressed the non-binding nature of the advisory opinion and that the status of the Archipelago “as a United Kingdom territory” is “essential” for the U.S. naval base Diego Garcia.¹⁰ The United Kingdom remains committed to this position, though as will be explained below, the United Kingdom and Mauritius have since commenced negotiations. An unsuccessful attempt to rely on the opinion was also made before the English Court of

⁴ [UN Doc. S/1506](#) (June 14, 1950).

⁵ *Conditions of Admission of a State to Memberships in the United Nations* (Article 4 of the Charter), [Advisory Opinion](#), 1948 ICJ Rep. 57 (May 28).

⁶ *Competence of the General Assembly for the Admission of a State to the United Nations*, [Advisory Opinion](#), 1950 ICJ Rep. 4 (Mar. 3).

⁷ [Mara’abe v. Prime Minister of Israel](#) [2009] HCJ 7957/04, para. 56 (Sup. Ct. Isr.) (Isr.).

⁸ *Id.*, para. 74.

⁹ Philippa Webb, [The United Kingdom and the Chagos Archipelago Advisory Opinion: Engagement and Resistance](#), 21 MELB. J. INT’L L. 1, pt. V (2021).

¹⁰ [Statement of UK in the General Assembly](#), at 11, UN Doc. A/73/PV.83 (May 22, 2019); [Webb](#), *supra* note 9, at 12–16.

Appeal. The Court of Appeal found that the opinion “is not a judgment in the traditional sense of determining a dispute as between parties where the judgment has binding effect.”¹¹

Seeking Implementation Through the Requesting Organ

As ICJ advisory opinions are directed to the requesting organ, one can expect that states seeking implementation initiate action within that organ. The success of such attempts has varied.

Recent examples in the General Assembly show this varying impact. For instance, after *the Wall* advisory opinion, the Assembly adopted a resolution which “considered” that “respect for the Court and its functions is essential to the rule of law.”¹² It demanded that Israel and all United Nations member states comply with their legal obligations, as mentioned in the opinion. The Assembly also took active steps and requested the secretary-general to establish a register of damage caused to all natural or legal persons resulting from Israel’s construction of the wall.¹³ Such a register was established in a later Assembly resolution, on which the secretary-general reports regularly to the General Assembly.¹⁴ The advisory opinion continues to be referred to in the Assembly’s resolutions,¹⁵ and Security Council Resolution 2334 on Israeli settlements recalled “the advisory opinion rendered” by the ICJ.¹⁶

In contrast, the General Assembly has not taken any concrete action in the aftermath of the *Kosovo* advisory opinion. After “having studied with great care the advisory opinion,” it merely acknowledged it and welcomed the EU facilitation process between the parties.¹⁷

With respect to *Chagos*, the General Assembly welcomed the opinion and demanded that the United Kingdom withdraw from the Archipelago “unconditionally within a period of *no more than six months* from the adoption of the present resolution.”¹⁸ The resolution furthermore called on the United Nations and its specialized agencies to recognize the Archipelago as “an integral part of the territory of Mauritius.”¹⁹

The Security Council’s only request for an advisory opinion concerned the legal consequences of South African presence in Namibia in 1970.²⁰ The Court found that that presence was illegal and that South Africa was obliged to withdraw its administration from Namibia immediately. Member states were obligated to refrain from any action that implied recognition of the legality of, or lent assistance to, such presence and administration. A Council resolution took note with appreciation of the opinion, agreed with its operative conclusions, and called upon all states to conduct themselves accordingly. Nevertheless, the United Kingdom, joined at times by France and the United States, continued to veto draft resolutions in the Security Council on the Namibia issue.²¹

¹¹ [R \(Hoareau\) v. Secretary of State for Foreign and Commonwealth Affairs](#) [2020] EWCA Civ. 1010, para. 116 (Royal Cts. Just. July 30, 2020) (UK).

¹² [GA Res. 10/15](#) (Aug. 2, 2004).

¹³ *Id.*

¹⁴ [GA Res. 10/17](#) (Jan. 24, 2007).

¹⁵ [GA Res. 72/14](#) (Dec. 7, 2017).

¹⁶ [SC Res. 2334](#), pmb. (Dec. 23, 2016).

¹⁷ [GA Res. 64/298](#) (Sept. 9, 2010).

¹⁸ [GA Res. 73/295](#), para. 3 (May 22, 2019) (emphasis added).

¹⁹ *Id.*, paras. 6–7.

²⁰ [SC Res. 284](#) (July 29, 1970).

²¹ *See, e.g.*, [SC Res. 10489](#) (Dec. 30, 1971) (draft); [SC Res. 11716](#) (June 6, 1975) (draft).

Seeking Implementation by Other Legal and Political Means

Beyond the requesting organ, states (and other interested parties) may pursue other avenues, both political and legal—including further litigation—in an attempt to implement an advisory opinion.

A recent example is the *Chagos* opinion, where Mauritius has sought to utilize the opinion in other fora to bring to bear various forms of political pressure on the United Kingdom. In August 2021, the Universal Postal Union, a United Nations specialized agency, decided to no longer recognize stamps issued by the British Indian Ocean Territory, which it would from then on consider to be part of Mauritius.²² Mauritius has also raised the issue in the Indian Ocean Tuna Commission (IOTC), an intergovernmental organization established under the auspices of the Food and Agriculture Organization (FAO). A 2022 legal opinion from the FAO took the view that the IOTC should treat Chagos as part of Mauritius.²³ The matter is, as of October 2023, still pending: as part of a consultative process with the IOTC, during the 2023 IOTC annual meeting, the United Kingdom committed to clarifying “the status of its [IOTC] membership before the end of the year,” and Mauritius raised no objection.

Perhaps most notable, however, has been Mauritius’ initiation of legal proceedings against the Maldives for delimitation of the maritime boundary between Maldives and the Chagos Archipelago, heard before a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS). In its judgment on preliminary objections on January 28, 2021, the Special Chamber rejected the Maldives’ arguments that the United Kingdom was an indispensable third party to the proceedings due to the sovereignty dispute over Chagos. The Special Chamber held that the ICJ’s advisory opinion, while not binding, was “authoritative” and made “determinations” with “legal effect and clear implications for the legal status of the Chagos Archipelago,” such that “Mauritius can be regarded as the coastal State in respect of the Chagos Archipelago for the purpose of the delimitation of a maritime boundary even before the process of the decolonization of Mauritius is completed.”²⁴ In contrast to the approach taken by the courts of Israel and the United Kingdom, which stressed the non-binding nature of advisory opinions, the Special Chamber treated the opinion not just as a subsidiary means of determining the law, but as a judgment that essentially settled the sovereignty dispute.

Post-Opinion Negotiations

Notwithstanding their non-binding character, advisory opinions may factor into efforts to settle disputes via negotiations. The recent *Chagos* example is demonstrative. While there has been no change in the United Kingdom’s official position, on November 3, 2022, Mauritius and the United Kingdom announced the start of negotiations “on the exercise of sovereignty” over the Archipelago. The Parties stated their intention “to secure an agreement on the basis of international law to resolve all outstanding issues,” taking into account “*relevant legal proceedings*.”²⁵

The statement conveyed the intention to conclude the talks by early 2023, yet no outcome has been made public as of October 2023. Finding an agreed solution on sovereignty is undoubtedly complicated by other factors. These include the UK–U.S. agreement on the continued operation of the U.S. naval base on Diego Garcia in the archipelago, compounded by the fact that the United States is not a party to the negotiations. Mauritius has publicly stated its commitment to retain the base. However, some British parliamentarians, as well as possibly some in the

²² Universal Postal Union Press Release, [UPU Adopts UN Resolution on Chagos Archipelago](#) (Aug. 27, 2021).

²³ [Report of the 27th Session of the Indian Ocean Tuna Commission](#), IOTC-2023-S27-R, paras. 12–13 (July 26, 2023).

²⁴ Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), [Preliminary Objections](#), Case No. 28, paras. 246–50 (ITLOS Jan. 28, 2021).

²⁵ [British Indian Ocean Territory/Chagos Archipelago, Statement Made on November 3, 2022](#), UIN HCWS354.

United States and India, are wary of the possibility that Mauritius, which is financially indebted to China, might allow China to erect a base in the Archipelago.²⁶ Other sensitivities, such as the status of the UK's Sovereign Bases in Cyprus²⁷ or its dispute with Argentina over the Falklands/Malvinas may be another complicating factor.²⁸ These demonstrate that the question of Chagos cannot be viewed in isolation from domestic sensitivities concerning other territorial disputes over British Overseas Territories.

A Nuanced Response

States often refer to the non-bindingness of advisory opinions when disagreeing with their content. The *Wall* opinion remains unimplemented almost twenty years later. Almost five years since the *Chagos* opinion, the United Kingdom has not ended its administration of the archipelago. In itself, the expectation that one particular state should comply with an opinion may also give the impression that advisory opinions are used as a guise to bypass the consent necessary for bringing contentious cases before the Court.²⁹

At the same time, it should be noted that, despite its views being rejected by the ICJ, the United Kingdom has stated that it will continue to be supportive of the Court as an institution and to engage with international courts generally.³⁰ The Supreme Court of Israel, despite rejecting the *Wall* opinion, mainly on factual grounds, sought to find common ground with the legal analysis of the ICJ. This has historically not always been the case, as there are examples of states that have shied away completely from engaging with international courts and tribunals in the wake of an unfavorable judicial or arbitral decision.³¹

The decision by Mauritius and the United Kingdom to enter into negotiations over the Archipelago was, furthermore, not taken in a vacuum: it is linked to the Court's opinion and the subsequent events described above. Whatever the results of these negotiations, the opinion has already influenced the decision making of both states. It may be too soon to evaluate the precise effect of the *Chagos* opinion and what contribution it will make toward resolving the dispute, but the mere fact that the parties are negotiating is more than can be said of states' reactions to other advisory opinions.

The Judgment of the ITLOS Special Chamber in *Mauritius/Maldives* has not been free of criticism, especially for the legal conclusions it drew from the *Chagos* opinion and the General Assembly resolution.³² Nevertheless, it demonstrates the potential of advisory opinions to produce effects similar to that of binding judgments and alter the legal situation of states. The Judgment allowed the case to progress to the merits phase and for the Special Chamber to delimit the maritime boundary of the UK-administered archipelago.

²⁶ Abhinandan Mishra, [China Looking for Naval Bases Near Diego Garcia](#), SUNDAY GUARDIAN (Dec. 10, 2022); Parul Chandra, [India in the Crossfire Over Strategic Chagos Islands](#), DECCAN HERALD (Nov. 3, 2022).

²⁷ E.g., the pleadings of Cyprus in [Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965](#), CR 2018/23, 48–49, 53–60 (Sept. 4, 2018).

²⁸ Falkland Islands Government Press Release, [Legislative Assembly Reaffirms Islanders Rights to Self-Determination](#) (Nov. 3, 2022).

²⁹ [Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965](#), [Advisory Opinion](#), 2019 ICJ Rep. 95 (Feb. 25) (dec., Tomka, J.).

³⁰ [Webb](#), *supra* note 9, at 22–23.

³¹ *Id.* at 20–21.

³² Natalie Klein, [Chagos: A Boundary Dispute Tips Over a Sovereignty Ruling](#), INTERPRETER (Feb. 8, 2021); Karen N. Scott, [Legal Acts and Legal Facts: The Mauritius/Maldives Maritime Boundary Dispute in the Chagos Archipelago](#), ANZSIL PERSPEC. (Feb. 23, 2021).

Conclusion

Judge Gros aptly said that “there are no two ways of declaring the law.” In keeping with the principle of self-appreciation,³³ whether or not an advisory opinion is considered as correctly reflecting the law—and how or whether to act upon it—is a matter for states’ consideration. And as seen above, different opinions have been received differently by states. And while the role advisory opinions play in the decision making of states may be hard to ascertain, the opinion of the World Court can provide support and validation for a particular understanding of the law and may induce states and other actors to adopt the position articulated by the Court.

³³ Prosper Weil, *“The Court Cannot Conclude Definitively . . .” Non Liquet Revisited*, 34 COLUM. J. TRANSNAT’L L. 109, 119 (1998).