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Advisory Opinion or Judgment? The Case of the Chagos Archipelago

Introduction

One of the tasks of the ICJ is to issue advisory opinions on questions submitted to it by bodies authorised to make such requests. In 2019, the ICJ issued an advisory opinion in a case concerning the Chagos Archipelago, which has attracted much interest, and not only among academics. The case is still relevant because it concerns the territory that the United Kingdom has not yet handed over to Mauritius.

The islands of the Chagos Archipelago, a dependency of the UK, constitute what is known as the British Indian Ocean Territory (BIOT). Since its establishment on 8 November 1965 by an Order in Council, the BIOT has become a contentious issue and a cause of two major disputes. Besides the Chagos islands, the BIOT also included, until June 1976, the islands of Aldabra, Desroches and Farquhar, which were ceded to the Seychelles, of which they are now part. Although constitutionally British Overseas Territories (BOTs) are not part of the UK, they fall within the “Crown’s undivided realm” as regards government power, ownership and belonging. When it comes to international relations, they do not enjoy separate status and the highest judicial body for all BOTs is the Judicial Committee of the Privy Council. The UK Parliament retains ultimate legislative authority, and any reform of a BOT’s constitution requires amendment either by an Order in Council or an Act of Par-

liament.¹ Disputes have arisen, on the one hand, between the Chagos islanders and the UK government regarding the legality of the expulsion of the former from the islands and, on the other, between the UK and Mauritius over which state is entitled to exercise authority over the islands. In other words, the disputes centre, on the one hand, around a fundamental human rights issue, whereas on the other, they focus on the question of sovereignty and decolonization.

The purpose of this article is to analyse the advisory opinion provided by the ICJ in the Chagos Archipelago case in 2019. It is primarily intended to answer the following question: is it consistent with the letter and the spirit of international law for the ICJ to issue advisory opinions in disputes between sovereign states, which, due to the lack of consent from one of the parties to the dispute, cannot be brought before the ICJ and be decided by means of a judgment. Another question that arises is how to read the ICJ's recent opinion – as advice or as something more – in cases where requesting an advisory opinion is the only way of gaining access to the Court when one of the parties refuses to consent to the jurisdiction. And in such cases, what role is the Court playing: is it issuing an opinion as such or is it – de facto if not de jure – ruling on the subject matter under the guise of an opinion?

In addition to their main objective, the authors will also pursue a number of complementary goals. In particular, an attempt will be made to determine whether, among other things, an ICJ ruling is the right means of settling an issue involving decolonization, and whether Brexit was a possible factor affecting the case under discussion.

The article consists of five parts. It begins with an introduction and ends with brief conclusions. The first part sets out the background to the dispute between the UK and Mauritius. The other parts focus respectively on the nature of advisory opinions and the ICJ's advisory opinion on the particular case involving the Chagos Archipelago in 2019. Then the au-

1 H. O. Yusuf, T. Chowdhury, *The persistence of colonial constitutionalism in British Overseas Territories*, "Global Constitutionalism" 2019, 8:1, p. 163.

thors show the possible impact of Brexit both on the dispute between the UK and Mauritius as well as on the UK's international standing in general. The article ends with some reflections on voluntarism in international law.

The methodology employed is descriptive and interpretative. It is descriptive in all those instances where the authors recall the facts, and interpretative where they explain why an advisory opinion should not be treated as an opinion per se but as a judgment on the subject-matter.

The authors argue that in cases where one of the parties cannot bring a contentious issue before the Court, an advisory opinion may, due to its significance and the very authority of the Court as the highest international judicial body, be read as a ruling on the issue. Such a stance is supported by the fact that advisory opinions are binding on UN organs in cases involving points of law decided by the Court. Finally, they conclude that *de lege lata* advisory opinions of the ICJ should absolutely only concern abstract legal problems and they should not have the character of authoritative court statements issued in pending inter-state disputes.

The Background of the Dispute Between the United Kingdom and Mauritius

From 1814 till 1965, the UK administered the Chagos Archipelago as a dependency of Mauritius. In 1965 the UK detached the Chagos Archipelago from Mauritius to form the British Indian Overseas Territory. In 1966 the Chagos Archipelago, and more precisely the archipelago's largest island Diego Garcia, was made available for military use and since 1971 it has been the site of a US military base.

On 12 March 1968, Mauritius gained its independence from the UK. Between 1968 and 1971, the Chagossians were forced to leave the islands, and, as a consequence, were resettled in Mauritius and the Seychelles. They received only modest compensation in return.² In the 1970s,

2 R. Cormacain, *Prerogative legislation as the paradigm of bad law-making: the Chagos Islands*, "Commonwealth Law Bulletin" 2013, 39:3, p. 488.

the Chagossians initiated the struggle for the right to return to their homeland, including to Diego Garcia where US defence facilities had been set up in the meantime. It was Michel Ventacassen who brought the case to the High Court in London in 1975.

The centrepiece of the Chagossians' litigation, however, was the *Bancoult* case. In 1998, Mr Louis Olivier Bancoult, a Chagossian, instituted proceedings in the UK courts aimed at challenging the validity of legislation denying him the right to reside in the Chagos Archipelago. Following the ruling of the Divisional Court (*Bancoult 1*),³ which found the expulsions to be invalid, the Labour government gave the Chagossians the right to return to islands other than Diego Garcia, once the appropriate feasibility studies had been conducted.⁴ Robin Cook, the then Foreign Minister, issued the Immigration Ordinance of 2000,⁵ repealing the 1971 Ordinance, under which the Chagossians were legally entitled to move to any of the Chagos islands, with the exception of Diego Garcia. However, in 2004, the BIOT (Constitution) Order and the BIOT (Immigration) Order were issued under royal prerogative.⁶ Section 9 of the BIOT Constitution prohibited the Chagossians from living on the Chagos islands. In 2004, the Chagossians, and more precisely Mr Bancoult who had challenged the validity of both the BIOT Constitution and the BIOT Immigration orders, were successful in the Divisional Court (2006) and the Court of Appeal (2007); however, their claims were rejected by the House of Lords (2008). The Law Lords upheld the 2004 Order in Council, which prevented the Chagossians from returning to their homeland, arguing that since the Chagos islands were part of the

3 See *UK R Bancoult v. Secretary of State for Foreign and Commonwealth Affairs*, 2001, QB 1067.

4 T. Frost, C. Murray, *The Chagos Islands Cases: The Empire Strikes Back*, "Northern Ireland Legal Quarterly" 2015, 66:3 p. 278.

5 *Ibidem*, p. 278; see also D. Snoxell, *An ICJ Advisory Opinion, Basis for a Negotiated Settlement on the Issues concerning the Future of the Chagos Islanders and of the British Indian Ocean Territory*, "QIL" 2018, 55, p. 12.

6 See R. Cormacain, *supra* note 2, p. 490; see also British Indian Ocean Territory Constitution Order 2004 <archive.org/details/BritishIndianOceanTerritoryConstitutionOrder2004>.

colony, they were subject to the prerogative powers of the Crown, which included the power to prevent resettlement⁷ (*Bancoult 2*).⁸ In its 29 June 2016 decision, the Supreme Court dismissed the Chagossians' appeal to return, i.e., it ruled against setting aside the 2008 verdict of the House of Lords.⁹ Nonetheless it recommended that the UK government review their right of abode. However, in November 2016 the UK government announced that it had decided against the Chagossians' resettlement on the grounds of feasibility, defence and security interests, as well as in view of the costs to the British taxpayer¹⁰ – the decision was subject to judicial review and was upheld.¹¹

The documents disclosed during the *Bancoult* litigation confirm that in 1965 the UK neglected its obligations to the BIOT under the UN Charter, i.e., the duty to foster self-government and facilitate the exercise of the right to self-determination, due to the fact that the territory was inhabited at that time by a permanent population and thus was a non-self-governing territory under the UN Charter, and also because the Chagossian societal group constituted a distinct people under customary international law.¹²

Following the proclamation of the Marine Protected Area (MPA) in 2010, Mauritius – a group of islands in the South – West Indian Ocean – now claimed that the Chagos Archipelago – a group of coral atolls

7 See T. Frost, C. Murray, *supra* note 4, p. 264.

8 See *UK R On the Application of Bancoult v. Secretary of State for Foreign and Commonwealth Affairs*, 2008, UKHL 61.

9 *UK R on the application of Bancoult No 2 v. Secretary of State for Foreign and Commonwealth Affairs* 2016, UKSC 35.

10 Update on the British Indian Ocean Territory: Written Statement, 16 November 2016.

11 *UK Bancoult and Hoareau v. The Secretary of State for Foreign and Commonwealth Affairs* 2019, EWHC 221

12 S. Allen, *International Law and the Resettlement of the (Outer) Chagos Islands*, "Human Rights Law Review" 2008, 8:4, p. 690; see also *Declaration on the granting of independence to colonial countries and people*, GA Res 1514, UNGAOR, 15th Sess, Supp No 16, UN Doc A/4684, 1960, 66, para. 2 and *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, GA Res 2625, UNGAOR, 25th Sess, Supp No 28, UN Doc A/8028, 1970, 121 and also S. Allen, *Self determination, the Chagos Advisory Opinion and the Chagossians*, "ICLQ" 2020, 69:1, pp. 206–211; R. McCorquodale, J. Robinson, N. Peart, *Territorial Integrity and Consent in the Chagos Advisory Opinion*, "ICLQ" 2020, 69:1, p. 223 et seq.

in the middle of the Indian Ocean – was a dependency under its authority. The problem with the BIOT MPA arose, among other things, because it was a unilateral decision that disregarded the legitimate interests of other states and the people concerned.¹³

On 18 March 2015, the arbitration tribunal constituted under Annex VII of the UN Convention on the Law of the Sea issued an award in the dispute between the Republic of Mauritius and the UK regarding the UK's decision on 1 April 2010 to establish the MPA around the Chagos Archipelago. The tribunal found that the commitment to return the Chagos to Mauritius was binding under international law and affirmed Mauritius's rights with respect to the Chagos. The tribunal found that the UK's unilateral declaration of the MPA was incompatible with its obligations under the UNCLOS, as the UK had failed to consult Mauritius and had disregarded Mauritius's fishing rights in Chagos waters, as well as its rights to minerals and oil in the seabed and subsoil. Furthermore, the tribunal ruled that the UK was bound by international law to return the Chagos Archipelago to Mauritius once the islands were no longer needed for defence purposes.¹⁴ The tribunal also pointed out that Mauritius's concerns included not merely the return of the Chagos Archipelago, but also the state in which the Archipelago would be returned. Hence, the question of whether the Archipelago should or should not be covered by the MPA greatly affects the nature of what Mauritius would eventually receive and the uses it would be able to make out of it.¹⁵

Furthermore, Chagossians living in the UK sought to challenge the proclamation of the MPA. The case was brought by Mr Bancoult on behalf of a group of Chagossians who had been expelled from the Archipelago. In the 11 June 2013 decision¹⁶ the High Court ruled against the

13 P. H. Sand, *Fortress Conservation Trumps Human Rights?: The 'Marine Protected Area' in the Chagos Archipelago*, "The Journal of Environment & Development", 2012, 21:1, p. 37.

14 *Chagos Marine Protected Area Arbitration Mauritius v. United Kingdom*, Award of 18 March 2015, para. 547 B.

15 *Ibidem*, para. 298.

16 *UK R Bancoult v. Secretary of State for Foreign and Commonwealth Affairs* 2013, EWHC 1502.

Chagossians and on 23 May 2014 the Court of Appeal upheld the verdict of the High Court¹⁷ (*Bancoult 3*). In February 2015, an application for leave to appeal was made to the Supreme Court, which on 8 February 2018 held that the MPA had not been created for an improper purpose and that the consultation process had been lawful.¹⁸

On 22 June 2017, the UN General Assembly passed Resolution 71/292 referring the Mauritius case to the ICJ for an advisory opinion. At the time the ICJ held oral hearings on the matter, no British judge was sitting on the court bench for the first time in its history.¹⁹ The questions submitted to the ICJ concerned the incomplete process of decolonization and the consequences under international law arising from the UK's continued administration of the Chagos Archipelago.²⁰ The ICJ issued its opinion on 25 February 2019. The first question was whether the decolonization of Mauritius had been lawfully completed by the time Mauritius had been granted independence in 1968, bearing in mind the earlier detachment of the Chagos Archipelago, and considering the perspective of international law, including the obligations arising from General Assembly resolutions 1514 (XV) (requiring the decolonizing state to maintain the territorial integrity of the colony), 2066 (XX) (calling on the UK not to violate the territorial integrity of Mauritius during decolonization), 2232 (XXI) and 2357 (XXII). The ICJ said that one could not talk of an international agreement – the 1965 agreement between Mauritius and the UK – when one of the parties had been under the authority of the latter. Hence, as a result of the Chagos Archipelago's unlawful detachment and incorporation into a new

17 *UK R Bancoult v. Secretary of State for Foreign and Commonwealth Affairs* 2014, EWCA 708.

18 *UK R on the application of Bancoult No 3 v. Secretary of State for Foreign and Commonwealth Affairs* 2018, UKSC 3.

19 S. Minas, *Why the ICJ's Chagos Archipelago advisory opinion matters for global justice – and for 'Global Britain'* "Transnational Legal Theory" 2019, 10:1, p. 129.

20 *Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, GA Res 292, UNGAOR, 71st Sess, Supp No 49, UN Doc A/RES/71/292, 2017, p. 2.

colony, the process of decolonization had not been lawfully completed. As to the second issue, namely the consequences arising under international law from the UK's continued administration of the Chagos Archipelago, including the inability of Mauritius to implement a programme of resettlement for its nationals, the ICJ said that the UK was obliged to bring its administration to an end, thereby enabling Mauritius to decolonize the territory in a manner consistent with the right of peoples to self-determination. As regards the resettlement of Mauritian nationals on the Chagos Archipelago, including those of Chagossian origin, the ICJ stated that this was an issue relating to the protection of human rights, which should be addressed by the General Assembly during the completion of the decolonization of Mauritius.

The ICJ ruled that the contentious issue was the decolonization process itself, which is a matter of particular concern to the UN. The ICJ also referred to the right of self-determination by declaring that the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering power; consequently, any detachment by the administering power of any part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people, is contrary to the right to self-determination.²¹ Finally, the ICJ ruled that the decolonization of Mauritius had not been conducted in a manner consistent with the right of peoples to self-determination and that the UK is under an obligation to bring to an end its administration of the Chagos Archipelago as soon as possible.²²

21 *Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 2019, ICJ Rep 95, para. 160.

22 *Ibidem*, pp. 40–41, paras 177–182. See also *Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, GA Res 295, UNGAOR, 73rd Sess, Supp No 49, UN Doc A/RES/73/295, 2019, where we can read: “Demands 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”, and the UK government statement following the publication of the UN Secretary General’s report on implementing Resolution 73/295 relating to the Chagos Archipelago, 13 June 2020,

At this point, however, the question arises of whether, in light of the facts presented above, the ICJ should have issued an advisory opinion at all, because we are dealing here with a situation in which the UK refused to give its consent for the ICJ to settle a dispute between the UK and the Republic of Mauritius. As a consequence, the legal character of advisory opinions requires examination, as does the question of whether issuing such an opinion is admissible in the case in question.

The Nature of Advisory Opinions

The ICJ is the highest judicial body in the international arena. Apart from hearing cases brought by states – the parties to the ICJ Statute²³ – the Court can also issue advisory opinions. It may give an advisory opinion on any legal question at the request of UN organs and affiliated UN agencies regarding legal issues arising within the scope of their activities.²⁴ It needs to be said that advisory opinions are not another form of legal recourse available to states but rather a means by which the Security Council and the General Assembly can seek advice on legal questions.²⁵

The ICJ settles disputes by issuing judgments that have binding force. On the other hand, the advisory opinions issued by the Court are authoritative but not formally binding. An important point to note here is that some entities may request the Court to launch contentious proceedings, whereas others may request advisory proceedings. Only states can appear as parties before the ICJ and initiate contentious proceedings, whereas proceedings that lead to the issuance of an advisory

where we find: “the International Court of Justice and General Assembly are not the appropriate fora for resolving what is fundamentally a bilateral matter of disputed sovereignty between 2 UN member states” <www.gov.uk/government/news/united-nations-secretary-generals-report-on-the-implementation-of-resolution-73295-uk-statement>.

23 Statute of the International Court of Justice, 18 April 1946.

24 Ibidem art. 65 in connection with art. 96 UN Charter, 26 June 1945.

25 M. Law, *The Chagos Request: Does It Herald a Rejuvenation of the International Court of Justice’s Advisory Function*, “Queen Mary Law Journal” 2018, IX, p. 27.

opinion – not contentious by definition – are intended for the UN General Assembly and the Security Council. Such an option is also open to the Economic and Social Council, the Trusteeship Council and UN specialized agencies; however, in these cases prior authorization of the General Assembly is required.

It should be made clear that states cannot ask the ICJ for an advisory opinion. Hence the ICJ cannot initiate such a procedure at the request of a state. On the other hand, when it comes to contentious cases the ICJ can only launch proceedings with the consent of states, i.e. the parties to the dispute.

It is also necessary to point out that, as is shown in practice, advisory opinions can concern both contentious issues and abstract formulated questions of law.²⁶ The consent of the states-parties to the dispute – is not required. As a consequence, the ICJ can issue an opinion at the request of the collegiate body in which the vote takes place (e.g., in the UN General Assembly) even if one of the states – a party to the dispute – or both states have voted against it, subject to the required majority having been obtained.²⁷

It is worth mentioning here that both contentious and advisory proceedings must refer to legal issues.²⁸ It is important to note that an advisory opinion is not formally binding. Nevertheless, due to the very authority enjoyed by the judiciary, it carries symbolic and political weight. The gravity of an advisory opinion also depends on the persuasiveness

26 “It has also been contended that the Court should not deal with a question couched in abstract terms. That is a mere affirmation devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise.” *Conditions of Admission of a State to Membership in the United Nations Article 4 of the Charter*, Advisory Opinion, 1948, ICJ Rep 57, p. 8; see also A. Wnukiewicz – Kozłowska, *Kompetencje doradcze sądów międzynarodowych Współczesne sądownictwo międzynarodowe*, ed. J. Kolasa, vol. II, Wrocław 2010, p. 171.

27 See also B. Kuźniak, M. Marcinko, M. Ingelevič-Citak, *Organizacje międzynarodowe*, Warszawa 2017, pp. 71–72, 80–84 and references cited therein.

28 See A. Wnukiewicz-Kozłowska, *supra* note 26, pp. 161–162.

of its reasoning.²⁹ Being interpretive in nature, it can significantly affect the direction in which international public law develops, and because it is an authoritative statement,³⁰ it may resemble a court judgment. As regards the latter, it should be noted that in the circumstances of a specific case it may mean – de facto even if not de jure – that a court judgment issued without the consent of the states that are – parties to the dispute – will lead to compulsory ICJ jurisdiction entering through the back door.³¹

The first court vested with the authority to issue advisory opinions was the court of the League of Nations – the Permanent Court of International Justice. Even at that time, the conditions under which the court was entitled to issue advisory opinions was a matter of controversy. Moreover, later, when the UN was established with the ICJ as its judicial body, the provisions of the UN Charter governing the advisory jurisdiction of the ICJ (art. 96(1) of the UN Charter) differed significantly from the provisions of the Covenant of the League of Nations defining the advisory jurisdiction of the PCIJ (art. 14 of the LN Covenant). In the case of the PCIJ, an advisory opinion could be issued in “any dispute or question referred to it”, as compared with “any legal question” under the UN Charter. The above modification may indicate that lawmakers did not envisage advisory opinions as a tool for resolving disputes directly;³² all the more so in the absence of consent from both states-parties to the dispute.

It should also be stressed that the Court exercises its advisory jurisdiction at its own discretion. Based on art. 65 of the ICJ Statute, it can be reasonably argued that the Court has the right to decide whether to accept or reject a request for an advisory opinion, i.e., it is the Court it-

29 M. Pomerance, *The ICJ's Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial*, “American Journal of International Law” 2005, 99:1, p. 36.

30 A. Kozłowski, *Międzynarodowy Trybunał Sprawiedliwości in Współczesne sądownictwo międzynarodowe*, ed. J. Kolasa, vol. II, Wrocław 2010, p. 36. See also A. Wnukiewicz-Kozłowska, supra note 26, p. 157 and J. M. Pasqualucci, *The Practice and Procedure of Inter – American Court of Human Rights*, Cambridge 2013, p. 37.

31 See A. Wnukiewicz-Kozłowska, supra note 26, p. 159.

32 Ibidem p. 160 and references cited therein.

self which decides whether or not to exercise its advisory jurisdiction in a particular case.³³ The ICJ should be extremely cautious and vigilant to ensure it does not issue judgments by way of advisory opinions, especially without the consent of the parties concerned. Such a risk cannot be excluded due to the fact that the contentious procedure does not differ significantly from its advisory counterpart (art. 68 of the ICJ Statute). An advisory opinion does not, in principle, constitute a state of *res judicata*; however, by requesting such an advisory opinion an organ may indirectly – through the exercise of its own authority – bestow upon it normative value.³⁴ For this reason, the Court should be vigilant when issuing advisory opinions in any kind of dispute between states.

Hence, what are the arguments in favour of issuing advisory opinions? Firstly, the Court can play the role of legal counsel to political organs, instructing them on questions of law without interfering in their political objectives; secondly, in the case of questions concerning the interpretation of the Charter, the powers of UN organs, the rights of its members, etc., instead of asking for internal legal advice or setting up an *ad hoc* commission of jurists, such advice can be sought from the ICJ.³⁵

What arguments, in turn, speak against advisory opinions? Firstly, some commentators believe that advisory opinions, which have no binding force, can be harmful to the prestige of the Court; secondly, the advisory role of the Court may serve as a way of circumventing the requirement of state consent to the judicial settlement of disputes; thirdly, the advisory function of the Court may directly clash with the contentious function of the Court since bringing a case before the Court under the guise of advisory proceedings does not preclude the dispute from being brought before the Court as a contentious case; and fourthly, the

33 Ibidem p. 162; D. W. Greig, *The Advisory Jurisdiction of the International Court and the Settlement of Disputes between States* "International & Comparative Law Quarterly" 1966, 15:2–3, p. 327.

34 See A. Wnukiewicz-Kozłowska, *supra* note 26, pp. 171–173 and references cited therein. See also A. Kozłowski, *supra* note 30, p. 36 and M. Pasqualucci, *supra* note 30, pp. 36–40.

35 R. Kolb, *The Elgar Companion to the International Court of Justice*, London 2014, pp. 258–260.

availability of facts is uncertain in advisory cases, so it may happen that the Court will not have the possibility to rely on a strong factual basis.³⁶

As was noted above, advisory opinions are binding neither on the requesting entities nor on the states concerned; however, they are binding on UN organs with regard to the points of law decided by the Court.³⁷ In addition, some advisory opinions have binding legal force and even a *res judicata* effect which, however, does not follow from the opinion itself but rather from other legal acts that give the Court's opinions binding force.³⁸

Summing up the above considerations, we can conclude that when deciding whether or not to issue an advisory opinion in a particular case the ICJ should be vigilant in ensuring there is no circumvention of the rule that the judicial settlement of a dispute requires the consent of the states-parties to that dispute.

The Advisory Opinion on the Chagos Archipelago Case

When the ICJ issued its advisory opinion in the Chagos Archipelago case, it referred to procedural questions. Citing the 1975 advisory opinion on *Western Sahara*, the Court observed that the questions related not to a territorial dispute between states but rather to the issue of decolonization. As a consequence, it was in the interest of the General Assembly to seek an advisory opinion that it believed would assist it in carrying out its functions with regard to decolonization.³⁹

The fundamental issue, namely, the requirement that the parties to the dispute give their consent for the case to be settled by the ICJ, in the absence of which the Court could only give (and did give) an advisory opinion, had been addressed on a number of earlier occasions. In its advisory opinion on the *Interpretation of Peace Treaties with Bulgaria*,

³⁶ *Ibidem*, pp. 260–261.

³⁷ *Ibidem*, p. 277.

³⁸ *Ibidem*, p. 279.

³⁹ *Legal consequences*, *supra* note 21, p. 22, para. 86.

Hungary and Romania, the ICJ clearly stated that this opinion had no binding force and was addressed not to the states but to the organ entitled to request the said opinion.⁴⁰ Similarly in its opinion on the *Legal consequences of the construction of a wall in the occupied Palestinian territory*, the ICJ declared that the refusal of a state to consent to the Court's jurisdiction in contentious cases had no bearing on the Court's jurisdiction in advisory opinions.⁴¹

Taking the above into consideration, in the Chagos Archipelago case the Court concluded that the United Kingdom was under an obligation to bring its administration of the Chagos Archipelago to an end as quickly as possible, and that all Member States must co-operate with the United Nations in completing the decolonization of Mauritius.⁴²

However, the authors of the present study focus on the formal aspects of this case, namely whether the Court has the right to issue an advisory opinion or whether it should make use of its authority and admit that due to the absence of consent from the states-parties to the dispute – it should refrain from making its views known (even in the form of an advisory opinion). In the opinion we read the following:

the Court does not consider that to give the opinion requested would have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another State. The Court therefore cannot, in the exercise of its discretion, decline to give the opinion on that ground.⁴³

Here, the Court clearly upholds the view it expressed in its advisory opinion on *Western Sahara*.⁴⁴ It follows from the above that the ICJ

40 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 1950, ICJ, Rep 65.

41 *Legal consequences of the construction of a wall In the occupied Palestinian territory*, Advisory Opinion, 2004, ICJ Rep 136, pp. 25–26, para. 47.

42 *Legal consequences*, supra note 21, p. 43, para. 182.

43 *Ibidem*, p. 23, para. 90.

44 *Western Sahara*, Advisory Opinion, 1975, ICJ Rep 12, p. 25, para. 33.

took the position that any circumvention (*sic!*) of the principle of state consent to the judicial settlement of disputes with another state was unacceptable.

At this point, however, it is worth recalling that in the history of its adjudication, the ICJ, just like its predecessor, the PCIJ, maintained an ambivalent position on this issue and only subsequently tried to reconcile its rather inconsistent views. In the case of *Eastern Carelia*, the Court advanced the general rule that it does not exercise any advisory jurisdiction in contentious situations in which one of the parties does not agree to the dispute being resolved by that Court. In the opinion we read the following:

there has been some discussion as to whether questions for an advisory opinion, if they relate to matters which form the subject of a pending dispute between nations, should be put to the Court without the consent of the parties [...] It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement [...] The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.⁴⁵

Later, however, in the case of the *Interpretation of Peace Treaties* (1950) cited above, the Court mitigated its initial position.⁴⁶ In turn, in the previously mentioned *Western Sahara* case, the ICJ attempted to reconcile the above positions, stressing that everything depends on the circumstances of a given case. In the opinion, we read the following:

In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the

⁴⁵ *Status of Eastern Carelia*, Advisory Opinion, 1923, PCIJ, Ser. B, No. 5, p. 29.

⁴⁶ *Interpretation*, *supra* note 40, p. 71.

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 jurisdiction.⁴⁷

This is, in principle, replicated in its opinion on the Chagos Archipelago. At this point, however, the question that should be asked is whether in the Chagos Archipelago case the Court acted consistently and complied with its procedural guidelines. In the opinion under consideration, it seems that the ICJ was aware of the fact that there is a very fine line between what is simply an opinion and what can be interpreted as a court judgment. In the Chagos Archipelago case, the ICJ stressed and pointed out again and again that when giving its opinion, it was referring only to the issue of decolonization, which is an issue of particular concern to the UN. However, how can this be understood against the background of the very telling and unequivocal Court pronouncement that “the United Kingdom is required to complete the administration of the Chagos Archipelago as rapidly as possible”, a decision made despite the fact that the UK did not consent to the judicial settlement of the dispute over the actual possession of territory? To better illustrate the problem outlined above, we can cite, by way of example, the view expressed by one of the representatives of the doctrine of public international law. In his contribution, we read that “this is obviously where the UK just totally lost the case”.⁴⁸

It should be pointed out that the addressees of the principle of self-determination mentioned in art. 1 of the UN Charter are not states

47 *Western Sahara*, supra note 44, p. 25, para. 33. See also M. N. Shaw, *Prawo międzynarodowe*, Warszawa 2000, pp. 573–574.

48 M. Milanovic, *ICJ Delivers Chagos Advisory Opinion, UK Loses Badly*, “European Journal of International Law Blog” 2019.

but nations.⁴⁹ It is widely understood that the aim of this principle is to protect peoples, not states.

The above notion found expression, *inter alia*, in the Declaration on Principles of International Law adopted by the UN General Assembly in 1970 in cases where peoples entitled to protection under the principle of self-determination actually found themselves in opposition to states. It was clearly stated that every state has a duty to respect the right of peoples to self-determination.⁵⁰ Unquestionably, the entities privileged under this rule are those nations that enjoy the right to self-determination, including the right to independence as states.⁵¹

As a consequence, since the nation, and not the state, is the addressee of the principle of self-determination, the dispute between Mauritius and the UK should be classified as an inter-state dispute over the exercising of sovereignty in a given territory, rather than one concerning ongoing decolonization. The decolonization of Mauritius, including the decolonization of the disputed territory, has already been completed, except in the case of Chagos, where it has not yet been effected. The United Kingdom does not deny that the disputed territory should be transferred to Mauritius, but instead argues that this can only take place after it ceases to be used as a base for US troops,⁵² whereas Mauritius wishes to reclaim the

49 R. Andrzejczuk, *Prawa człowieka podstawą prawa narodów do samostanowienia*, Lublin 2004, p. 162; see also P. Kilian, *Self-determination of Peoples in the Charter of the United Nations* "RECHTD" 2019, 11:3, pp. 341–353.

50 "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter. Declaration, *supra* note 12, p. 123; see also R. Andrzejczuk, *supra* note 49, p. 177.

51 *Ibidem*, p. 161. With regard to the principle of self-determination of peoples, see also K. Knop, *Diversity and Self-Determination in International Law*, Cambridge 2002; K. Roepstorff, *The Politics of Self-Determination Beyond the Decolonisation Process*, Abingdon, New York 2013, and M. Pomerance, *Self-Determination in Law and Practice. The New Doctrine in the United Nations*, The Hague–Boston–London 1982.

52 See the draft minutes of the Lancaster House Meeting, where we read "if the need for the facilities on the islands disappeared the islands should be returned to Mauritius." Chagos Marine, *supra* note 14, para. 74. It should be noted that the new state, which is created as

territory immediately. The key question in the dispute is not whether, but when the territory in question will be surrendered to Mauritius, in other words, not whether the disputed territory is to be returned to Mauritius, but the timing of this event (*sic!*). Such a dispute should be classified as a disagreement over the exercising of sovereignty, and therefore as a territorial dispute, and not one involving the ongoing self-determination of a nation. The above reasoning is supported by the fact that there is no guarantee that the actions undertaken by Mauritius will lead to the return of the Chagossians to the island, all the more so as not all Chagossians are Mauritian citizens.⁵³ Moreover, as we read in the ICJ advisory opinion, the Chagossians are descendants of enslaved persons originally from Mozambique and Madagascar, who in the early 1800s were brought to work on British-owned coconut plantations.⁵⁴ Hence, the state of Mauritius cannot be equated with the people whose rights are to be protected under the principle of self-determination. It should also be added that the Prime Minister of Mauritius, Pravind Kumar Juqnauth, stated that his country is ready to conclude agreements with both the United States and the UK to allow unhindered operation of the military base.⁵⁵

Hence, bearing in mind international law, and fully appreciating the significance and importance of the principle of self-determination, the au-

a result of decolonization, is not obliged to honour the commitments incurred by the colonial state, although such a possibility exists. In such a case we are dealing with implied succession. It can therefore be assumed that initially Mauritius implicitly honoured both the Lancaster House agreement and British – American agreements providing Americans with access to the island of Diego Garcia.

53 Following the establishment of BIOT and the US military base some Chagossians were relocated to Mauritius, while others were resettled in Seychelles, thereby making them Seychellois citizens, and yet others migrated to the UK having been awarded UK citizenship.

54 *Legal consequences*, supra note 21, p. 28, para. 113; see also L. Jeffery, 'For Mauritians, joy; for Chagossians, sadness': *Mauritian independence, the sacrifice of the Chagos Archipelago, and the suffering of the Chagos islanders*, in *The Mauritian Paradox: Fifty years of development, diversity and democracy*, eds. R. Ramtohul, T. H. Eriksen, Baltimore, Maryland, 2018, p. 245 where we read that the Chagos Islands were uninhabited prior to European colonial expansion in the Indian Ocean from the late 18th century onwards; it was the French and later British colonists who populated the islands with slave labour and contract workers, mostly from East Africa and Madagascar via Mauritius.

55 <www.reuters.com/article/us-britain-mauritius-un-idUSKCN1SS2CR>.

thors of the present study subscribe to the view that colonies have absolutely no place in the modern world. On the other hand, the critical focus of this study was the fact that the ICJ decided to issue an advisory opinion in the present case. In a situation where no judicial path was open to Mauritius in its territorial dispute (due to the absence of UK consent to ICJ jurisdiction), it was necessary for the court to exercise extreme caution and vigilance so as not to allow mandatory jurisdiction through the back door. The ICJ not only spoke out on the issue of decolonization but authoritatively decided what the United Kingdom should do. In the *obiter dicta* we read that the General Assembly had not sought the Court's opinion as an instrument for resolving a territorial dispute.⁵⁶ But how else to read the ICJ's words "the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible"⁵⁷ if not as a clear and unequivocal statement on the subject, designed to settle a bilateral dispute. And even if we agree that the issue of decolonization is at stake, decolonization should concern the nation as a whole, i.e., all Chagossians striving to secure the right to return to and resettle on the Chagos islands. So, how to read the second question posed to the ICJ, namely "[w]hat are the consequences under international law [...] including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?" if not as referring only to one group represented by the Republic of Mauritius rather than to the entire nation, however we define it. The advisory opinion is not binding and is not addressed to the parties to the dispute, but only to the UN General Assembly. Nevertheless it is so important that, if not *de jure* then certainly *de facto*, it may be read as a judgment in the circumstances of a specific case.

The UN General Assembly should also be cautious when asking for an advisory opinion, because what we are dealing with here is a ter-

⁵⁶ *Legal consequences...*, supra note 21, p. 22, para. 86.

⁵⁷ *Ibidem*, p. 42 para. 178.

ritorial dispute in the background of which there is the question of decolonization.

It is therefore worth considering the reasons why the UN voted in favour of asking the ICJ for an advisory opinion on this matter, and why the ICJ finally issued such an opinion. To put it more succinctly, why did this happen? An analysis of current international relations and events leads to the conclusion that one factor that influenced these decisions, at least to some extent, was what is commonly known as Brexit.

The Impact of Brexit on the Dispute Between United Kingdom and Mauritius and on the UK's International Standing

On 29 March 2017 the UK government notified the EU Council of Ministers of its decision to withdraw from the EU. Following this declaration, the UK's left EU on 31 January 2020 and the transition period ended on 31 December 2020. The very process of UK's withdrawal from the EU did not only have consequences for the Union. Another noticeable effect has been the declining influence of the UK on the international scene, which can, at least partly, be attributed to Brexit. EU Member States no longer support the UK's international interests, for they no longer feel obliged to do so. Telling examples of this tendency include the UK's failure to secure the re-election of a British judge to the ICJ as well as its failure to prevent the UN General Assembly from requesting an advisory opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. In the case of the former, it is the second time that a UN Security Council permanent member has had no judge on the ICJ and the first time that it has lost a vote in the UN General Assembly. After Sir Christopher Greenwood's candidacy was defeated in the General Assembly, the UK withdrew his application. The vacancy on the ICJ was eventually filled by Mr. Dalveer Bhandari, an Indian citizen – India being the UK's most significant post-Brexit

trading partner.⁵⁸ As regards the UN General Assembly vote on seeking an advisory opinion in the Chagos case, Cyprus (a former colony of the UK) joined Mauritius in supporting the UN Resolution, whereas Bulgaria, Croatia, Hungary and Lithuania joined the UK in voting against. The other EU Member States abstained. Hence, bearing in mind the UK's diminishing role on the international scene, it would be difficult not to acknowledge, at least partially, the impact of Brexit on the voting habits of EU Member States in the UN General Assembly. What is more, the vote on the resolution took place almost exactly a year after the Brexit referendum. Hence its adoption can be attributable, at least to some extent, to the abstentions of EU Member States. And as for the UK's loss of a seat on the ICJ, it occurred at exactly at the same time that British diplomacy was preoccupied with Brexit.

There are other cases where the influence of Brexit is even more obvious, for example in the decisions to move the European Medicines Agency and the European Banking Authority from London to Amsterdam⁵⁹ and Paris, respectively.⁶⁰ According to the European Commission “[t]he relocation of these two Agencies is a direct consequence – and the first visible result – of the United Kingdom’s decision to leave the European Union”.⁶¹ The UK’s withdrawal from the EU may also have serious repercussions for Gibraltar, which has been a British Overseas Territory since 1969, as it once more raises the possibility of UK and Spain exercising joint sovereignty over this territory. What is more, in a recent regulation concerning post-Brexit visa-free travel, Gibraltar is referred

58 *Election of five members of the International Court of Justice*, SC, UN Doc. S/PV.8110, 2017, p. 2.

59 See EU, *Regulation of the European Parliament and of the Council 2018/1718 of 14 November 2018 amending Regulation EC No 726/2004 as regards the location of the seat of the European Medicines Agency*, 2018, OJ, L 291/3.

60 See EU, *Regulation of the European Parliament and of the Council 2018/1717 of 14 November 2018 amending Regulation EU No 1093/2010 as regards the location of the seat of the European Banking Authority*, 2018, OJ, L 291/1.

61 <ec.europa.eu/commission/presscorner/detail/en/IP_17_4777>.

to as a colony of the British Crown.⁶² Indeed, the removal of a British MEP as a rapporteur to overcome an objection to the term “colony” to describe the British Overseas Territory is a further clear sign of the UK’s isolation.⁶³ In the case of BOTs, whose status is uncertain, there arises the question of their future relationship with the EU and possibly also the UK.⁶⁴

In fact, the UK’s departure from the EU is seen as presaging a re-evaluation of the former’s position in the world. Since the Second World War, the UK has exercised more influence in the international community than its actual position merited, due to its special relationships with the USA and Europe. Today, these relationships are beginning to break down, and as they do so the special standing enjoyed by the UK and the role it has played up to now in promoting a stable and open international order is likewise eroding.

Hence, if current international interests and the emotions they inspire begin to prevail in a collective body like the UN General Assembly – where decisions are taken in the form of a vote, then an expert body like the Court should exercise considerable prudence and caution. Otherwise, it will violate the foundations of public international law, which by its very nature is a relatively fragile instrument, since it is based on agreement between states, which is contractual in nature.

Voluntarism in International Law

The administration of justice at the level of public international law is, in principle, non-mandatory in character. We are aware that this is not the best solution; however, at the current stage of the international com-

62 See *Regulation of the European Parliament and of the Council 2019/592 of 10 April 2019 amending Regulation EU 2018/1806 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as regards the withdrawal of the United Kingdom from the Union*, 2019, OJ, L 1031/1.

63 See S. Minas, *supra* note 19, p. 135.

64 See O. Yusuf, T. Chowdhury, *supra* note 1, p. 158.

munity's development it is the only possible option. Indeed, the absence of any compulsory jurisdiction means that public international law is essentially contractual in form.

A review of the main sources of public international law, e.g. treaties and international customs, shows quite clearly that in this sphere the law is based on the consent of states. Consent to a treaty and thus to its specific content is expressed via the acts of signing and then ratifying such an international agreement; in the case of custom, consent, in principle, is reduced to the uniform conduct of states (*usus*) and the belief that a particular practice is not a matter of chance but is prescribed by law and is even – we can argue – imposed by law (*opinio juris*). Moreover, lawmakers are usually at the same time its addressees. As L.F. Oppenheim wrote a century ago, “since the Law of Nations is based on the common consent of States [...] the Law of Nations is a law between, not above, the States”⁶⁵. Today, however, we must concur with the opinion that “this extreme voluntarism does not find confirmation in the practice of international law”⁶⁶. Among those exempted from this rule are those states created as a result of decolonization and which entered the already existing system of norms of international law formed without their contribution; this is especially the case with those norms created by way of custom (this exception does not apply to treaty norms, since their succession to treaty rights and obligations is governed by the *tabula rasa* rule, which enables newly created states to give their consent to be bound by the norms they have inherited from their predecessors). On the other hand, in the case of written law, some exceptions can be traced back to the requirement of a state's consent. These can be found, for instance, in some treaty – making mechanisms and in the law-making processes of organs of international organizations. In such bodies, most decisions are

65 L. Oppenheim, *International Law. A Treatise*, vol. I, London–New York 1912, p. 20.

66 J. Brunnée J., *Consent* in *Max Planck Encyclopedia of Public International Law*, ed. R. Wolfrum, vol. II, New York 2012, p. 679.

not made unanimously, i.e., with the consent of all states – members of the organization. Rather, a specific majority of votes will suffice.

In addition to the problem indicated above, it cannot be said – either historically or currently – that the consent of sovereign states as equal participants in the international community is not the primary, main and decisive factor conditioning the development of public international law norms. The necessity of relying on state consent is due to the relatively poor degree of organization of the international community. Compared to the situation at the state level, the international community clearly lacks a global centre of legislative and executive power and does not exercise compulsory jurisdiction over its members. With regard to international law, the most convenient situation is when compliance with the law of nations is anchored in the consent given a priori by states to the content of legal regulations and is based on the principle of *pacta sunt servanda* respected by all states. In the case of a dispute, in particular the judicial settlement of a dispute, it is extremely important that a state – party gives its consent to proceedings under the court's jurisdiction. The lack of such consent may lead to a situation in which international courts will endeavour to adjudicate, but their judgments will nevertheless not be enforced by states. Such a situation would mean a significant step backwards in the development of international law. As we have just mentioned, the international community is not organized in the same way as the domestic community. An important characteristic of the former is the lack of any centralized system of law enforcement analogous to that which functions in the domestic realm, such as a state's coercive apparatus.⁶⁷

Thus, bearing in mind the necessity for compliance with the nature and essence of international law, and:

1. Considering the fact that public international law is based on the consent of states;
2. Considering the fact that there is no legislative and executive centre in the international community ranking higher than sovereign states and exercising compulsory jurisdiction;

⁶⁷ W. Czapliński, *Sądownictwo międzynarodowe*, in *Wielka encyklopedia prawa*, ed. J. Symonides, D. Pyć, vol. IV, Warszawa 2014, p. 448.

3. In the light of the subject and the purpose of current and historical legal regulations, which show that advisory opinions were not designed as a tool directly supporting dispute settlement; and
4. Taking into account the effectiveness of international law in its application,

the conclusion to be drawn *de lege lata* is that the advisory opinions of the ICJ should not have the character of authoritative court statements issued in ongoing inter-state disputes. These opinions should be issued at the request of an organ or organization authorized to do so in situations where such an opinion is useful for their work. They should solely and directly concern abstract legal problems, which means that in some cases the ICJ should refrain from issuing them.

Advisory opinions should neither complement nor replace the settlement of international disputes. It must be remembered that international law is relatively fragile, as its norms apply and operate only between states, i.e., horizontally rather than vertically, that is, in situations involving the vertical subordination of states to norms. The desire to strengthen international law by compelling members of the international community to comply with its provisions may, paradoxically, weaken the law. International courts, especially one as important as the ICJ (given its global reach and general competence), should exercise a considerable degree of self-restraint in this area.⁶⁸

We should also be aware that the law in operation in the international community, which by its nature is voluntary, is closely bound up with political interests. In practice this fact would appear to be its weakness. For example, it cannot be ruled out that political factors played a role in the present case. The many long – standing relationships between international law and politics, as well as the constant interweaving of actual actions undertaken by states in international relations, sometimes dictated by state

68 S. Yee, *Notes on the International Court of Justice (Part 7) – The Upcoming Separation of the Chagos Archipelago Advisory Opinion: Between the Court's Participation in the UN's Work on Decolonization and the Consent Principle in International Dispute Settlement*, "Chinese Journal of International Law" 2017, 16:4, pp. 623–642.

goals and interests (not always directly related to the decisions and steps taken) and sometimes by the requirements of the law, highlight some of the imperfections and deficiencies in the *jus gentium* today. It ought to be stressed that the actors on the international scene constitute a large and a heterogeneous group,⁶⁹ since in addition to states they also include other players. These collective entities (such as the European Union) are oriented towards the protection and promotion of the common interests of their member states; however, achieving this goal requires taking into consideration the scope and strength of such structures. Against this background, we should indeed ask whether so many European countries would still have abstained in the UN General Assembly vote on seeking an opinion on the Chagos Archipelago had it not been for the Brexit situation. Was the request for an advisory opinion at least partly dictated by the desire to “punish” Great Britain for its “divorce” from the EU?

In summary, the introduction of compulsory jurisdiction through the “back door” would appear to be an extremely dangerous move, as this is one of the factors that can undermine the already fragile foundations of *jus gentium* today. That said, these factors stem from basing international law on both the consent of states as lawmakers as well as on the dictates of international politics – which remains an extremely important regulator of international relations.

Conclusions

In the international community, legislators, in particular states, are subjects of public international law. States lay down rules in their capacity as both legislators and the addressees of these rules. While international courts are not legislators, the impact they have on international relations, including on the interpretation and development of public international law, cannot be denied. The most important judicial institution of the international com-

69 I. Popiuk-Rysińska, *Uczestnicy stosunków międzynarodowych, ich interesy i oddziaływanie, in Stosunki międzynarodowe w XXI wieku*, eds. E. Halizak et al., Warszawa 2006, p. 480.

munity, i.e., the court of the United Nations – the ICJ, has two instruments at its disposal: judgments and advisory opinions. From a formal point of view, an ICJ judgment only binds the parties to a particular dispute and only in a given case (Article 59 of the Statute of the ICJ), whereas an advisory opinion is not binding. In fact, however, both types of rulings are authoritative. When comparing a judgment to an advisory opinion, it is worth emphasizing that the former, unlike the latter, is binding. However, an advisory opinion is addressed to collective bodies, such as in particular the UN General Assembly. Moreover, when delivering a judgment, the court influences the widely accepted interpretation of international law. However, from a formal point of view it does so only indirectly, whereas by issuing an advisory opinion it does so directly. Therefore, it is difficult to hierarchize judgments and advisory opinions in terms of their authority, for both have relevant albeit different features upon which their significance depends. It should be emphasized, however, that a judgment may only be issued with the consent of the parties to the dispute. When issuing advisory opinions, which are equally salient, disregarding the fact that the parties to a dispute did not agree to a court settlement, does not seem justified. Issuing advisory opinions in disputes between states should most certainly not serve as a means of circumventing the principle that a party to a dispute must give its consent for the matter to be settled by judicial means. After all, the latter would violate the very essence of public international law, which is based on the consent of states.

To conclude, it is worth recalling that the doctrine is not a source of public international law; however, it is difficult to deny its influence on practice. The authors are of the opinion that the role – or even the duty – of the doctrine is to explain disputed issues and clearly define the course of action. It can be argued that in the advisory proceedings before the ICJ the arguments were raised, which were also used in this study. However, they have a different weight when they come from an independent, objective commentator, on the one hand, who – and this is worth stressing – does not stick to conservative positions, according to which, equal states are the only “rulers” of the

international community and everything that takes place must absolutely be based on their consent; and, on the other hand, from a commentator who is focused on enhancing the significance and the power of international law, the law the states are subjects to and the law which should be applied to in contentious situations. Nonetheless, the fact that the bodies of international organizations, and in particular the judiciary, in very sensitive areas, grant themselves the power to go beyond what is covered by the consent of states, does not enhance the significance and the prestige of international law. This study was written with this in mind and was guided by such a concern and even – let’s not be afraid to emphasize – a mission.

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SUMMARY

Advisory Opinion or Judgment? The Case of the Chagos Archipelago

The aim of this article is to provide an analysis of the ICJ's advisory opinion of 25 February 2019 on the Chagos Archipelago. It will endeavour to answer the following questions: (i) is it consistent with the letter and the spirit of international law for the ICJ to issue advisory opinions in cases involving a dispute between states, which, due to the lack of consent from one of the states, cannot be brought before the ICJ

and be settled by a judgment of that judicial body?; (ii) is such a ruling the right way to settle the issue of decolonization?; and (iii) did Brexit play any role in the case under discussion?

The article begins by describing the background to the dispute between the UK and Mauritius. The focus of the analysis then shifts to the nature of advisory opinions and the 2019 ICJ advisory opinion on the Chagos Archipelago. Next, the authors discuss the possible impact of Brexit on the dispute between the UK and Mauritius itself, as well as on the UK's international standing in general. The article concludes with reflections on voluntarism in international law.

The authors conclude that *de lege lata* an authorized body or organization may ask the ICJ for an advisory opinion in situations where it believes that such an opinion would be useful for its work. However, such advisory opinions should not have the character of authoritative court statements made in pending disputes between sovereign states. As a consequence, such opinions should refer only to abstract legal problems, which means that in some cases the ICJ should refrain from issuing them.

Keywords: ICJ, the case of the Chagos Archipelago, Brexit, advisory opinion, decolonization

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