

The Chagos request and the role of the consent principle in the ICJ's advisory jurisdiction, or: What to do when opportunity knocks

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1. *Introduction*

When the request for an advisory opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 came to the International Court of Justice (ICJ or Court), a unique opportunity knocked on the doors of the Peace Palace. With its answer to the questions asked by the General Assembly¹ the Court has the possibility to strengthen the right of self-determination and human rights.² However, the ICJ has to clarify a crucial procedural question first: Does it (the ICJ) actually have the right to exercise jurisdiction to render the opinion or should it – for the first time in its history – make use of its discretionary power to decline giving an advisory opinion due to the lack of consent of an interested state.

During the plenary meeting on 22 June 2017, it became clear that the United Kingdom emphasised the bilateral nature of the dispute and argued that an advisory opinion would circumvent the principle of consent to judicial settlement.³ Before the Court there has been considerable debate about the question, which is as old as the Court itself and which has

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¹ 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, UNGA Res 71/292 (22 June 2017) UN Doc A/RES/71/292.

² See T Burri, LC Lima, L Marotti and I Papanicolopulu, 'The Advisory Opinion of the International Court of Justice on the Chagos Archipelago: An Anticipatory Analysis' (2018) 55 QIL-Questions Intl L 1.

³ See Statement by Ambassador Matthew Rycroft, Permanent Representative to the United Nations, at the General Assembly Meeting to discuss request for an advisory

received particular attention in academic debate,⁴ under what circumstances the argument of circumvention could prevail.⁵ On the one hand, the United Kingdom has maintained its initial position stating that it was inappropriate to use the Court's advisory function as a 'back-door' to settle a bilateral dispute although the states did not consent to judicial settlement.⁶ On the other hand, Mauritius rejected this view and has stressed that there are no compelling reasons for the Court to use its discretionary power to dismiss the request.⁷

opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 (22 June 2017) '[...] [T]he request for an advisory opinion is an attempt by the Government of Mauritius to circumvent a vital principle: the principle that a State is not obliged to have its bilateral disputes submitted for judicial settlement without its consent.' <www.gov.uk/government/speeches/questions-on-the-british-indian-ocean-territory-have-long-been-a-bilateral-matter-between-the-uk-and-mauritius>; see also M Milanovic, 'ICJ Advisory Opinion Request on the Chagos Islands', *EJIL: Talk!* (24 June 2017) <www.ejiltalk.org/icj-advisory-opinion-request-on-the-chagos-islands/>; D Akande, A Tzanakopoulos, 'Can the International Court of Justice Decide on the Chagos Islands Advisory Proceedings without the UK's Consent?', *EJIL: Talk!* (27 June 2017), <www.ejiltalk.org/can-the-international-court-of-justice-decide-on-the-chagos-islands-advisory-proceedings-without-the-uks-consent/>; 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' (2017) 16 *Chinese J Intl L* 623-642.

⁴ See H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons Ltd. 1958) 353 et seq; DW Greig, 'The Advisory Jurisdiction of the International Court and the Settlement of Disputes between States' (1966) 15 *ICLQ* 325; D Pratap, *The Advisory Jurisdiction of the International Court* (Clarendon 1972) 154 et seq; M Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras* (John Hopkins UP 1973) 287 et seq; H Thirlway, 'The Law and Procedure of the International Court of Justice 1960-1989' (2000) 71 *BYBIL* 119 et seq; M Aljaghoub, 'The Absence of State Consent to Advisory Opinions in the International Court of Justice: Judicial and Political Restraints' (2010) 24 *Arab L Q* 191; R Kolb, *The International Court of Justice* (Hart Publishing 2013) 1069 et seq; M Law, 'The Chagos Request: Does It Herald a Rejuvenation of the International Court of Justice's Advisory Function' (2018) 9 *Queen Mary L J* 25.

⁵ A detailed analysis of the arguments presented can be found at Z Crespi Reghizzi, 'La juridiction consultative à l'épreuve du principe consensuel : l'affaire des Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965' (2018) 55 *QIL-Questions Intl L* 15-34.

⁶ Written Statement of the United Kingdom of Great Britain and Northern Ireland, ch 7 para 7.7 para 7.21; CR 2018/21, 25 et seq.

⁷ Written Statement of the Republic of Mauritius, ch 5 para 5.18 et seq; Written Comments of the Republic of Mauritius, para 2.26 et seq CR 2018/20, 32 et seq.



2. *Advisory opinions and the consent principle – an unlikely couple?*

Advisory jurisdiction has its origins in Art. 14 of the Covenant of the League of Nations which empowered the Court's predecessor, the Permanent Court of International Justice (PCIJ), to 'give an advisory opinion upon any dispute or question referred to it...'. Similarly, the power to provide legal advice to UN organs and institutions was granted to the present Court. The governing provision for the Court's advisory jurisdiction is Art. 65 (1) of the ICJ Statute which states that '[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request'.⁸ The wording of the Statute itself ('*may, peut*') suggests that this advisory jurisdiction is not completely unrestricted and that the Court has a discretion to decline a request.⁹ In addition, the Court itself has consistently emphasised that 'Article 65, paragraph 1, of the Statute, which establishes the power of the Court to give an advisory opinion, is permissive and [...] the permissive character of Article 65, paragraph 1, gives it [the Court] the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request'.¹⁰ However, in the past, the present Court has never exercised its discretionary power.¹¹ Instead the Court has always emphasised that its reply 'represents its participation in the activities of the Organisation, and, in principle, should not be refused'.¹² Only compelling reasons should lead to a refusal.¹³

⁸ Besides the UN Charter (art 96), the Rules of Court (arts 102-109) and the Practice Directions (art XII) contain provisions concerning the Court's power to give advisory opinions.

⁹ See JA Frowein, K Oellers-Frahm, 'Article 65', in A Zimmermann, K Oellers-Frahm, C Tomuschat, CJ Tams (eds), *The Statute of the International Court of Justice. A Commentary* (2nd edn, OUP 2012) 1617 para 31: 'Otherwise the word 'may' in the text of Art. 65, para 1 would make no sense'.

¹⁰ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 21 para 23.

¹¹ In the Nuclear Weapons case the Court stressed that the refusal wasn't based on its discretionary power, but justified by a lack of jurisdiction, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 236 para 14.

¹² *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase* (Advisory Opinion) [1950] ICJ Rep 71.

¹³ Consistent jurisprudence of the Court: for the most recent statement on this matter see *Accordance with International Law of the Unilateral Declaration of Independence in*

One of the factors the Court may take into consideration when determining its jurisdiction is the consent of the States concerned. It is a well-established principle of international law that the Court's jurisdiction over states in a contentious case is based on the states' consent. However, one can argue that since advisory opinions are addressed to the United Nations and its organs – and have no binding force for a state –, a principle governing contentious procedure is not applicable to advisory opinions.¹⁴ In particular, the Court's findings in *Interpretation of Peace Treaties*¹⁵ give reason to believe that the consent principle has lost relevance to the settlement of disputes in advisory opinions. Furthermore, the Court itself has recognised in its *Western Sabara* opinion that the consent of the states concerned is not a condition for its competence to give an advisory opinion.¹⁶ However, these findings shall not hide the fact that lack of consent may be a factor to be considered when it comes to the question of discretion and propriety. The Court has recognised that 'the lack of consent of an interested State may render the 'giving of' an advisory opinion incompatible with the Court's judicial character'.¹⁷ It has confirmed this approach in several cases when re-examining whether giving an opinion would circumvent the principle of consent to judicial settlement¹⁸. Therefore, in principle, the only way for the court to take lack of consent into account is through its discretionary power. But will the lack of British consent really make the ICJ exercise its discretion?

Respect of Kosovo (Advisory Opinion) [2010] ICJ Rep 416 para 30, and the authorities referred to there.

¹⁴ See H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons Ltd. 1958), 357-358; B Conforti, *The Law and Practice of the United Nations* (2nd edn, Springer 2000), 270.

¹⁵ See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase* (Advisory Opinion) [1950] ICJ Rep 71: 'The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. [...] It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take'.

¹⁶ *Western Sabara* (n 10) para 32-33.

¹⁷ *ibid* para 33.

¹⁸ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 157 para 47-50 (with the relevant case law).



3. *A glance at history*

If one dips into the past, one necessarily comes across a famous decision of the Court's predecessor concerning the status of *Eastern Carelia*.¹⁹ In its decision rendered in 1923 the PCIJ – for the first and only time – declined to give an advisory opinion due to lack of consent. Even though the ICJ has never rejected a request for an advisory opinion, it has repeatedly made reference to *Eastern Carelia* in its decisions.²⁰ Therefore, it seems very likely that the ICJ will again discuss the case – although Mauritius argues that the case belongs in the footnotes.²¹ However, it still remains unclear to which extent the legal position taken in *Eastern Carelia* may give guidance for decisions of the Court 95 years later.

The request in *Eastern Carelia* originated in a dispute between Finland and Russia. At that time, Russia was neither a member of the League of Nations nor a party to the Statute of the Permanent Court. The PCIJ, which was asked by Council of the League to give an opinion on contractual obligations arising from the Treaty of Dorpat and an annexed declaration with regard to the autonomy of Eastern Carelia, rejected the request because it lacked jurisdiction due to the fact that Russia had not consented to having the Council deal with the dispute. Consequently, the Court had no competence either.²² If one reads the opinion carefully, it becomes quite

¹⁹ *Status of Eastern Carelia* (Advisory Opinion) [1923] PCIJ Series B No 5, 7 et seq; for a review of the case, see J Heliskoski, 'Eastern Carelia (Request for Advisory Opinion)' (2007) Max Planck Encyclopedia of Public International Law [MPEPIL] <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e123>.

²⁰ In several advisory opinions concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase* (Advisory Opinion) [1950] ICJ Rep 72; the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 23 para 31; *Western Sahara* (n 10) para 28, 47; the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 159 para 56 and the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 416 para 29.

²¹ Written Statement of the Republic of Mauritius, 173 para 5.19 footnote 543.

²² See *Status of Eastern Carelia* (Advisory Opinion) [1923] PCIJ Series B No 5 para 33; According to Article 17 of the Covenant the Council was competent to settle disputes involving a non-Member of the League if the non-Member State agreed to the Council's intervention in the case. In the case at stake Russia rejected any invitation to accept the dispute settlement mechanism laid down in the Covenant. Due to the fact that no consent had been given by Russia, the Council was not competent itself to address the dispute (or



clear that it is deeply ambiguous regarding the need for specific state consent.²³ Therefore, it appears a stretch to invoke the *Eastern Carelia* principle as a relevant precedent for the present case.²⁴ If one assumes instead that the fact that Russia was a non-member of the League, not bound by the Covenant and therefore not subject to the dispute settlement mechanism laid down in the League Covenant were decisive²⁵, the differences between the *Eastern Carelia* case and the *Chagos* will be obvious: the United Kingdom is a United Nations Member and has ratified both Charter and Statute. Or, to put it differently, by accepting the provisions of the UN Charter and the Court's Statute, UN members have given their general consent to the Courts advisory jurisdiction on any legal question²⁶ – even if their interests are affected. As *Lauterpacht* put it, there is no need to protect the states from procedures to which they have agreed to beforehand as members of the United Nations.²⁷

to raise questions concerning the matter to the PCIJ), thus the Court had no jurisdiction to give the requested opinion; see also M Hudson, *The Permanent Court of International Justice, 1920-24. A Treatise* (The Macmillan company 1943) 500.

²³ In this regard Spiermann argued that this ambiguity results from the disagreement of the PCIJ on this question; see O Spiermann, *International legal argument in the Permanent Court of International Justice: the rise of the international judiciary* (CUP 2005) 160-175.

²⁴ See R Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar Publishing 2014) 273; Besides Hudson argued that the reasoning given by the PCIJ that answering the question would be substantially equivalent to deciding the dispute between the parties was an over-statement of the effect of an advisory opinion, see M Hudson, *The Permanent Court of International Justice, 1920-24. A Treatise* (The Macmillan company 1943) 500.

²⁵ See also R Kolb (n 4) 1166, where he argues that the decision was strongly linked with the political context in 1923. 'Russia was an enigmatic power, and at that time virulently rejected the League and its Covenant. [...] So, in 1923, the appropriate judicial policy was to be cautious.'

²⁶ See, on that point also *Western Sahara* (n 10) para 30: 'In other respects, however, Spain's position in relation to the present proceedings finds no parallel in the circumstances of the advisory proceedings concerning the Status of Eastern Carelia in 1923. In that case, one of the States concerned was neither a party to the Statute of the Permanent Court nor, at the time, a Member of the League of Nations, and lack of competence of the League to deal with a dispute involving non-member States which refused its intervention was a decisive reason for the Court's declining to give an answer. In the present case, Spain is a Member of the United Nations and has accepted the provisions of the Charter and Statute; it has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction'.

²⁷ H Lauterpacht, *The Development of International Law by the International Court*, (Stevens & Sons Ltd. 1958) 355-358.



In addition, the PCIJ stated that there was another essential reason for not tackling the *Eastern Carelia* dispute. Due to 'very particular circumstances' the Court believed that the question it had to answer concerned an already existing purely bilateral dispute. Therefore, any involvement of the Court would be equivalent to deciding the dispute.²⁸ The present Court has confirmed this principle on several occasions but, at the same time, distanced itself from it.²⁹ The Court has accepted that an organ can request an opinion in disputes which are of broader concern to the United Nations and have been on its agenda for a certain period of time.³⁰ In *Western Sahara*, the Court observed that 'in this case [there is] a legal controversy, but one which arose during the proceedings of the General Assembly and in relation to matters with which it was dealing. It did not arise independently in bilateral relations'.³¹ Under these circumstances, the General Assembly's request did not constitute a breach of the non-circumvention rule. The Court reaffirmed this point of view in the *Wall Advisory Opinion* where it stated that '[t]he opinion is requested on a question which is of particularly acute concern (emphasis added) to the United Nations, and one which is located in a much broader frame of reference than a bilateral dispute'.³² Put simply, if disputes are inseparably linked with activities of the UN itself and internationalised due to the attention given by the UN, the principle of consent is not jeopardised.

In the light of the above, it may be argued that because the *Chagos* case concerns a decolonisation issue, it is a matter covered by the General Assembly's responsibility and was brought to the Court to obtain legal assistance on how to deal with it. The proponents have argued that the present

²⁸ *Status of Eastern Carelia* (Advisory Opinion) 1923, PCIJ Series B No 5 29 'The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court'.

²⁹ Likewise, the PCIJ itself narrowed the application of the *Eastern Carelia* principle in the *Frontier between Turkey and Iraq* case in 1925. In the latter case, which was also an inter-state dispute, the opinion could be given. (*Article 3, Paragraph 2, of Treaty of Lausanne* (Frontier between Turkey and Iraq) (Advisory Opinion) 1925 PCIJ Series B No 12 18).

³⁰ See R Kolb (n 4)1073.

³¹ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 25 para 34.

³² *ibid* para 50.



case is linked to the *Western Sahara* case,³³ where the Court decided to give an opinion³⁴. Consequently, rendering an opinion in this case will not constitute a violation of the consent principle. In contrast, opponents have stated that the General Assembly or the United Nations have not been actively engaged in matters of decolonisation in *Chagos*.³⁵ According to this view, the nature of the dispute is still bilateral and the consent principle will prevail. Undoubtedly the *Chagos* case is quite different from the Israeli-Palestinian conflict for example, in which the UN has been deeply involved from its beginnings³⁶ and in which the Court accepted to give an opinion as well. Nonetheless, decolonisation is an important and inherent part of the UN's work. Since its foundation, the General Assembly has made considerable efforts and has always played a central role to support the decolonisation process.³⁷ It was the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV),³⁸ in particular, which proclaimed the principle of self-determination as a right of peoples and 'the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations' and which was an important instrument to develop and implement the decol-

³³ It should not be forgotten that the Western Sahara Opinion could not solve the dispute: soon after its delivery Morocco launched the 'Green March' and asserted its claim to the territory. During the following decades violent clashes erupted (mostly) between the Polisario Front and Moroccan forces. Although in 1991 a UN Mission (MINURSO) was established and a ceasefire came into effect, the referendum in which the people of Western Sahara could choose between independence and integration has not yet taken place. Almost half a century after the ICJ's decision the conflict is still unresolved – but in the first quarter of 2019 UN-led peace talks are planned.

³⁴ CR 2018/20, 81 para 25.

³⁵ CR 2018/21, 33 para 14.

³⁶ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 159 para 50.

³⁷ P Kunig, 'Decolonization' in: R Wolfrum (ed), *United Nations: Law, Policies and Practice* (Martinus Nijhoff 1995) 390 et seq.

³⁸ UNGA Res 1514 (XV) (14 December 1960); The legal claim to decolonization since then found recognition in numerous further resolutions (eg UNGA Res 1541 (XV) (15 December 1960), UNGA Res 2625 (XXV) (24 October 1970) ('Friendly Relations Declaration'). Currently the Third International Decade for the Eradication of Colonialism (2011-2020) is still ongoing, see UNGA Res 65/119 (10 December 2010) by which the General Assembly called upon Member States to intensify their efforts with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.



onisation process. Likewise, the *Chagos* case is about decolonisation: After the British Indian Ocean Territory (BIOT) was formed on 8th November 1965, the General Assembly adopted resolution 2066 (XX) which declared that the detachment of certain islands from the Territory of Mauritius, a non-self-governing territory according to General Assembly resolution 66 (I), would violate the 1960 Declaration.³⁹ Since the General Assembly assumed that the Chagos Islands belonged to Mauritius – thereby ignoring the non-existence of pre-colonial bonds between them – and since it accepted the United Kingdom's assertion that the island was not permanently inhabited at that time, the Archipelago was not classified as a non-self-governing territory, when Mauritius became independent.⁴⁰ As a result, Chagos has remained unaffected by the forces of decolonisation.⁴¹ Even though the matter of Chagos did not receive much attention during the last decades,⁴² the General Assembly has undoubtedly an institutional interest in it because the issue relates to decolonisation, a core, but still incomplete responsibility of the UN. Consequently, the Assembly may wish to obtain legal assistance from the Court to pursue its decolonisation policy. Therefore, giving an advisory opinion in Chagos would not threaten the principle of consent to judicial settlement. The Court should deviate from ancient paths and distinguish the present case from *Eastern Carelia*.

4. *Undermining the consent principle – an unsolvable, but acceptable problem?*

The circumvention question is as old as the Court itself – and even as its predecessor. From the very beginning, serious objections have been raised against the very idea of giving the PCIJ an advisory function.⁴³ Some

³⁹ UNGA Res 2066 (XX) (16 December 1965).

⁴⁰ See S Allen, *The Chagos Islanders and International Law* (Hart Publishing 2014) 4-10.

⁴¹ S Allen, *The Chagos Islanders and International Law* (Hart Publishing 2014) 6.

⁴² Regarding the situation in Kosovo the Court accepted that the General Assembly had not been so actively seized of the matter. However, the situation was still different due to the fact that the General Assembly at least had exercised functions of its own in the situation in Kosovo, see *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 421 43-46.

⁴³ An overview can be found at M Hudson, *The Permanent Court of International Justice, 1920-24. A Treatise* (The Macmillan company 1943) 510-511.

argued that although an advisory opinion would not be binding, 'it would create a situation in which the losing state would simply be unable to resist the resolution of the dispute indicated in the opinion'⁴⁴ because the position of the 'losing' state would have been deprived of its legitimacy.⁴⁵ However, history shows that these arguments could not prevail – against all odds the PCIJ was empowered to deliver advisory opinions.

It is worth to briefly recall the work done by the 1920 Advisory Committee of Jurists⁴⁶ as its draft is 'the backbone'⁴⁷ of the ICJ's Statute until today. The 1920 Advisory Committee of Jurists foresaw the need for the assimilation of advisory to contentious procedure. The proposal for Article 36 (3) provided that '[w]hen it [the PCIJ] shall give an opinion upon a question which forms the subject of an existing dispute it shall do so under the same conditions as if the case had been actually submitted to it for decision.' Nonetheless this wording was rejected by the Third Committee of the First Assembly of the League⁴⁸ because 'the Covenant, in Article 14, contained a provision in accordance with which the Court could not refuse to give advisory opinions' and '[i]t was therefore unnecessary to include a rule to the same effect in the Constitution of the Court'.⁴⁹ In consequence, the Statute did not contain a clear commitment to assimilate the courts procedures. *E contrario* one may argue that advisory opinions should not be decided under the same conditions as contentious cases and, thus, con-

⁴⁴ R Kolb (n 4) 1029.

⁴⁵ *ibid* 1029.

⁴⁶ According to Art. 14 of the Statute of the League '[t]he Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice'. Therefore the Council of the League decided to create the so called Advisory Committee of Jurists, which was entrusted with the preparation of a scheme for the establishment of the Permanent Court of International Justice. Between 16 June and 24 July 1920 10 statesmen, scholars and diplomats tried to answer the various questions, which the Legal Section of the Permanent Secretariat of the League had prepared in a memorandum, and created a draft-scheme for the PCIJ.

⁴⁷ O Spiermann, "Who attempts too much does nothing well": The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice', 73 *British YB Intl L* 2002 (2003) 187-260 at 190.

⁴⁸ See JA Frowein, K Oellers-Frahm, 'Article 65', in A Zimmermann, K Oellers-Frahm, C Tomuschat, CJ Tams (eds), *The Statute of the International Court of Justice. A Commentary* (2nd edn, OUP 2012) 1609 para 2.

⁴⁹ Records of the First Assembly-Meetings of the Committees, vol 1 401.



sent of the state parties concerned would not be necessarily required. However, this argument is not persuasive because in later years assimilation of advisory to contentious procedures was promoted.⁵⁰

When the PCIJ was established, its primary purpose was to contribute to the settlement of international disputes as was the aim of the whole League system⁵¹. In this spirit, the advisory function should assist the Council's dispute settlement efforts. This support would be particularly important when legal issues were raised, or any clarification of legal aspects was needed. 'In short, advisory opinions were primarily designed to be concerned with disputes between states'.⁵² This is also shown by the wording of Article 14 which stated that the Court is enabled to give an advisory opinion upon any *dispute* or question referred to it: dispute first, question second. Undoubtedly, there are differences between the advisory function of the PCIJ and the present Court.⁵³ To begin with, the wording has changed. While Art. 14 of the Covenant concerned 'disputes and questions', the Charter refers to 'legal questions'. Although Germany has argued that '[t]his constitutes a deliberate alteration of the terms of that provision allowing the almost obvious assumption that under the system of the Charter a bilateral dispute should not be made the subject of a request for an advisory opinion'⁵⁴ the term legal questions also includes disputes. The change has led to a much broader advisory role of the present Court. The

⁵⁰ The amendments to the PCIJ's Statute included a new article 68, which provided that '[i]n the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable'.

⁵¹ S Rosenne, M Shaw (eds), *Rosenne's Law and practice of the international court, 1920-2015*, vol I (5th edn, Brill Nijhoff 2016) 279-280.

⁵² R Kolb (n 4) 1027.

⁵³ But see *Rosenne* who argues that there is no point in making comparisons between the advisory work of the Permanent Court and that of the present Court, see S Rosenne, M Shaw (ed), *Rosenne's Law and practice of the international court, 1920-2015*, vol II (5th edn, Brill Nijhoff 2016) 1045.

⁵⁴ Written statement of Germany, XIV para 43.



ICJ's advisory function does no longer focus on inter-state disputes,⁵⁵ nowadays the 'constitutional function'⁵⁶ of the Court is of greater importance.⁵⁷ This is also supported by the fact that the highest number of requests concerned matters of UN law and procedural and competence-based problems of UN organs.⁵⁸ Nonetheless, until today, the advisory function has been a valuable tool to find the right responses to questions concerning disputes arising between two States.⁵⁹ Maybe we just have to finally accept the inherent circumvention problem. It will ensure that the Court's advisory procedure continues 'to play a key role in the smooth functioning of world organisations, and provides a particularly suitable means for the Court to defuse tension and ward off conflicts by determination of the law'.⁶⁰

5. Conclusion

All in all, the *Chagos* case is more than just a bilateral dispute between the United Kingdom and Mauritius about the legacy of the UK's conduct in 1965 or about returning the Archipelago to Mauritian sovereignty. It is rather a matter of coming to terms with the injustice suffered by Chagossians and of defining the role the UN should play in this. While appreciating what the ICJ has achieved since its foundation, it would be an excellent moment in time to get rid of the *Eastern Carelia* dictum and to give a dynamic and expansive statement of the law. Let us hope that the

⁵⁵ JA Frowein, K Oellers-Frahm, 'Article 65', in A Zimmermann, K Oellers-Frahm, C Tomuschat, CJ Tams (eds), *The Statute of the International Court of Justice. A Commentary* (2nd edn, OUP 2012) 1610 para 6-8.

⁵⁶ Recognizing that the ICJ's constitutional function is still debatable (see M Aljaghoub, *The Advisory Function of the International Court of Justice 1946-2005* (Springer 2006) 81 et seq), advisory opinions are understood here as guide 'to promote (but only on request, and thus in a subordinate way) international law within the UN and contribute to its development (a 'constitutional' function); see R Kolb (n 4) 1030.

⁵⁷ R Kolb (n 4) 1030.

⁵⁸ JA Frowein, K Oellers-Frahm, 'Article 65', in A Zimmermann, K Oellers-Frahm, C Tomuschat, CJ Tams (eds), *The Statute of the International Court of Justice. A Commentary* (2nd edn, OUP 2012) 1628 para 64.

⁵⁹ The most important ones are mentioned and analysed above inter alia concerning the status of Namibia, Western Sahara, the Israeli Wall and the independence of Kosovo.

⁶⁰ H.E. Judge Shi Jiuyong (President of the International Court of Justice), Speech to the Sixth Committee of the General Assembly of the United Nations (5 November 2004), 7 <www.icj-cij.org/files/press-releases/0/630.pdf>.



Court will seize this unique opportunity⁶¹ and that the *Chagos* case will not go down in history as the first case in which the present Court refused to give an advisory opinion.

⁶¹ Hopefully we won't experience a new edition of Tolstoy's classic fable 'A Lost Opportunity', see L Tolstoy, 'A Lost Opportunity' in *The Kreutzer Sonata and Other Stories*, (1889, first English translation by BR Tucker, Ogilvie Publishing 1890; reprint Kessinger Publishing 2010).

