Preliminary Questions in the ICJ Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965

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Abstract

This paper analyzes the preliminary questions in the International Court of Justice (ICJ) advisory opinion on the Separation of the Chagos Archipelago from Mauritius in 1965. In the first Section, it deals with the issue of jurisdiction, and in particular with the object of the request made by the United Nations General Assembly (UNGA) in 2017. The aim of this Section is to underline that the formulation of the request has played a crucial role for the determination, by the Court, of the legal ground on which it based its opinion. The question has been treated correctly as a matter of de-

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colonization and self-determination, as suggested by the General Assembly (GA), and this choice has influenced both the admissibility and the merits of the case.

The second Section analyzes the questions of admissibility raised in the course of the *Chagos* proceeding. It is argued that, although the conclusions reached by the opinion are correct, the last and most important objection to the admissibility should have been treated by the Court so as to point out that consent, as such, is not a condition for the exercise of the advisory jurisdiction, especially when "community interests" come at issue. In the balance between the discretion not to render the opinion and the duty to cooperate with other United Nations (UN) organs, the latter prevailed, given the importance of the legal values – protected by obligations *erga omnes* – involved in the legal questions put to the Court's assessment.

I. Introduction

On 25.2.2019, the ICJ rendered its long-awaited advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (*Chagos* Opinion). This opinion had been requested by the UNGA, through Res. 71/292, whereby the Assembly asked the following questions:

> "(a) Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?;
>
> (b) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, 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?".[1]

According to the Court, "the process of decolonization of Mauritius was not lawfully completed when that Country acceded to independence in

[1] A/RES/71/292, 22.6.2017.

1968",[2] by virtue of the dismemberment suffered by the former colony in 1965, when the Administering Power obtained through an agreement with Mauritian authorities the maintenance, under its own control, of the Chagos Islands, since then part of the Administered Territory.[3]

During the proceedings, to which many States and, for the first time, the African Union, took part, a number of preliminary questions had been raised, concerning both the jurisdiction of the Court and the "opportunity" for it to render the opinion requested by the GA.

The present contribution aims to analyze these preliminary issues decided by the Court, object of a doctrinal debate since the adoption of the GA resolution asking for the opinion.[4] The methodological approach here adopted is based on the assumption that the advisory jurisdiction is governed by the same procedural principles relevant in contentious cases. It is undisputed that in its advisory function the ICJ acts as a judicial body, aiming at assessing the extent and scope of international law rules,[5] as emphasized in a number of opinions.[6]

In international proceedings, a clear distinction – theoretically speaking, at least – between preliminary issues and merits is to be made. A preliminary question stands on a logical priority in respect of the merits, and the solution of the former in a given sense is logically necessary in order to ex-

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[2] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25.2.2019, 44 (hereinafter, *Chagos* Opinion). The opinion has not yet been edited within the Reports of the Court. The opinion, the declarations and dissenting opinion of the Judges, as well as all the written statements and text of oral pleadings are nonetheless available at <https://www.icj-cij.org> (last access: 11.6.2019).

[3] See *Chagos* Opinion (note 2), paras. 32 and 108.

[4] See e.g. *D. Akande/A. Tzanakopoulos*, Can the International Court of Justice Decide on the Chagos Islands Advisory Proceedings without the UK's Consent?, EJIL Talk!, 27.6.2017, <https://www.ejiltalk.org>; *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, Questions of International Law, Zoom-out 55, 2018, 15 et seq.; *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 16 (2017), 623 et seq.

[5] *P. Benvenuti*, L'accertamento del diritto mediante i pareri consultivi della Corte internazionale di giustizia, 1985, 20.

[6] *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, 166 et seq., 175, para. 24: "the Court has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions"; similarly, *Constitution of the Maritime Safety Committee of the Inter-Governmental Consultative Organization*, ICJ Reports 1960, 150 et seq., 153.

amine and to pronounce on the latter;[7] consequently, preliminary questions cannot concern and overlap with the merits.[8]

In particular, it is safe to observe that the examination of preliminary questions is indispensable not only in contentious cases, but also in advisory proceedings,[9] as demonstrated by all advisory cases discussed before the ICJ. However, in contrast to what happens in contentious jurisdiction, where a separate proceeding on jurisdiction and admissibility is normally made, in the advisory procedure the Court makes a mere *conceptual* distinction between these issues, pronouncing, in the same opinion, on both of them,[10] although after a separate deliberation.

Preliminary questions relate both to jurisdiction and to admissibility (*recevabilité*):[11] the questions of jurisdiction involve the interpretation and application of Art. 65 of the ICJ Statute and Art. 96 of the Charter of the United Nations, namely the rules establishing the advisory jurisdiction, fixing its limits *ratione materiae* and *ratione personae*, the object of the requested opinion and the entities which may request it.[12]

The questions of admissibility form a residual category,[13] "attracting" all the issues not falling within jurisdiction. It is not possible to list these questions in a pre-established scheme, since they depend on a case-by-case evaluation based on the (jurisprudential) notion of "*judicial propriety*".[14] In case the advisory proceeding appears inconsistent with its nature of the judicial organ, the Court should use its discretionary power set forth in Art. 65 of

7 *G. Morelli*, Questioni preliminari nel processo internazionale, Riv. Dir. Int. 54 (1971), 5 et seq., 5.

8 *G. Morelli,* Eccezioni preliminari di merito?, Riv. Dir. Int. 58 (1975), 5 et seq., 7.

9 *P. Benvenuti,* Corte internazionale di giustizia, Digesto delle discipline pubblicistiche, IV, 1989, 241 et seq., 264.

10 On this point, see the critical remarks by *A. Aust*, Advisory Opinions, Journal of International Dispute Settlement 1 (2010), 123 et seq., 132.

11 *L. Radicati di Bròzolo*, Sulle questioni preliminari nella procedura consultiva davanti alla Corte internazionale di giustizia, Riv. Dir. Int. 59 (1976), 677 et seq., 681.

12 See generally, *G. Abi-Saab*, Les exceptions préliminaires dans la procédure de la Cour internationale de justice. Étude des notions fondamentales de procédure et des moyens de leur mise en œuvre, 1967, 72 et seq.; *M. M. Aljaghoub*, The Advisory Function of the International Court of Justice, 1946-2005, 2006, 38 et seq.; *R. Kolb*, The International Court of Justice, 2013, 1033.

13 *L. Radicati di Bròzolo* (note 11), 687. According to *R. Kolb*, (note 12), 1033, questions not falling within jurisdiction belong to two different categories, namely admissibility and discretion.

14 *G. Abi-Saab* (note 12), 149 et seq., 152.

the Statute and thus refuse to render the requested opinion, even if jurisdiction requirements are met.[15]

In the first Section, this contribution analyzes the questions of jurisdiction raised in the written and oral phases of the proceeding: it will be argued that the way the ICJ solved these issues somehow shaped all of the subsequent steps of the *Chagos* Opinion.

In the second Section, questions of admissibility will be addressed, in the light of the compelling reasons which, according to some States, should have induced the Court to refuse the request made by the GA. In this Section, it will be maintained that in the *Chagos* case the need of cooperation among UN organs prevailed, once again in the ICJ's advisory jurisprudence, over *any* other reason, whether "compelling" or not, which could have led the Court not to answer the questions at stake.

II. Questions of Jurisdiction

1. The Legal Nature of the Question and the Interpretation of the Request

The ICJ first considered, on the basis of Art. 65.1 of its Statute, whether it had jurisdiction to examine the request of the GA. The Court's assessment seems coherent with its own advisory case-law, but the main point is that, in the present author's view, it decisively conditioned both the admissibility questions and the merits. In other words, the major premise of the logical process behind the pronouncement rests on the section devoted to jurisdiction, and, more precisely, on the interpretation of the request.

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15 *Expressis verbis, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 et seq., 156, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403 et seq., 415 et seq., para. 29; *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, ICJ Reports 2012, 10 et seq., 24 et seq., and implicitly, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*), Advisory Opinion, ICJ Reports 1971, 16 et seq., 23 et seq.; *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12, 21 et seq. In legal doctrine, *H. Thirlway*, Advisory Opinions, MPEPIL, 2006, para. 13; *J. A. Frowein/K. Oellers-Frahm*, Article 65, in: A. Zimmermann/K. Oellers-Frahm/C. Tomuschat/C. J. Tams/M. Kashgar/D. Diehl (eds.), The Statute of the International Court of Justice, 2nd ed. 2012, 1605 et seq., 1617.

The Court exclusively focused on the *object* of the request: the legal nature of the question therein and the determination of its precise content. First of all, the ICJ very easily qualified the question as legal, pursuant to Art. 65 of its Statute and Art. 96 of the UN Charter, on the assumption that "a request from the General Assembly for an advisory opinion to examine a situation by reference to international law concerns a legal question".[16] The material scope of this notion is notoriously wide,[17] extending to all questions which "are by their very nature susceptible of a reply based on law".[18] This approach has often allowed the Court to exercise its advisory function in all those circumstances in which it was possible to isolate the legal aspects of a given question and, consequently, to apply international law.[19] In this way it has always dismissed, for example, objections based on the alleged *political* nature of some questions posed by the UN organs,[20] finding its jurisdiction on cases susceptible of a legal evaluation, sometimes encompassing also the determination of the consequences arising, under international law, from those cases.[21]

In the *Chagos* case, the Court was requested to assess a given fact, namely the separation of the Chagos from Mauritius, with regard to a precise time lapse, the period between 1965 and 1968, in the light of international law in force at the time,[22] and to determine the legal consequences of the continuing administration of the Archipelago by the United Kingdom (UK).

Once ascertained "that the two questions submitted to it are legal in character",[23] the Court turned its attention to a profile that is strictly connected, logically and legally, to that pertaining to the legal nature of the question, and, above all, constitutes the basis on which the entire opinion

16 *Chagos* Opinion (note 2), para. 58.

17 *P. Benvenuti* (note 5), 160.

18 *Western Sahara* Opinion (note 15), 18, para. 15.

19 *D. Pratap*, The Advisory Jurisdiction of the International Court, 1972, 86 et seq.; *P. Benvenuti* (note 5), 190.

20 *Conditions of Admission of a State to Membership in the United Nations* (*Article 4 of the Charter*), ICJ Reports 1948, 57 et seq., 58 et seq.; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226 et seq., 234, para. 13; *Wall* Opinion (note 15), para. 41, *Kosovo* Opinion (note 15), para. 27. On this aspect, see *D. W. Greig*, The Advisory Jurisdiction of the International Court and the Settlement of Disputes between States, ICLQ 15 (1966), 325 et seq., 339 et seq.; *K. Oellers-Frahm*, Article 96, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus/N. Wessendorf, The Charter of the United Nations. A Commentary, 3rd ed. 2012, II, 1975 et seq., 1985-1986.

21 See, e.g., *Namibia* and *Wall* cases (note 15).

22 On this point, see the observations made by Judge *Gaja* (Separate Opinion of Judge *Gaja*), paras. 1 and 2.

23 *Chagos* Opinion (note 2), para. 59.

stands: the *formulation* of the request. It is worth noting, in this regard, that in the *Western Sahara* Opinion the Court, in order to assess the legal nature of the questions raised by the GA, observed that these were "*framed* in terms of law" and raised "problems of international law".[24]

In the *Chagos* Opinion, the Court examined the objections[25] contending that the request had allegedly been framed in vague terms – so that the exact statement of the question required by Art. 65.2 of the ICJ Statute was not clear – and in a way aimed at hiding "the *real issue* of international law with respect to the Chagos Archipelago for which an answer is sought".[26] According to this argument, although "the referred questions ostensibly concern decolonization, their true purpose and effect is to seek the Court's adjudication over a question of sovereignty".[27] Although not expressly dealt with by the Court, it is useful to recall a similar objection, focused on the "real" author of the request, namely Mauritius.[28]

The Court dismissed these arguments on the basis of what it had already stated in the *Wall* Opinion,[29] namely

> "that lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court".[30]

In this way, the ICJ reiterates what it has often claimed in previous cases: as a judicial body, it has the power to interpret the question at issue, in order to clarify its meaning, to fix the exact statement of the question, pursu-

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[24] *Western Sahara* Opinion (note 15), 18, para. 15, emphasis added; the same sentence is quoted by the Court in the *Wall* Opinion (note 15), 153, para. 37.

[25] *Chagos* Opinion (note 2), para. 60.

[26] See UK Written Statement, 146; Australian Written Statement, 4-5, para. 21.

[27] Australian Written Statement, 4 et seq., para. 21. Similar objections had been raised by France (Exposé écrit de la République Française, 4), and Israel (Written Statement of Israel, 8).

[28] This objection had been raised, although implicitly, by the UK (UK Written Statement [note 26], 11, 81, 85), by Israel (Written Statement of Israel [note 27], 7 et seq.) which emphasized the attempts made by Mauritius to obtain a judicial settlement of its dispute with the UK and the decision to pursue the way of the advisory opinion after the express British refusal to the judicial settlement. On this issue, see *P. Benvenuti* (note 5), 128 et seq., who contends that States can be considered, under a "substantial" point of view, the "real" authors of an advisory opinion request, and *P. Daillier*, Article 96, in: J.-P. Cot/A. Pellet/M. Forteau, La Charte des Nations Unies. Commentaire article par article, 3rd ed. 2005, Vol. II, 2003 et seq., 2006, where the author refers to the "useful fiction" of the request made by a UN organ rather than by the "interested State".

[29] *Wall* Opinion (note 15), 153 et seq., para. 38.

[30] *Chagos* Opinion (note 2), 18, para. 61.

ant to Art. 65.2 of the Statute, and even to *reformulate* the wording of the request, if necessary, to identify "the true legal question under consideration".[31] As pointed out by Judge *Morelli* in 1962:

> "[i]t is exclusively for the Court to decide, in the process of its reasoning, what are the questions which have to be solved in order to answer the question submitted to it".

The requesting organ, in fact, "cannot […] place any limitations on the Court as regards the logical processes to be followed in answering it"[32]. When a question is framed in a vague and imprecise manner, the Court *preliminarily* delimits its object,[33] thus tracing the heuristic path leading to the solution to be given to the request.

In a number of proceedings, the Court had to carry on such operations, with regard, for example, to questions "at once infelicitously expressed and vague".[34] The Permanent Court of International Justice (PCIJ) had already had to correct questions framed in an "imprecise" manner.[35] Along this line,

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[31] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 88, para. 35. On the power of the ICJ to interpret and reformulate the questions under scrutiny, see *C. De Visscher*, Aspects récents du droit procédural de la Cour internationale de justice, 1966, 198; *S. Rosenne*, The Law and Practice of the International Court, 1985, 701; *P. Benvenuti* (note 5), 163; *T. Elias*, The International Court of Justice and Some Contemporary Problems, 1983, 28; *B. I. Bonafé*, Il potere della Corte internazionale di giustizia di riformulare la domanda di parere consultivo, in: L. Gradoni/E. Milano, Il parere della Corte internazionale di giustizia sulla dichiarazione di indipendenza del Kosovo: un'analisi critica, 2011, 31 et seq., 36 et seq.; *R. Kolb* (note 12), 1077 et seq.

[32] *Certain expenses of the United Nations Article 17, paragraph 2, of the Charter,* Separate Opinion of Judge *Morelli*, ICJ Reports 1962, 151 et seq., 216 et seq., 217 para. 2.

[33] *L. Radicati di Bròzolo* (note 11), 682 et seq., who contends that reformulation and interpretation of the request give rise to a particular typology of preliminary questions, different from jurisdiction and admissibility. See similarly *M. Arcari*, Le traitement des "questions préliminaires" dans l'affaire du Kosovo (ou de la double nature de la fonction consultative de la Cour internationale de justice), in: M. Arcari/L. Balmond (eds.), International Law Issues Arising from the International Court of Justice Advisory Opinion on Kosovo, 2011, 33 et seq., 37, who contends that reformulation belongs to the category of preliminary questions only *lato sensu*. It seems, however, that the interpretation/reformulation issue attains closely to the questions of jurisdiction, as demonstrated by the *Wall* Opinion (note 15), paras. 37-38.

[34] *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1982, 348, para. 46.

[35] See *Question of Jaworzina, Polish-Czekoslovakian Frontier*, Collection of Advisory Opinion, Series B, No. 8, 50. In legal doctrine see *D. Pratap* (note 19), 96 et seq., *K. J. Keith*, The Extent of the Advisory Jurisdiction of the International Court of Justice, 1971, 64 et seq., *P. Benvenuti* (note 5), 163 et seq.

the ICJ has interpreted[36] or even reformulated questions raised by political organs,[37] as it allegedly occurred in the *Kosovo* case.[38] In other words, the ICJ has always had to face up to different kinds and degrees of "lack of clarity of the request",[39] acting in perfect continuity with the PCIJ and firmly reaffirming its position

> "if it is to remain faithful of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request".[40]

A wide power, therefore, that the Court claimed again in the *Chagos* Opinion,[41] but nonetheless it is not unlimited. As argued by Judge *Morelli*,

> "This freedom can [...] be understood only as subordinated both to the rules of law and logic by which the Court is bound and also to the objective which the Court must pursue, which is the solution of the question submitted to it".[42]

And the Court itself has often underlined that in dealing with a request for an advisory opinion it "should keep within the *bounds* of the question put to it by the General Assembly"[43] as well as that it is "in principle, bound by the terms of the questions formulated in the request".[44] In this

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[36] See, e.g., *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (note 6), 166 et seq., 184, para. 41.

[37] *Constitution of the Maritime Safety Committee* (note 6), 152 et seq.; *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal*, ICJ Reports 1987, 18 et seq., paras. 32-45. A similar operation had been carried out by the PCIJ: *Interpretation of the Greco-Turkish Agreement of December 1st 1926*, Collection of Advisory Opinions, Series B, No. 16, 3 et seq., 15 et seq. See also the opinions of Judge *Lauterpacht*, *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, ICJ Reports 1056, 23 et seq., 37, and Judge *Petrén*, *Western Sahara* Opinion (note 15), 104 et seq. For the opposite opinion, Judge *Anzilotti*, Individual Opinion Attached to the *Free City of Danzig and the International Labour Organization*, Series B, No. 18, 18 et seq., 20.

[38] *Kosovo* Opinion (note 15), 423 et seq. See *A. Tancredi*, Il parere della Corte internazionale di giustizia sulla dichiarazione di indipendenza del Kosovo, Riv. Dir. Int. 93 (2010), 994 et seq., 1005 et seq.; *B. I. Bonafé* (note 31), *passim*.

[39] *Admissibility of Hearings of Petitioners by the Committee on South West Africa* (note 37), 25; *Certain expenses of the United Nations* (note 32), 157 et seq.; *Application for Review of Judgement No. 273* (note 34), 348, para. 46; *Interpretation of the Agreement of 25 March 1951* (note 31), 87 et seq., paras. 34-36.

[40] *Interpretation of the Agreement of 25 March 1951* (note 31), 88.

[41] *Chagos* Opinion (note 2), para. 135.

[42] *Certain expenses of the United Nations* (note 32), 216 et seq., 217 et seq., para. 2.

[43] South-West Africa-Voting Procedure, ICJ Reports 1955, 67, 71 et seq.

[44] *Application for Review of Judgement No. 158*, 183 et seq., para. 41.

regard, it has been maintained that the power in issue is subject both to procedural and substantive limits.[45]

In the *Chagos* case, the ICJ dismissed the arguments raised by some States[46] and found "no need for it to reformulate the questions"[47] raised by the GA. It is interesting to notice, at this point, that for the Court reformulation is to be performed only "in exceptional circumstances".[48] Through this statement, the Court seems to have taken the opportunity to clarify an aspect for which it had been hardly criticized in 2010, with regard to the *Kosovo* Opinion.[49]

Once excluded the necessity to reframe the questions, the Court deemed a mere interpretation of the request made by the GA to be sufficient, thus implicitly drawing a distinction between interpretation and reformulation.[50] The ICJ held that both questions had been formulated in a sufficiently clear manner and, above all, put in relation to precise rules of international law. As for the first question, the GA submitted to its assessment certain facts, occurred in a definite time-lapse, "which fall within the framework of the process of decolonization of Mauritius as a non-self-governing territory".[51] This circumstance would suffice to exclude that the object of the request was "a bilateral dispute over sovereignty which might exist between the United Kingdom and Mauritius".[52] The GA requested to assess whether the decolonization of Mauritius "was lawfully completed in 1968, having regard to international law",[53] in the light of the excision of the Chagos Archipelago from the Mauritian territory. As for the second question, the Court read it as a request to determine the legal consequences of the maintenance of the Archipelago under the control of the Administering Power.

The formulation of the questions in legal terms and the exclusion, from their wording, of any reference to the underlying dispute between Mauri-

45 *B. I. Bonafé* (note 31), 40 et seq.
46 See, e.g., Written Statement Germany, paras. 95 et seq.
47 *Chagos* Opinion (note 2), para. 136.
48 *Chagos* Opinion (note 2), para. 135.
49 Sul punto v. *M. Arcari* (note 33), 47 et seq., 57; *E. Milano*, Il parere consultivo della Corte internazionale di giustizia sulla dichiarazione di indipendenza del Kosovo: qualche istruzione per l'uso, <http://www.sidi-isil.org>, 2; but see also *B. I. Bonafé* (note 31), 40, 45 et seq. See also the opinions of the Judges *Koroma*, *Kosovo* Opinion (note 15), 467 et seq., para. 3; *Bennouna*, *Kosovo* Opinion (note 15), 500 et seq., 507, para. 35, *Tomka*, *Kosovo* Opinion (note 15), 454 et seq., 456, para. 10.
50 On this distinction, see *A. Tancredi* (note 38), 1007.
51 *Chagos* Opinion (note 2), para. 136.
52 *Chagos* Opinion (note 2), para. 136. See below, para. 4.
53 *Chagos* Opinion (note 2), para. 136.

tius and the UK, assumes therefore a fundamental role and leads the ICJ to qualify both questions as unequivocally legal, to be "read" through nothing more than ordinary interpretation criteria. It is exactly at this point that most part of the *Chagos* opinion is determined, where the Court deems that "[t]here is […] no need for it to interpret *restrictively* the questions put to it by the General Assembly".[54]

The criterion utilized by the Court thus seems the textual and literal one, which, as well-known, is the first method to be used in the interpretation of any legal rule.[55] In the jurisprudence of the ICJ it is replaced by other criteria, like the "subjective" one, only in order to interpret or reformulate a question that is *not* entirely clear.[56] Through an interpretation based on the *textual* elements of GA Res. 71/292, the Court easily found in the decolonization the legal framework of the questions under scrutiny. It is to be highlighted that this examination has been carried out by the Court after the section of the opinion pertaining to the admissibility of the case, and in particular following the findings on the objection based on the lack of consent on the part of the UK as a reason to decline the opinion.[57] This circumstance leads to argue that, beside the textual criterion, the Court relied on a specific normative *context*, by reading the legal notions contained in Res. 71/292 in the light of the UN Charter provisions regarding the question under consideration as well as the UN practice in that field.[58]

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[54] *Chagos* Opinion (note 2), para. 137, emphasis added.

[55] It is a fundamental principle of interpretation, as already stated by the PCIJ, in the advisory opinion of 16.5.1925 on *Service postal polonaise à Danzig*, in: Recueil des avis consultatifs, Serie B, No. 11, 5 et seq., 39. See *L. M. Bentivoglio*, Interpretazione delle norme internazionali, Enciclopedia del diritto, Vol. XXII, 1972, 310 et seq., 321; *R. K. Gardiner*, Treaty Interpretation, 2nd ed. 2016, 164 (with reference to treaty rules).

[56] *B. I. Bonafé* (note 31), 41 et seq. It is interesting to notice, in this regard, that the suggestions raised by Germany in its Written Statement (para. 126), namely to narrowly interpret the GA request, was essentially based on a subjective criterion, since, according to this submission, the ICJ should have carefully analyzed the "intention" of the GA (para. 124: "it cannot be assumed that in the present case the GA wanted to request the Court […] to provide a comprehensive answer regarding the legal status of the territory in question"). But, at the same time, Germany submitted that in order to pursue this narrow interpretation, the Court should have taken into account "the very wording of the request" (para. 131).

[57] See below, Section III. 4. It is noteworthy, however, that this "*renvoi*" is made by the Court in the Section of the Opinion devoted to the issue of jurisdiction (*Chagos* Opinion [note 2], para. 61), thus considering the problem of interpretation as strictly related to the preliminary questions of jurisdiction.

[58] On the "contextual" criterion in the interpretation of acts of international organizations, see *M. Benzig*, International Organizations or Institutions, Secondary Law, MPEPIL (2007), para. 47; and for the close connection between "the ordinary meaning (of a treaty) and its context, see *R. K. Gardiner* (note 55), 198 et seq.

2. The Competence of the GA with Regard to Decolonization

Art. 96 of the UN Charter and Art. 65 of the ICJ Statute define the limits *ratione personae ac materiae* to the advisory jurisdiction.[59] The object of the request may regard any legal question (*toute question juridique*), if it is raised by the GA or the Security Council (SC). Requests made by other organs and institutions may regard only legal questions arising within the scope of their activities. In the 1996 opinion *on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the Court examined this aspect among the preliminary questions on jurisdiction and, in particular, following the assessment on the legal nature of the question put to it by the World Health Organization's (WHO) Assembly. In that case, in fact, the lack of competence of the requesting organ determined the lack of jurisdiction of the Court, thus allowing the Court to dismiss the request without even examining the questions of admissibility of the case.[60]

In the *Chagos* case, instead, the Court carried out a quite hasty analysis of this jurisdiction-related point, simply relying on the fact that Art. 96.1 UN Charter gives the GA the competence to request an opinion on any legal question.[61] The legal nature of the question raised in Res. 71/292 thus allows the Court to conclude that "the request has been made in accordance with the Charter".[62] From this perspective, the Court seems to have followed the *Western Sahara* precedent, where in order to determine the competence *ratione materiae* of the GA the ICJ only verified whether the question in issue was legal or not.[63]

Maybe the reason for such an approach lies in the fact that during the *Chagos* proceeding most parts of the objections focused on the admissibility of the case rather than on jurisdiction and that, in any case, none of the participants seriously challenged the conformity of Res. 71/292 with Art. 96 UN Charter. Be that as it may, one cannot but observe that in other cases

[59] According to *G. Abi-Saab* (note 12), 146, the *legitimatio activa* of the requesting organ "se rapproche par son but des conditions de l'intérêt ou de la qualité en matière contentieuse".

[60] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* ICJ Reports 1996, 66 et seq., 84, para. 31: "the Court finds that an essential condition of founding its jurisdiction in the present case is absent and that it cannot, accordingly, give the opinion requested. Consequently, the Court is not called upon to examine the arguments which were laid before it with regard to the exercise of its discretionary power to give an opinion."

[61] *Chagos* Opinion (note 2), para. 56.

[62] *Chagos* Opinion (note 2), para. 59.

[63] *Western Sahara* Opinion (note 15), 18, para. 14.

the ICJ analyzed this aspect with deeper attention and, above all, within the context of preliminary questions of jurisdiction.[64] In the most important advisory cases of recent ICJ case law, namely the *Wall* and *Kosovo* Opinions, the Court – although induced in doing so by the submissions made during the respective proceedings – had ascertained whether the questions put to it were within the scope of the GA's competences.[65]

In the *Chagos* case, by contrast, the ICJ didn't examine, at least not *expressly* and not in the jurisdiction Section of the opinion, the problem relating to the competence of the GA.[66] It has to be pointed out, nonetheless, that the textual interpretation of the Res. 71/292 allowed the Court to emphasize the competence and, consequently, the "*qualité à agir*" of the GA in the field of decolonization and self-determination of peoples. Quoting the *Western Sahara* Opinion,[67] in fact, the Court relied on "*the interest* of the General Assembly *to seek an advisory opinion* which it deems of assistance in carrying out its functions in regard to decolonization",[68] although in the section relating to the admissibility of the request. As we will see below, this is the main ground on which the Court dismissed the objection based on the lack of consent on the part of the UK to the judicial solution of the underlying dispute. What must be highlighted, at this point of our analysis, is that by qualifying the case as a question of decolonization and self-determination, the Court could fundamentally base its opinion on the "crucial role" of the GA in this field.[69]

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[64] E.g., *Interpretation of Peace Treaties*, ICJ Reports 1950, 65 et seq., 70; *Legality of the Threat or Use of Nuclear Weapons* (note 20), 232 et seq.

[65] *Wall* Opinion (note 15), 144 et seq.; *Kosovo* Opinion (note 15), paras. 21-24 (on which see *A. Tancredi* [note 38], 998. It is worth noting that, according to some scholars, the jurisdiction of the Court is strictly connected with the competence *ratione materiae* of the requesting organ even in the case of requests for advisory opinion raised by the GA or the SC, so that "the words 'arising within the scope of their activities' in para. 2 of Art. 96 are *redundant*" [*H. Kelsen*, The Law of the United Nations, 1951, 546, emphasis added]. This view is based on the assumption that Art. 96.1 of the UN Charter was not intended to extend the scope of activities of the GA and the SC; for a similar view see *S. M. Schwebel*, Authorizing the Secretary General of the United Nations to Request Advisory Opinions to the International Court of Justice, AJIL 78 [1984], 869 et seq., 874; *S. Rosenne* [note 31], 660; *R. Kolb* [note 12], 1034, even though he underlines the wide ranging competence of the GA. *Contra*, *K. Oellers-Frahm*, Article 96 [note 20], 1980, who contends that there is no such restriction and that, in any case, in view of the wide range of competences of the GA and the SC, questions not falling within the activities of these organs are scarcely imaginable.).

[66] Despite the arguments raised by Russia (Written Statement, para. 33) and France (see below, note 76).

[67] *Western Sahara* Opinion (note 15), 26 et seq., para. 39.

[68] *Chagos* Opinion (note 2), para. 86, emphasis added.

[69] *Chagos* Opinion (note 2), para. 163.

In this regard, two observations arise. On the one hand, there is no doubt about the competence of the GA in the matter of decolonization and self-determination, nor have any States raised arguments claiming the contrary. Art. 10 of the UN Charter, which states that the GA may discuss any questions or any matters within the scope of the UN Charter, vests this organ with a "comprehensive jurisdiction".[70] Art. 1.2 of the UN Charter situates the principle of self-determination among the purposes of the UN, so that it served as the main legal basis for the adoption by the GA of a huge number of resolutions in the matter of decolonization.[71] Among these acts, it suffices to mention the Declaration on the Granting of Independence to Colonial Countries and Peoples,[72] to which the GA referred in its request to the Court and often mentioned throughout the *Chagos* Opinion by the Court itself.[73] Arts. 55, 56 and 73 of the UN Charter complete the UN legal framework in the matter of self-determination.

On the other hand, the competence of the GA with specific regard to the decolonization of Mauritius looks hardly disputable, by reason of the general competence referred to above. Moreover, following the detachment of the *Chagos* islands, the GA adopted Res. 2066 (XX), 2232 (XXI) and 2357 (XXII), expressly devoted to the decolonization of Mauritius and to its title to territorial integrity.[74] From this point of view, some authors maintain that a customary rule, emerged within the UN system, conferred to the GA the power to indicate measures to be adopted within a specific non-autonomous territory in order to gain independence.[75] It must also be emphasized the wide room of *manœuvre* recognized to the GA by the ICJ in the field of self-determination, and, in particular, with regard to the forms and procedures by which that right is to be realized.[76]

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[70] *E. Klein/S. Schmahl*, Article 10, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus/N. Wessendorf (note 20), Vol. I, 461 et seq., 463.

[71] *S. Oeter*, Self-Determination, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus/N. Wessendorf (note 20), 313 et seq., 320 et seq.; *B. Conforti/C. Focarelli*, Le Nazioni Unite, XIth ed. 2017, 419 et seq.

[72] A/RES/1514/XV of 14.12.1960.

[73] See Section 3 of the *Chagos* Opinion. See also Judge *Sebutinde*, Separate Opinion, paras. 5-11.

[74] But see the objection of France, maintaining that the GA was not actively seized of the situation of Mauritius when Res. 71/292 was adopted (Written Statement, para. 13) and the observations of Judge *Tomka*, Separate Opinion, para. 5.

[75] *B. Conforti/C. Focarelli* (note 71), 422 et seq.

[76] *J. Crawford*, The General Assembly, The International Court and Self-Determination, in: V. Lowe/M. Fitzmaurice (eds.), Fifty Years of the International Court of Justice. Essays in Honor of Sir Robert Jennings, 1996, 585 et seq., 591.

It should be considered, furthermore, that the GA request for an advisory opinion did not even give rise to the problem of overlapping competences with other UN organs, as it had allegedly occurred in the *Wall* and *Kosovo* proceedings.[77]

3. The Framing of the Request as the True Pillar of the Entire *Chagos* Case

As seen, the formulation of Res. 71/292 led the ICJ to assess as legal in nature the questions put to it by the GA and to ascribe the subject matter of the request to the competences of the GA. So, if in the *Kosovo* case the *reformulation* of the request had played a crucial role for the subsequent assessment of the Court, it is quite clear that in the *Chagos* case the same role has been played by the *formulation* of the questions put to the ICJ: in both cases, in fact, the Court has made a choice, exercising "its freedom to select the ground on which to base" its pronouncement,[78] which has its legal basis on a general procedural principle.[79] In this case, in other words, the Court deliberately dismissed the arguments raised by some States, according to which it should have interpreted the request as pertaining to a territorial dispute, and selected the legal ground wisely "suggested" in the GA resolution, namely that of decolonization and self-determination. In this "selection" lies the logical operation known, in legal theory, as the qualification of

[77] *Wall* Opinion (note 15), paras. 18-35; *Kosovo* Opinion (note 15), paras. 36-47, where the ICJ dismissed the objections based on Art. 12 of the UN Charter, which provides for a temporary ban on recommendations by the GA with regard to cases being dealt with (see, generally, *E. Klein/S. Schmahl*, Article 12, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus/N. Wessendorf [note 20], Vol. I, 507 et seq., and, on this particular aspect, *M. I. Papa*, Evitare di pronunciarsi? Questioni di giurisdizione e *propriety* nell'ottica delle relazioni istituzionali tra gli organi delle Nazioni Unite, in: L. Gradoni/E. Milano [note 31], 9 et seq., 12 et seq.).

[78] *S. Rosenne*, The Law and Practice of the International Court, 1920-1996, Vol. III, Procedure, 1997, 1270, who referred to the contentious jurisdiction of the ICJ. On this aspect, see also *A. Orakhelashvili*, The International Court and "Its Freedom to Select the Ground Upon Which It Will Base Its Judgement", ICLQ 56 (2007), 171 et seq.; *R. Kolb* (note 12), 1079: "it is not unusual to see the Court piloting the question into the waters that best do justice to the situation".

[79] *A. Tancredi* (note 38), 1015, who maintains that in the *Kosovo* Opinion, rather than reframing the question, the ICJ resorted to the power to select the rule to put at very basis of its own reasoning. It was, therefore, a blatant exercise of *Vorverständnis* of the question raised by the GA in 2008 (*A. Tancredi*, The ICJ's Kosovo Advisory Opinion as an Exercise in Pre-Understanding, in: M. Arcari, L. Balmond [note 33], 217 et seq.).

the concrete case in relation to a given rule, or the subsumption of the former under the latter.[80]

Once again, the *Western Sahara* Opinion seems to have been adopted as a model by the Court, given that the request was framed in terms of decolonization and did not refer to a dispute between the States involved in that situation.[81] By dismissing, in the section on jurisdiction, the objection based on "the true legal question behind the request",[82] the Court prepared the ground for the assessment of the admissibility issues, thus avoiding to deal with the controversial issue of sovereignty, specularly to what occurred in the *Kosovo* case, where the Court had limited the scope of the request so as to avoid passing upon certain issues.[83]

For these reasons, one cannot but share the view of those who emphasized the "cleverness" of the drafters of Res. 71/292[84] and it is significant that the UK recognized that the request appeared "to have been carefully framed so as to avoid making an express reference to sovereignty".[85] In this context, there is another aspect of the request which deserves to be considered: the period of time in which the GA situates the legal question put to the Court. Again, the ICJ confers a specific weight to the formulation of the request, as clearly results from the french version of the opinion:

> "[i]n Question (a) (dans *le libellé* de la question a), the General Assembly situates the process of decolonization of Mauritius in the period between the separation of the Chagos Archipelago from its territory in 1965 and its independence in 1968."[86]

This specific choice made by the GA, and indirectly by the ICJ, leads at two fundamental results: firstly, as a matter of applicable law, the Court was expected to apply customary rules relevant at that time as well as resolutions adopted by the GA before 1968, namely Res. 1514 and those specifi-

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80 See, among others, *K. Larenz*, Methodenlehre der Rechtswissenschaft, 3rd ed. 1975, 255 et seq., *K. Michaelis*, Über das Verhältnis von logischer und sachlicher Richtigkeit bei der sogenannten Subsumtion, in: Göttinger Festschrift für das Oberlandesgericht Celle, 1961, 117 et seq.; *M. Taruffo*, Giudizio (Teoria generale), Enciclopedia Giuridica Treccani, Vol. XV, 1988, 6.

81 *Western Sahara* Opinion (note 15), para. 39.

82 See UK Written Statement (note 26); Australian Written Statement (note 27).

83 *M. Arcari* (note 33), 49.

84 *M. Milanovic*, ICJ Delivers Chagos Advisory Opinion. UK Loses Badly, EJIL Talk!, 25.2.2019; *J. Klabbers*, Shrinkin Self-Determination: the *Chagos* Opinion of the International Court of Justice, ESIL Reflections, Vol. 8/2, 3.

85 UK Written Statement (note 26), 11, para. 20.

86 *Chagos* Opinion (note 2), para. 140.

cally devoted to the Mauritian situation.[87] Secondly, this temporal delimitation serves to elude the "consent objection": the dispute between Mauritius and the UK, according to the latter,[88] arose only *after* the beginning of the 1980's, that is to say at least twelve years after the decolonization of Mauritius was completed.[89] Although the ICJ didn't mention this aspect, apparently relying only on the absence of any reference to the dispute into the GA's request,[90] it seems nonetheless that it has been taken into account, in the light of the statement of the facts contained in the opinion.

To conclude, the findings of the Court on the questions of jurisdiction appear to be well-founded. After all, it should be reminded that during the proceedings none of the participants had disputed the jurisdiction of the Court to render the opinion. Not surprisingly, this was the only point of the *dispositif* on which the bench was unanimous.[91] Even the States that had hardly opposed to the request in the debate within the GA,[92] during the advisory proceeding raised a number of objections disputing the *opportunity* for the Court to render the opinion, rather than the jurisdiction to entertain the request. In the same vein, scholars who examined the preliminary questions before the delivery of the *Chagos* Opinion, focused only on the admissibility of the request.[93]

It is clear, however, that even the *merits* of the *Chagos* case have been determined at the stage of the interpretation of the GA request. The qualification of the case as a matter of decolonization, that is to say the less controversial aspect of self-determination,[94] is at the very basis of the findings of the Court: above all, it found that the *right* to self-determination applies to non-autonomous territories in their *entirety*, since territorial integrity is a *corollary* of that right. As a consequence, any territorial dismemberment carried out by the Administering Power is a breach of self-determination, unless it is "based on the freely expressed and genuine will of the people of the territory concerned".[95] On this premises, the Court *inevitably* considered the separation of the Chagos Archipelago as an internationally wrong-

87 *Chagos* Opinion (note 2), para. 161.
88 UK Written Statement (note 26), 76 et seq.
89 See the oral pleadings of *P. Klein* on behalf of Mauritius, CR 2018/20, 3.9.2018, 36 et seq.
90 *Chagos* Opinion (note 2), para. 136.
91 *Chagos* Opinion (note 2), para. 183.
92 See the position of UK, USA and Israel (UN Doc. A/71/PV.88).
93 *Z. Crespi Reghizzi* (note 4), 15 et seq.; *S. Yee* (note 4), 623 et seq.
94 *J. Klabbers* (note 84), 2.
95 *Chagos* Opinion (note 2), para. 160.

ful act,[96] as the circumstance in which it occurred in 1965 were not in conformity with the requirements of self-determination.[97]

III. Questions of Admissibility

The ICJ begins its assessment on the admissibility questions, fixing the "coordinates" of its reasoning: on the one hand, the principle that it may decline to render the opinion in order to protect *the integrity of its judicial function* "as the principal judicial organ of the United Nations";[98] on the other, the principle of cooperation among UN organs: the Court is

> "mindful of the fact that its answer to a request for an advisory opinion represents its participation in the activities of the Organization, and, in principle, should not be refused".

The point of equilibrium between these two apparently concurring purposes is to be found, once again,[99] in the *leitmotiv* of the advisory jurisprudence, namely that "only 'compelling reasons' may lead the Court to refuse its opinion".[100] The Court examines four of these reasons, leaving the most relevant one at the end of its assessment.

1. The Alleged Unsuitability of the Advisory Procedure for the Determination of Factual Issues

According to some participants, the Court should have declined the exercise of its jurisdiction due to the unsuitability of the advisory proceeding for

96 *Chagos* Opinion (note 2), para. 174.

97 According to the Court, the agreement by which the UK kept the control over the Archipelago could not even be considered as a treaty under international law, given that one of the parties to it, Mauritius, "which is said to have ceded the territory to the United Kingdom, was under the authority of the latter". In any case, in the light of the circumstances in which that agreement was signed, "the Court considers that this detachment was not based on the free and genuine expression of the will of the people concerned" (*Chagos* Opinion [note 2], para. 172).

98 *Chagos* Opinion (note 2), para. 64.

99 *Wall* Opinion (note 15), 156, para. 44; *Kosovo* Opinion (note 15), 416, para. 30, just to mention the most recent cases.

100 *Chagos* Opinion (note 2), para. 65.

the assessment over complex and disputed facts.[101] The case-law on this issue is quite clear. In the *Namibia* case, the ICJ stated that the reference in Art. 96 UN Charter "to legal questions cannot be interpreted as opposing legal to factual issues" on which, if necessary, the Court may make findings.[102] In the *Interpretation of the Agreement of 25.3.1951 between the WHO and Egypt*, the Court emphasized that a rule of international law "does not operate in a vacuum" but in relations to a factual framework; consequently, it is not prevented from "setting out the pertinent elements of fact".[103] In the *Wall* case, the ICJ persuasively argued that "the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance", implicitly claiming its power to take into account factual issues and to decline to give the opinion in case of facts not sufficiently elucidated.[104] More explicitly, Judge *Kooijmans* contended that "it is the Court's own responsibility to assess whether the available information is sufficient to give the requested opinion".[105]

These cases seem to corroborate the opinion of those who contend that also in its advisory jurisdiction the Court has the power to take cognizance of relevant facts and that the procedure, in its entirety, is suitable for such an assessment.[106] Moreover, Art. 107.2 of the Court's Rules seems to assume – or, at least, not to deny – the power under consideration, since it states that the advisory opinion shall contain "a statement of the facts". It has been argued that this provision "*fait pendant*" to Art. 95 of the same rules, which lists the elements a judgement shall contain in contentious cases.[107]

Be that as it may, as a matter of fact, the requesting organ, and often the Secretary General, normally submit reports and documents to the Court

[101] E.g., UK Written Statement (note 26), 114 et seq.; Australian Written Statement (note 27), 7, para. 31; Written Statement of Israel (note 27), 13 et seq.

[102] *Namibia* Opinion (note 15), 27, para. 40.

[103] *Interpretation of the Agreement of 25 March 1951* (note 31), 76.

[104] *Wall* Opinion (note 15), 161, para. 56, emphasis added, see para. 58, where the Court found that it had before it sufficient information to give the opinion.

[105] Separate Opinion of Judge *Kooijmans*, *Wall* Opinion (note 15), 219 et seq., 227, para. 28.

[106] See, among others, *M. O. Hudson*, The Twenty-Fourth Year of the World Court, AJIL 40 (1946), 1 et seq., 13; *P. Benvenuti* (note 5), 177 et seq.; *J. A. Frowein/K. Oellers-Frahm* (note 15), 1620 et seq., who do not seem to dispute that the Court may also pronounce on factual issues. *Contra*, *F. Vallat*, The Competence of the United Nations General Assembly, RdC 97 (1959), 203 et seq., 216.

[107] *G. Guyomar*, Commentaire du Règlement de la Cour internationale de justice adopté le 14 Avril 1978, 1983, 688.

containing detailed information on the factual issues behind the request.[108] It must also be emphasized that, pursuant to Art. 66.2 of ICJ Statute, any State entitled to appear before the Court "as likely to be able to furnish information on the question" may participate to each advisory procedure, through written and oral statements.

The fact that the Court may take cognizance of factual issues does not mean, however, that it inevitably succeeds in obtaining sufficient information on the question requested. Should this occur, the power under consideration implies that the Court may refuse to render the requested opinion, as a matter of (in)admissibility,[109] as clearly stated in the *Wall* Opinion.[110] In this case, the Court relied on the *Eastern Carelia* precedent, where the PCIJ declined to exercise its advisory jurisdiction due to the fact the request raised a question of fact which could not have been elucidated without hearing both the interested parties, including Russia, which, however, had refused to take part in that proceeding.[111] Moreover, it should be reminded that also in the exercise of its contentious jurisdiction the Court may declare a case inadmissible, due to the lack of sufficient factual elements.[112] It is noteworthy that, in the *Wall* case, Judge *Buergental*, who voted against the decision of the Court to comply with the GA's request,[113] based his Declaration *only* on the alleged lack of information and evidence.[114]

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[108] See, e.g., the *Wall* case and the reports submitted by the Secretary General, regarding the route and the socio-economic impact of the wall in the West Bank (UN Doc. A/ES-10/248 24.11.2003). On the "special" role of the Secretary-General "as a more neutral representative of the public interest providing the Court with necessary information", see *A. Paulus*, Article 66, in: A. Zimmermann/K. Oellers-Frahm/C. Tomuschat/C. J. Tams/M. Kashgar/D. Diehl (note 15), 1638 et seq., 1650 et seq.

[109] *G. G. Fitzmaurice*, International Organizations and Tribunals, 1947-1951, in: The Law and Procedure of the International Court of Justice 1 (1986), Vol. I, 122; *D. Pratap* (note 19), 149; *P. Benvenuti* (note 5), 184; *R. Kolb* (note 12), 1082; *C. Greenwood*, Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice, in: G. Gaja/J. G. Stoutenburg (eds.), Enhancing the Rule of Law Through the International Court of Justice, 2012, 63 et seq., 69.

[110] See above note 73.

[111] *Status of Eastern Carelia*, Advisory Opinion, PCIJ Series B, No. 5, 8 et seq., 28. This aspect is strictly connected to the "consent" argument and it must be taken into due account when the latter come at issue (see below note 201).

[112] *P. Benvenuti* (note 5), 184.

[113] *Wall* Opinion (note 15), para. 163, point 2).

[114] *Wall* Opinion, Declaration of Judge *Buergenthal*, 240 et seq., 240, para. 1, where there is no mention to the main argument raised at the time against the opportunity for the Court to give the opinion, namely the lack of consent on the part of Israel.

In the *Chagos* case, the Court, not surprisingly, rejected the factual objection, relying on its prior case law[115] and, more decisively, on the wide participation of States and international organization to the procedure at issue.[116] It must be emphasized that all the States having an interest, or a *fumus* of interest, in the advisory procedure, participated through the submission of detailed written statements, comments and through oral pleadings.[117] This is particularly significant with regard to the United Kingdom, who strongly contended that the Court should have declined to exercise its jurisdiction in this case, but, nonetheless, provided the Court with submissions and documents on relevant factual elements of the question.[118]

2. The "Uselessness" of the Opinion as a Compelling Reason Not to Exercise the Advisory Jurisdiction

This is the weakest among the objections to the admissibility of the *Chagos* case, dismissed by the ICJ on the grounds that "it is not for the Court itself to determine the usefulness of its response to the requesting organ".[119] The Court refers to the *Kosovo* Opinion, where it stated that:

> "it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions".[120]

In the *1996 Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the Court dismissed the objection based on the ground that the GA had not explained the purpose for which it requested an opinion, since the requesting organ "has the right to decide for itself on the usefulness of an opinion in the light of its own needs".[121] In the light of these considera-

[115] *Western Sahara* Opinion (note 15), 28 et seq., para. 46; *Namibia* Opinion (note 15), 27, para. 40.

[116] *Chagos* Opinion (note 2), paras. 73-74.

[117] During the written phase, for instance, 32 written statements had been submitted to the Court.

[118] In that regard, it may be useful to remind that, in the *Wall* case, the refusal opposed by Israel to provide the Court with factual information and to advance arguments limited to the preliminary questions, did not prevent the ICJ from render the Opinion, given the adequacy of information at its disposal (see note 73). So, should the UK have decided not to furnish submission on facts, the result would have been, nonetheless, the same.

[119] *Chagos* Opinion (note 2), para. 76.

[120] *Kosovo* Opinion (note 15), para. 34.

[121] *Nuclear Weapons* Opinion (note 60), 237, para. 16.

tions, in the *Wall* Opinion the ICJ concluded that it could "not decline to answer the question posed based on the ground that its opinion would lack any useful purpose".[122]

The objection in issue seems to be misconceived since it relies on a notion, that of utility, which lies outside the legal discourse and, above all, the competences of a judicial body. It appears to belong to the political field and to the criteria of efficiency and legitimacy, which may, at most, apply to the activity of political organs of international organizations.[123] Moreover, the duty to cooperate with the other organs of the UN[124] would be manifestly breached if the Court exercises its discretion not in order to protect its judicial nature, but rather on the basis of a non-legal evaluation.

3. The Relationship Between the Opinion and the 2015 Arbitral Award on the Chagos Marine Protected Area, or Use and Misuse of *res judicata*

During the proceeding, some States raised the objection that the opinion would reopen the terms of a dispute already decided by an arbitral tribunal in 2015. This argument relies on the Marine Protected Area (MPA) Award issued by an arbitral tribunal constituted in accordance with Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS).[125] After the establishment by the UK, of an MPA surrounding the Chagos Archipelago, Mauritius made four submissions before the arbitral tribunal: with the first one, which is the only relevant for the purposes of this paper, Mauritius requested the tribunal to declare that the UK was not the coastal State under the UNCLOS. The tribunal dismissed this argument, because it was "properly characterized as relating to *land sovereignty* over the Chagos Ar-

[122] *Wall* Opinion (note 15), 163, para. 62, and *Chagos* Opinion (note 2), para. 77.

[123] See, e.g., *D. Zaum*, Legitimacy, in J. K. Cogan/I. Hurd/I. Johnstone (eds.), The Oxford Handbook of International Organizations, 2016, 1107 et seq., 1109, where the author examines the so-called "output legitimacy", namely "shared beliefs about normatively desirable outcomes, and the ability of institutions to achieve them".

[124] See below Section III. 4.

[125] PCA, In the Matter of the *Chagos Marine Protected Area Arbitration* (*Mauritius v. the United Kingdom*), Award, 18.3.2015 (hereinafter *MPA* Award). For a detailed analysis of this award see *M. Gervasi*, The Interpretation of the United Nations Convention on the Law of the Sea in the Chagos Marine Protected Area Arbitration: The Influence of the Land Sovereignty Dispute, in: A. Del Vecchio/R. Virzo (eds.), Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals, 2019, 191 et seq.

chipelago",[126] thus not pertaining to the interpretation and application of UNCLOS. Therefore, it lied outside of its jurisdiction.[127] As for the other submissions, the tribunal only stated on the fourth one, which related to the breach of certain UNCLOS provisions.[128]

The ICJ rejected the objection based on the *res judicata* authority of the MPA Award on three grounds:[129] firstly, advisory opinions are given to UN organs, not to States; secondly, the principle of *res judicata* does not preclude the ICJ from rendering an advisory opinion; thirdly, in any case, there was no identity between the issues determined in the MPA Award and those under scrutiny in the *Chagos* advisory proceeding.

The findings of the Court on this point seem to be well-founded, if one takes into account the very notion of *res judicata* and the way the objection in issue had been construed. It is not possible to examine the *res judicata* principle in international law[130] as well as the relationship between the ICJ and other tribunals.[131] Suffice to remind that the decision of an international tribunal, whether arbitral or permanent, is *res judicata*, both in the formal and the material senses.[132] As well known, however, this notion is *relative* in nature,[133] under the objective and the subjective point of view: on the one hand, it applies only to the decision, *stricto sensu*, of the case, that is to say to the operative part of the decision ("*le dispositif*"),[134] thus excluding findings on the facts and on preliminary objections, since "*l'une et l'autre ne sont que le moyen par lequel on arive à la decision*".[135] On the other hand,

[126] *MPA* Award (note 125), 88, para. 212, emphasis added.

[127] *MPA* Award (note 125), 215.

[128] In particular, it found that the UK had breached Arts. 2.3, 56.2, and 194.4 UNCLOS by establishing the MPA.

[129] *Chagos* Opinion (note 2), para. 81.

[130] See *V. Lowe*, *Res Judicata* and the Rule of Law in International Arbitration, AJICL 8 (1996), 38 et seq.; *A. Reinisch*, The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes, The Law and Practice of International Court and Tribunals, 2004, 37 et seq.

[131] See *G. Gaja*, Relationship of the ICJ with Other International Courts and Tribunals, in: A. Zimmermann/K. Oellers-Frahm/C. Tomuschat/C. J. Tams/M. Kashgar/D. Diehl (note 15), 571 et seq.

[132] *G. Morelli*, La sentenza internazionale, 1931, 211 et seq.; *C. De Visscher*, La chose jugée devant la Cour internationale de la Haye, RBDI, 1965, 5 et seq.; as to *res judicata* as a principle for the coordination among the various dispute settlement mechanisms provided for by the UNCLOS, see *R. Virzo*, Il regolamento delle controversie nel diritto del mare: rapporti tra procedimenti, 2008, 225 et seq.

[133] *H. Lammasch*, Die Rechtskraft internationaler Schiedssprüche, 1913, 91 et seq.

[134] See Judge *Anzilotti*, Dissenting Opinion, *Interpretation of Judgments Nos. 7 and 8* (*Factory at Chorzów*), Judgement of 16.12.1927, Series A, 23 et seq.

[135] *L. Delbez*, Les principes généraux du contentieux international, 1962, 135 et seq.

the decision is binding exclusively for the *parties* in dispute.[136] In the ICJ system, this feature of *res judicata* is enshrined in Art. 59 ICJ Statute,[137] while the principle as a whole derives from the combination of Arts. 59, 60 and 61.[138] To sum up, the principle applies where its three traditional elements are met: *persona*, *petitum* and *causa petendi.*[139]

In the light of these brief observations, one cannot but conclude that the notion of *res judicata*, by definition, applies solely to the relationship between decisions or judgements, that is to say acts issued by courts or tribunals vested with binding force between the parties of the case which has been decided. This should suffice to exclude that an arbitral award can prevent the ICJ from rendering an advisory opinion, which, as such, has no binding force.[140] Even accepting, in general terms, the opposite view, the picture would not change, since the requirements of *res judicata* do not seem to be satisfied in the situation in issue. Advisory opinions are, in fact, requested by (and given to) the organs of the UN or to the other institutions set forth in Art. 96 UN Charter. Since it is not given to States, the parties of the MPA Award remain totally unaffected by the *Chagos* Opinion.

Moreover, the "objective" limit to *res judicata* suggests three observations. First, the principle covers exclusively the operative part of a decision. The "*dispositif*" of the MPA Award on the merits regarded only the establishment of the MPA and its wrongfulness in the light of UNCLOS. It did not decide at all on the disputed issue of sovereignty over the Chagos Archipelago.[141] From this perspective, the British argument seems ill-founded, to the extent, at least, that it relied on one of the first claims[142] submitted by Mauritius to the tribunal – focused on sovereignty over the Islands – and dismissed by the tribunal itself for the lack of jurisdiction. Second, even if the award had dealt with the issue of sovereignty, there would be, nonetheless, no objective overlap with the ICJ opinion, since its (main) object was the decolonization of Mauritius and not the bilateral dispute connected to it. But – and this is the third point – the very subject-matter of the award,

136 See, e.g., *M. Dubisson*, La Cour internationale de justice, 1964, 247.

137 See *C. Brown,* Article 59, in: A. Zimmermann/K. Oellers-Frahm/C. Tomuschat/C. J. Tams/M. Kashgar/D. Diehl (note 15), 1416 et seq., 1433 et seq.

138 *R. Kolb* (note 12), 762.

139 Judge *Anzilotti*, *Factory at Chorzów* (note 134), 23.

140 It should be added that an advisory opinion is without the authority of *res judicata* (see *R. Kolb* [note 12], 1096), so that it neither gives rise to *res judicata* nor it is affected by it.

141 See note 130.

142 UK Written Statement (note 26), 83, point c) where it is underlined that Mauritius had sought a finding on sovereignty issue; UK Written Comments, 44, 3.7.

namely the MPA, and the object of the opinion decisively differ, also under the point of view of the law applicable to them.

4. The Lack of Consent Objection

The main objection to the exercise of the advisory function by the Court focused on the allegation that the pronouncement would have been a blatant circumvention of the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.[143] In this case, it was maintained, there was not a mere absence of consent but an express *refusal* of one of the disputing parties, the UK, to the judicial settlement of the dispute itself.[144]

As already mentioned, the ICJ dismissed this objection as a direct consequence of the way it interpreted the GA's request. The Court's reasoning opens with the usual *petitio principii*:

> "there would be a compelling reason for it to decline to give an advisory opinion when such 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".[145]

In the following paragraph, however, it relied on the object of the GA's request, that is to say, on its formulation:[146] since it was a question pertaining to decolonization, the aim of the GA was "to receive the Court's assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius".[147] It significantly quoted, once again, the *Western Sahara* case[148], emphasizing that the GA's purpose was not to receive assistance "in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy".[149] At this point the Court correctly referred to

[143] For such an argument, see UK Written Statement (note 26), 101 et seq.; Australian Written Statement (note 27), 7 et seq.; Written Statement of Israel (note 27), 5 et seq.; US Written Comments, 6 et seq.

[144] Australian Written Statement (note 27), 11.

[145] *Chagos* Opinion (note 2), para. 85, where the ICJ quotes the *Western Sahara* Opinion (note 15), 25, para. 33.

[146] See Section II. 3.

[147] *Chagos* Opinion (note 2), para. 86.

[148] *Western Sahara* Opinion (note 15), para. 39.

[149] *Chagos* Opinion (note 2), para. 86. On the powers of the GA in the field of dispute settlement, see *B. Conforti/C. Focarelli* (note 71), 354 et seq.

both the *Western Sahara* and *Wall* cases[150] and emphasized that the issues raised by the request were located in a *broader* frame of reference than a bilateral dispute.[151]

Even though the final outcome of this reasoning is to be shared, there are, nonetheless, some observations to make. First of all, it would have been preferable that the Court recognized, *expressis verbis*, the existence of a dispute between Mauritius and the UK and that this circumstance, *as such*, could not prevent it from giving the opinion. Secondly, this case shows how important the relationship between "disputes" and legal questions in the context of advisory jurisdiction is. Thirdly, it may be argued that when common values – like self-determination – are at stake, the ICJ reveals an "attitude" to give greater weight to its obligation to cooperate with other UN organs rather than to its discretion not to render the opinion requested.

a) The Dispute Between Mauritius and the UK

The dispute between Mauritius and the UK on the sovereignty over the Chagos Archipelago is a matter of fact that can be assumed, for the purpose of this contribution, as a postulate. Suffice it to remind the position expressed, on this point, by the States concerned: in its written statement, Mauritius concluded that its decolonization process was not lawfully completed because of a specific unlawful conduct of the UK and required an immediate cessation of the British administration of the Archipelago, so that it could "exercise *sovereignty* over the totality of its territory".[152] Even more explicitly, during the oral pleadings, Professor *Klein*, on behalf of Mauritius, said: "Existe-t-il un différend entre Maurice et la puissance administrante? Oui, évidement; personne ne le nie."[153] As for the UK, its *opposition* to the Mauritian *claims* has always been firm and explicit, aimed at restating the British sovereignty over the islands.[154] The dispute, in other words, "falls squarely within the accepted definition of a 'dispute' long applied in the Court's case-law and that of its predecessor".[155]

150 *Western Sahara* Opinion (note 15), para. 38; *Wall* Opinion (note 15), para. 50.
151 *Chagos* Opinion (note 2), para. 88.
152 Written Statement of Mauritius, 285.
153 Public sitting, 3.9.2018, CR/2018/20, 35. See also the Written Statement of Argentina, 10, para. 23.
154 UK Written Statement (note 26), 83.
155 UK Written Statement (note 26), 75.

The requirements of a dispute, in fact, seem to be actually met in this case: there is not only a conflict of interests as such, but also a contrast between the respective attitudes of the parties in relation to that conflict of interest.[156] In the words of Judge *Morelli*, it can be observed that the dispute in issue appears to be "resulting, on one side, from a claim by one of the parties and, on the other side, of the contesting of that claim by the other party".[157] Even adopting the notion of dispute recently advanced by the ICJ in the *Nuclear Arms Race* case, focused on the "awareness" requirement,[158] the conclusion does not change, since it is undisputed that each party was fully aware of the position of the other.[159] It must be added that, at the very beginning of the proceeding before the ICJ, Judges *Greenwood* and *Crawford* recused themselves by reason of the fact that both had taken part in the MPA Arbitration, respectively, as judge appointed by the UK and as counsel for Mauritius.[160]

The existence of a dispute between the UK and Mauritius, which is also supported in legal doctrine,[161] gives rise to two observations. First of all, the notion of legal question, discussed above, under Art. 96 of the UN Charter and Art. 65 of the ICJ Statute is broad enough to encompass also questions related to international disputes.[162] Art. 68 of the Statute and Art. 102.2 and 102.3 of the Rules of the Court expressly refer to the exercise of the advisory jurisdiction with regard to legal questions actually pending between two

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156 See *G. Morelli*, Nozione ed elementi costituitivi della controversia internazionale, Riv. Dir. Int. 43 (1960), 405 et seq.

157 *South West Africa, Liberia and Ethiopia v. South Africa*, Dissenting Opinion of Judge *Morelli*, ICJ Reports 1962, 319 et seq., 567, emphasis added; this notion has been shared by Judge *Fitzmaurice* in its Dissenting Opinion attached to the *Namibia* Opinion (note 15), 16 et seq., 314.

158 See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. India*), Jurisdiction and Admissibility, Judgement, ICJ Reports 2016, 255 et seq., 271, para. 38: "a dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were "positively opposed" by the applicant". For a critical analysis of this approach, see *B. I. Bonafé*, Establishing the Existence of a Dispute before the International Court of Justice: Drawbacks and Implications, Questions of International Law, Zoom-out 45 (2017), 3 et seq.

159 *Z. Crespi Reghizzi* (note 4), 24 et seq.

160 On this point, see *D. Akande/A. Tzanakopoulos*, Composition of the Bench in ICJ Advisory Proceedings: Implications for the Chagos Islands case, EJIL Talk!, 10.7.2017, <https://www.ejiltalk.org>.

161 *Z. Crespi Reghizzi* (note 4), 24 et seq.; *S. Yee* (note 4) 624 et seq.; *J. Lu*, Reflections on the Questions regarding Chagos Archipelago Put to the ICJ, AVR, 56 (2018), 361 et seq.

162 See, among many others, *J. A. Frowein/K. Oellers-Frahm* (note 15), 1616 et seq.; *R. Kolb* (note 12), 1069 et seq. and the authors cited in notes 17-20.

or more States.[163] It is safe to argue that the notion of "pendency" implies that of dispute.[164] The ICJ, moreover, has always stated that the lack of consent does not deprive it of its *jurisdiction* to give the opinion requested.[165] This point is, by now, absolutely clear, as it results also by the *Chagos* proceedings, where the lack of consent issue had not been raised among the questions of jurisdiction, but rather among those of admissibility. The ICJ has, in fact, often made clear that "the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion".[166] We will turn to this aspect in the next paragraph.

For the moment – and this is the second point mentioned above – it may be argued that the existence of a dispute between Mauritius and the UK could have led the Court to apply Art. 68 of its Statute as well as Art. 102 of the Rules,[167] in view of the *comprehensive* answer it decided to deliver with regard, for instance, to issues of international responsibility of the UK:[168] the *ratio* of these provisions is to ensure an exhaustive assessment of the questions involved in a given case, irrespective of its contentious or advisory nature,[169] thus being a corollary of the judicial character of the advisory function that the Court has steadily claimed throughout its history. Notably, however, neither the UK nor Mauritius had submitted to the Court a request to appoint a judge *ad hoc*, most likely due to litigation strategy. It is noteworthy, moreover, that the Court possesses a large amount of discre-

163 Article 68 ICJ Statute: "In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable." Article 102 of the Rules: "2. The Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable. For this purpose, it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States. 3. When an advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply, as also the provisions of these Rules concerning the application of that Article."

164 *G. Morelli*, Controversia internazionale, questione, processo, Riv. Dir. Int. 60 (1977), 5 et seq., 15.

165 See, recently, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, ICJ Reports 1989, 177 et seq., 188, para. 31; *Wall* Opinion (note 15), para. 47.

166 *Western Sahara* Opinion (note 15), 25, para. 32.

167 For a similar position, see *D. Akande/A. Tzanakopoulos* (note 160).

168 See *Chagos* Opinion (note 2), paras. 177-178.

169 *B. Costantino*, Il giudice ad hoc nell'attività consultiva della Corte internazionale di giustizia, Il processo internazionale. Studi in onore di Gaetano Morelli, Común. e Stud., XIV, 1975, 240 et seq., 257.

tion on the matter[170] and that, according to some scholars, Art. 68 of the Statute has lost part of its relevance, at least in comparison to what occurred with the PCIJ,[171] so that it is "today a quite unnecessary, if harmless, provision in the Statute"[172]. But it is also true that the recusation of Judges *Crawford* and *Greenwood*, which probably took place pursuant to Art. 24.1 of the Statute, as well as the fact that, during the oral pleadings, both Mauritius and the UK had been granted considerably more time than all other participants, suggest that, at least, the Court took into account the underlying dispute between the States concerned.[173] Be that as it may, Art. 68 would have been a useful tool in order to face the "consent objection". The *Western Sahara* Opinion – which has been taken as a leading case both by the participants[174] and by the Court itself[175] and which looks very close to the *Chagos affair*, since it was also focused on decolonization – may be considered as a proper precedent also in that regard. The underlying dispute between Morocco and Spain on sovereignty over the Western Sahara had been taken into account by the Court, which granted the appointment of a judge *ad hoc*.[176] Leaving aside the way in which it was qualified by the Court,[177] it is noteworthy that the dispute played a role in the whole construction of that opinion,[178] although it was only *a part* of the wider legal question at stake. In the *Namibia* case, where, by contrast, the request for a judge *ad hoc* had been dismissed, Judge *Gros* reminded that "the Court itself, and not the parties, must be the guardian of the Court's judicial integrity" and, consequently, it "is to apply Art. 31 of the Statute, which concerns the appointment of a judge ad hoc", if the case concerns a legal question actually pending, within the meaning of Art. 68, and if so requested by the States con-

170 *J. P. Cot*, Article 68, in: A. Zimmermann/K. Oellers-Frahm/C. Tomuschat/C. J. Tams/M. Kashgar/D. Diehl (note 15), 1669 et seq., 1674.

171 *J. P. Cot* (note 170), 1672; *S. Forlati*, The International Court of Justice: An Arbitral Tribunal or a Judicial Body, 2014, 40.

172 *J. P. Cot* (note 170), 1684.

173 According to *Z. Crespi Reghizzi* (note 4), 25 et seq., the *favor* reserved to the parties during the oral phase may suggest that the Court applied Article 68 of the Statute and the related provisions of the Rules.

174 UK Written Statement (note 26), 102, 111, 114.

175 See Section I., paras. 1 and 2.

176 See *Western Sahara*, Order, 22.5.1975, ICJ Reports, 1975, 6 et seq.

177 See below Section III. 4. c).

178 See on this aspect the observations of Judge *Gros*, who contended that, in that case, there was no dispute at all, and thus criticized the order and the fact that the opinion has been construed as "a precise transposition of what is customary in contentious proceedings" (Declaration of Judge *Gros*, *Western Sahara* Opinion [note 15], 72).

cerned.[179] Similarly, Judge *Fitzmaurice* maintained that the pendency of a dispute is not a ground on which the Court must refuse to exercise its advisory function and added: "[w]here the Court was to blame, was in not applying the contentious procedure to the present advisory proceedings".[180] Even more significantly, in the *Wall* case, Judge *Owada*, while concurring with the Court when it dismissed the "consent objection" raised by Israel, expressed the view that the existence of a dispute was not relevant neither for the Court's jurisdiction *nor* as a question of admissibility. Nonetheless, he argued that it "should be a factor to be taken into account by the Court in determining *the extent to which, and the manner in which*, the Court should exercise jurisdiction in such advisory proceedings".[181] Then he emphasized the role that Art. 68 of the Statute could have played in that case, in terms of fairness in the administration of justice by the Court.[182]

b) The Relationship Between the Legal Question and the Dispute

The applicability of Art. 68 of the Statute and the related Rules provisions is one consequence, of a mere procedural character, of the existence of the dispute between the UK and Mauritius. It is now necessary to assess whether, as maintained by some authors and by some States, this circumstance could have led the ICJ to declare the inadmissibility of the request for reasons of judicial propriety. To this purpose, it must first be determined what the relationship between the legal questions raised by the GA and the dispute described above is.

The case-law of the Court suggests that the main criterion is to be found, once again, in the formulation of the request. It may be useful to recall the insightful observations made by Judge *Higgins* in the *Wall* case: despite the findings of the Court, she maintained that in that case there was an undeniable dispute within the legal question. Furthermore, the aim of the GA was to use the advisory opinion not to secure advice on its decolonization duties, but rather to exercise its powers over that dispute,[183] in the light of the

179 Dissenting Opinion of Judge *Gros*, *Namibia* Opinion (note 15), 323 et seq., 325.
180 Dissenting Opinion of Judge *Fitzmaurice*, *Namibia* Opinion (note 15), 292.
181 *Wall* Opinion, Separate Opinion of Judge *Owada*, *Wall* Opinion (note 15), 260 et seq., 263, emphasis added.
182 Judge *Owada* (note 181), 266 et seq., where it is, nonetheless, remarked that Israel did not made requests pursuant Art. 102 of the ICJ's Rules.
183 *Wall* Opinion, Separate Opinion of Judge *Higgins*, *Wall* Opinion (note 15), 207 et seq., 208, para. 7, 210, para. 12.

long-standing special institutional interest of the UN in the Israel/Palestine dispute. She underlined, nonetheless, that the request of the GA focused on a *specific* feature of the complex dispute between Israel and Palestine, namely the lawfulness of the West Bank Wall under international humanitarian law. The conclusion of this argument is that "the formulation of the question *precludes consideration of that context*".[184] In this case, therefore, the legal question and the dispute did not overlap, rather, the former was deemed to be *included* within the latter.

The *Chagos* case seems to fall in the reverse situation: the ICJ, while avoiding as far as possible to mention the territorial dispute between the UK and Mauritius, seems nonetheless to maintain that it is to be considered as a part of "the broader frame of reference of decolonization".[185] This deduction is suggested by the reference made by the Court to a *dictum*, framed in clearer terms, of the *Western Sahara* case:

> "the legal questions of which the Court has been seized are located in a *broader frame of reference than the settlement of a particular dispute* and embrace other elements".[186]

Moreover, it may be added, in the words of Judge *Gros*, that "(t)here is no bilateral dispute which is *detachable* from the United Nations debate on the decolonization".[187]

The dispute between Mauritius and the UK is therefore an *element* of the legal question raised by the GA and relating to the matter decolonization. It is not possible to dwell on the scope and content of this question. However, one cannot but observe that it involves a complex "network" of legal positions (rights, obligations, powers), both substantial and procedural,[188] which belong to a plurality of subjects, namely, at least, the Mauritian self-determination unit, the Administering Power, and, *above all*, the UN, given its fundamental role in the field of decolonization and self-determination.

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184 Judge *Higgins* (note 183), 210 et seq., para. 14.

185 *Chagos* Opinion (note 2), para. 88.

186 *Western Sahara* Opinion (note 15), 26, para. 38, emphasis added.

187 Declaration of Judge *Gros*, *Western Sahara* Opinion (note 15), 71, emphasis added. It must be pointed out, however, that for this Judge, there was no dispute at all in that case.

188 *Prima facie*, the legal question, taking into account its "temporal" dimension (1965-1968), involves, *inter alia*: the application of the principle of self-determination to the (then) Mauritian colony, its relation with the territorial integrity of the self-determination unit, the *jus representationis* of the Mauritian authorities which negotiated the cession of Chagos to the UK, the obligations of the Administering Power before and after the independence of Mauritius, the role of the UN GA in this situation, pursuant to the UN Charter and Res. 1514/1960, 2625/1970 and so on.

The dispute on sovereignty is a *consequence* – under the logical, chronological, and legal point of view – of such a broad legal framework. To sum up, the *Chagos affaire* squarely falls within the definition, already envisaged in legal doctrine,[189] of a legal question whose solution *affects* the resolution of the dispute. It is worth noting that Judge *Donoghue*, who voted against the finding on the admissibility of the case, remarked the relationship between the question of decolonization and the dispute, maintaining that they "(could) not be separated".[190]

c) The Role of the "Consent Objection" In the ICJ Advisory Case-Law

As already mentioned, the consent objection is irrelevant as a matter of jurisdiction, but it may, in principle, lead the Court to decline the exercise of jurisdiction. Relying on the permissive wording of Art. 65, the Court has always claimed its discretion not to entertain a request for an advisory opinion.[191] In its case law, including the *Chagos* opinion[192], the ICJ has always stated that such a situation may occur

> "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".[193]

However, as a matter of fact, the ICJ has never refused to exercise its jurisdiction on such a basis, so that even authors who, in principle, share the idea of a discretionary power of the Court, underline that "[i]t is not clear from the jurisprudence of the Court under what circumstances the argument of circumvention could prevail".[194] As well known, the *1923 Eastern Carelia* case could not be properly considered as an exception. In that case, the PCIJ found it "impossible to give its opinion" on a dispute between Finland and Russia, due to the lack of consent of the latter.[195] But it may be argued that the refusal at issue has been decisively determined by the fact

189 See *G. Morelli* (note 164), 15.
190 *Chagos* Opinion (note 2), dissenting opinion of Judge *Donoghue*, para. 4, para. 16.
191 See note 15 above.
192 See note 139 above.
193 *Western Sahara* Opinion (note 15), 25, para. 33; *Wall* Opinion (note 15), 158, para. 47.
194 *J. A. Frowein/K. Oellers-Frahm* (note 15), 1618.
195 *Eastern Carelia* Opinion (note 111), 28.

that Russia was not a member of the League of Nations.[196] Under Art. 14 of the Covenant of this organization, which regulated the functions of the PCIJ,[197] the advisory jurisdiction was intended to be a part of the complex dispute settlement procedure carried out by the League as a whole.[198] The absence of consent on the part of Russia, therefore, deprived the organization, and in particular the Council, of the competence to examine the case. In other words, the refusal of the PCIJ was determined by the lack of jurisdiction *ratione personae*, rather than by reasons of admissibility.[199] It may be added, moreover, that the lack of consent, *as such*, was not deemed to give rise to the admissibility of the case: rather, due to the lack of participation of one of the parties in dispute, the Court found itself unable to deal with complex factual issues.[200]

In the 1950 Opinion on the *Interpretation of Peace Treaties*, the ICJ focused its argument on two points: firstly,

> "[t]he consent of States, parties to a dispute, is the basis of the Court 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. The Court's reply is only of an advisory character: as such it has no binding force".

Secondly, as a consequence "no State, whether a Member of the United Nations or not can prevent the giving of an Advisory Opinion".[201]

In *Namibia*, it decided to pronounce, having found that the question did not relate to a legal dispute actually pending between two or more States,[202] even though more than one doubt on this point had been raised.[203] Notably,

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196 *K. Keith* (note 35), 89 et seq.; *M. Pomerance*, The Advisory Function of the International Court of Justice in the League and UN Eras, 1973, 282 et seq.

197 For the role of the PCIJ in the League of Nations System, see *K. Oellers-Frahm*, Article 14, in: R. Kolb (ed.), Commentaire sur le Pacte de la Societè des Nations, 2015, 587 et seq., 592 et seq.

198 *R. Luzzatto*, La competenza consultiva della Corte internazionale di giustizia nella soluzione delle controversie internazionali, in Il processo internazionale. Studi in onore di Gaetano Morelli, Común. e Stud. XIV, 1975, 479 et seq., 482.

199 *L. Radicati di Brozolo* (note 11), 686; *G. Abi-Saab*, On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice, in: L. Boisson de Chazournes/P. Sands (eds.), International Law, the International Court of Justice and Nuclear Weapons, 1999, 36 et seq., 40.

200 *R. Luzzatto* (note 198), 497.

201 *Interpretation of Peace Treaties* Opinion (note 64), 71 et seq., emphasis added.

202 *Namibia* Opinion (note 15), 24, para. 32. Maybe it is not without significance that, in this case, there was no deliberation on preliminary questions.

203 See notes 179 and 180 above.

the ICJ looked at State consent from another perspective. The State which had raised the consent objection was a member of the UN and, as such, *bound* by Art. 96 of the Charter: it had accepted the advisory function of the ICJ and, moreover, it had

> "appeared before the Court, participated in both the written and oral proceedings and, while raising specific objections against the competence of the Court, has addressed itself to the merits of the question".[204]

In *Western Sahara* the Court elaborated an *escamotage* in order to circumvent the principle of circumvention it had previously expressed: in that case it found that a dispute existed,

> "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".[205]

Similarly, in the *Mazilu* case the "circumvention principle" seems to have been basically evaded by the ICJ:[206] it did not refuse to give the requested opinion in the case of a *dispute* between the UN and a State, for which the GA had not been able to obtain a binding opinion – pursuant the Convention on privileges and immunities of the UN – because of a reservation made by the State concerned. The ICJ based its decision to render the opinion on the formal argument[207] that the request concerned not the *application* of the Convention but rather its "*applicability*" to the case under scrutiny.[208]

Finally, in the *Wall* Opinion, the ICJ firmly dismissed the circumvention objection, although on the highly questionable basis that there was no dis-

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[204] *Namibia* Opinion (note 15), 23 et seq., para. 31.

[205] *Western Sahara* Opinion (note 15), 25, para. 34, emphasis added. It is interesting to notice that both the *Namibia* and *Western Sahara* precedent seem to apply to the *Chagos* case: the UK, as (founding) Member of the UN has given its consent to the exercise of the advisory jurisdiction and, secondly, its dispute with Mauritius can hardly be considered as a purely bilateral matter. As the UK itself pointed out, the claim of Mauritius over Chagos have been pursued "a variety of international fora" and, most notably, the former colony "first claimed sovereignty over the Chagos Archipelago before the UN"; the British "firm reply" to these claims took place as well before the GA (UK Written Statement [note 26], 76, para. 5.6, 77, para. 5.7, 78).

[206] *H. Thirlway*, The International Court of Justice, 2016, 69.

[207] *G. Gaja,* Diseguaglianza fra le parti nella soluzione di controversie per mezzo di un parere della Corte internazionale di giustizia, Riv. Dir. Int. 83 (1999), 138 et seq.

[208] See *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (note 165), 191, para. 38. On this case, see *R. Ago*, Pareri consultivi "vincolanti" della Corte internazionale di giustizia. Problemi di ieri e di oggi, Riv. Dir. Int. 74 (1990), 5 et seq., 17 et seq.

pute at all between the interested State (Israel) and Palestine.[209] It should be remembered, however, that in that case, the main argument was focused on the fact that the question raised by the GA was of particular concern to the UN. In any case, the consent objection was unanimously rejected by the Court as a ground of inadmissibility: Judge *Buergenthal*, who voted against the decision to render the opinion, based his objection on the lack of sufficient information before the Court, *rather* than on the absence of Israeli consent.[210] As persuasively argued, the *Wall* case seems to have "broaden the approach taken by the Court in the *Western Sahara* case", giving a decisive weight to the long-standing UN interest on the question in issue.[211] Other authors go further, arguing that in the *Wall* opinion the "circumvention principle" seems to have been tacitly abandoned, and that the Court may be becoming generally more favorable to requests somehow related to pending disputes.[212]

The case law of the ICJ led some authors to emphasize the limits of the discretion granted to the Court by Art. 65 of the Statute.[213] Others maintain that

> "the ICJ in its *dicta* while describing its power to give opinions as 'discretionary' […] has couched this statement with such qualifications as to render it *nugatory*".[214]

According to this argument, the notion of discretion – meant, at least, as freedom to select one among a plurality of possible solutions on the basis of a *purely subjective determination*[215] – has no place in the ICJ advisory juris-

209 *M. Pomerance*, The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial, AJIL, 99 (2005), 26 et seq., 34; *U. Villani*, La funzione consultiva della Corte internazionale di giustizia, Comunità Internaz. 74 (2019), 39 et seq., 42 et seq.

210 See note 114 and the Opinion of Judge *Buergenthal* referred to therein.

211 *J. A. Frowein/K. Oellers-Frahm* (note 15), 1618 et seq.

212 *H. Thirlway* (note 206), 69.

213 *K. J. Keith* (note 35), 142 et seq., 149; *A. Verdross/B. Simma*, Universelles Völkerrecht. Theorie und Praxis, 3rd ed. 1984, 128 et seq.

214 *G. Abi-Saab* (note 199), 42.

215 See, e.g., *C. Mortati*, Discrezionalità, Novissimo Digesto Italiano, V, 1960, 1098 et seq., 1101, 1109.

diction. The Court is rather *obliged* to give the opinion requested,[216] unless it reveals *detrimental* to its judicial integrity.[217]

Be that as it may, it is evident that, faced to legal questions of a particular concern to the UN and pertaining to obligations *erga omnes*, the *balance* sought by the ICJ tends to sacrifice the "consent principle" – *theoretically* assumed as a compelling reason to decline the delivery of opinions – in favor of the obligation, for the Court itself, to cooperate with other organs of the UN in pursuance of its functions.[218] As it is well-known, balancing, a technique aimed at the composition of competing rights and interests,[219] differs from interpretation, since it implies a decision on priority among principles, on the basis of an axiological and "mobile" hierarchy.[220] However, it is a method normally applied with regard to rights, principles and interests of a "constitutional" nature and, consequently, it belongs to the realm of constitutional justice.[221]

This kind of legal and judicial reasoning is not unknown to international adjudication[222] and, in particular, to the ICJ, which always seeks a balance between the rights of the parties and the interests of justice, given that "the due and proper administration of justice is a field of a dynamic equilibri-

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216 *G. Abi-Saab* (note 12), 152 et seq., emphasis added. See also *R. Kolb* (note 12), 1094 who goes further and contends that "[t]he Court's own practice is thus clear evidence in denial of its own statements on the so-called discretionary power: although claimed in words, it is unknown to the Court's actual deeds"; *R. Luzzatto* (note 198), 496 et seq.; *B. Conforti/C. Focarelli* (note 71), 450.

217 *P. Benvenuti* (note 5), 211, 214; *R. Kolb* (note 12), 1083 et seq.

218 This idea of a balance between discretion and the duty, for the Court, to participate in the UN activities seems to be shared, from a general perspective, by *H. Thirlway* (note 206), 68, who underlines that "the principle [of cooperation among UN organs] seems to be overriding" in the ICJ case law.

219 See generally *A. Morrone*, Bilanciamento (giustizia cost.), Enciclopedia del diritto, Annali, II, 2, 2008, 185 et seq.

220 *R. Guastini*, L'interpretazione dei documenti normativi, 2004, 216 et seq., 295 et seq. See also *R. Alexy*, Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung, 1978 and *R. Bin*, Diritti e argomenti. Il bilanciamento degli interessi nella giurisprudenza costituzionale, 1992, 56 et seq.

221 *A. Morrone* (note 219), 187, 196.

222 See generally *P. Hector*, Das völkerrechtliche Abwägungsgebot, 1992, 217, who argues that "[d]ie Balancierung ist ein genuines völkerrechtliches Instrument", and 198 et seq., where the author analyzes "[d]ie vierstufige Struktur des Abwägungsverfahrens". Balancing applies to a variety of fields in international law, such as the relationship between effectiveness and legitimacy in statehood, judicial protection of human rights and so on (see, e.g., *A. Tancredi*, State Sovereignty: Balancing Effectiveness and Legality/Legitimacy, in: R. Pisillo Mazzeschi/P. De Sena [eds.], Global Justice, Human Rights and the Modernization of International Law, 2018, 17 et seq.; *A. Tancredi*, La tutela dei diritti fondamentali "assoluti" in Europa: "it's all balancing", Ragion pratica 29 [2007], 383 et seq.).

um".[223] In the advisory jurisdiction, the Court exercises "what might be called a kind of constitutional function" by promoting "the role of international law in UN activities".[224] In this field, there are two competing "constitutional" principles. On the one hand, the discretion set forth in Art. 65 of the ICJ Statute, which, in a number of cases and, finally, in *Chagos*, had been "filled" with content through the principle of consent to the judicial settlement of disputes, as a limit to the admissibility of advisory opinion requests. On the other hand, there is the duty, for the Court to cooperate with other UN organs: in a lot of cases, and in *Chagos* as well, it has been "measured" in relation to the *subject-matter* of the request under consideration, namely decolonization/self-determination.

As for the principle of consent, one cannot but observe that the law on jurisdiction in the ICJ system has resulted from a judicial policy which sets out to create a "careful" and delicate balance between "consensualism", on the one hand, and the community interest in dispute resolution on the other.[225] Consent is still to be considered as principle pertaining to the structure of the international legal system and, as such, is of a peremptory character.[226] It must be highlighted, nonetheless, that this peculiar feature of consent comes at issue within the *contentious* jurisdiction of the Court.[227] If the Court takes into account competing interests in its contentious function, it is, *a fortiori*, free to act in a similar fashion within the advisory jurisdiction, in which the principle of consent appears decisively *deprived* of its main features.

As for the obligation of the Court to participate in the UN activities, it is worth noting that the advisory jurisdiction of the ICJ has always been exercised with regard to legal questions of a "constitutional character", that is to say related to fundamental aspects of the UN institutional law, such as, e.g., the admission of new Members.[228] But the Court has been requested, in the

223 *R. Kolb* (note 12), 1136 et seq.

224 *R. Kolb* (note 12), 1020.

225 *R. Kolb* (note 12), 562.

226 *P. Picone/M. I. Papa*, Giurisdizione della Corte internazionale di giustizia e obblighi *erga omnes*, in: P. Picone (ed.), Comunità internazionale e obblighi "*erga omnes*", 2013, 673 et seq., 692.

227 *P. Picone/M. I. Papa* (note 226), 693 et seq., where the authors observe that *other* limits to the contentious jurisdiction, of a lower degree faced to the principle of consent, are "mitigated" when the dispute under scrutiny involves interests of the international community as a whole: it is the case, for example, of the so-called "Monetary Gold" principle.

228 *L. Boisson de Chazournes*, La procédure consultative de la Cour internationale de justice et la promotion de la règle de droit: remarques sur les conditions d'accès et de participa-

vast majority of cases, to deal with questions of international law pertaining to "the common interest of mankind",[229] like the legality of the use of nuclear weapons, fundamental rules of humanitarian law (as it occurred in the *Wall* Opinion) and, most notably, self-determination and decolonization (*Namibia*, *Western Sahara*, *Wall*), a field in which the ICJ has always played a crucial role.[230] What matters for the purpose of this contribution is that the legal question raised in the *Chagos* case falls squarely in the latter category,[231] and, thus, within the realm of obligations *erga omnes* and of *jus cogens*.[232] Since, at least, the *Namibia* case, the ICJ adopted "a mode of cooperation" with the GA in the field of self-determination. This means that the obligation for the Court to cooperate with other organs appears particularly tough in this field,[233] especially when the external dimension of self-determination is at issue.

To conclude, it seems that in the balance sought by the Court between the principle of consent – which outside the contentious jurisdiction is deprived of its peremptory nature – and the principle of cooperation between the UN organs in a field of a particular concern for the organization, the latter prevailed in a very clear-cut manner.

IV. Conclusions

The *Chagos* case is illustrative of the weight of preliminary questions within an advisory proceeding, despite the apparent hasty way in which these issues have been treated by the Court. In this particular instance, the identification of the *object* of the request made by the GA played a crucial

tion, in: P. M. Dupuy/B. Fassbender/M. N. Shaw/K. P. Sommermann (eds.), Völkerrecht als Wertordnung. Festschrift für Christian Tomuschat, 2006, 479 et seq., 480 et seq.

229 *L. Boisson de Chazournes*, Advisory Opinions and the Furtherance of the Common Interest of Mankind, in: L. Boisson de Chazournes/C. Romano/R. Mackenzie (eds.), International Organizations and International Dispute Settlement: Trends and Prospects, 2002, 105 et seq., 108.

230 *A. Cassese*, The International Court of Justice and the Right of Peoples to Self-Determination, in: V. Lowe/M. Fitzmaurice (note 76), 351 et seq.

231 On the importance of this opinion for the principle of self-determination, see *C. Eggett/S. Thinn*, Clarification and Conflation: Obligations Erga Omnes in the Chagos Opinion, EJIL Talk!, 21.5.2019, <https://www.ejiltalk.org>.

232 *A. Cassese*, Self-Determination. A Legal Reappraisal, 1995, 140; *A. Tancredi*, Autodeterminazione dei popoli, in: S. Cassese (ed.), Dizionario di diritto pubblico, 2006, Vol. I, 568 et seq.; *J. Crawford*, Brownlie's Principles of Public International Law, 8th ed. 2012, 596.

233 *J. Crawford* (note 76), 591.

role both for the treatment of the questions of admissibility and for the merits of the case as a whole.

According to the ICJ, neither a reformulation nor a restrictive interpretation of the GA's request was necessary: it decided, therefore, to rely on the *text* of Res. 71/292 and, consequently, found in the decolonization and self-determination the legal framework of the questions under scrutiny. This gave rise to various consequences for the proceeding: first, due to their very subject-matter, the legal questions were to be seen in the context of the UN activities and, in particular, in relation to the functions carried out by the GA in this field since the foundation of the organization itself. Second, at this stage of the procedure, the ICJ prepared the ground, on the one hand, to dismiss, as a matter of admissibility of the request, the objection based on the alleged circumvention of State consent to the judicial settlement of disputes and, on the other hand, to find that the separation of the Archipelago from Mauritius was an internationally wrongful act. Put it differently, it seems that the opinion[234] of those who argued that the UK has lost "badly" the *Chagos* case is to be shared, even though it must be added that this "match" was lost at the first half, and precisely when the ICJ selected the legal ground on which to base its own opinion in the right to self-determination, that is to say exactly the ground "wisely" suggested by the GA.

As to the "consent objection", it revealed, once more, a futile argument: even before a question which looks quintessentially as a "legal question actually pending between two or more States", the ICJ preferred to rely, as said, on the framing of the request, rather than stating that the lack of consent, *as such*, is not a condition not to render the opinion. In other words, the fact that the dispute was only an aspect of the broader decolonization question seems to have constituted the last of a series of alibis utilized by the Court to evade what seems to be inferred from its advisory jurisprudence, namely that consent, outside the contentious jurisdiction, is totally deprived of its peremptory character.

It has been argued, moreover, that faced to legal questions involving "community interests", the ICJ takes quite seriously its obligation to cooperate with other UN organs. The *Chagos* case, falling squarely within the principle of self-determination, seems to support this idea: in the balance between the discretion not to render the opinion and the duty to contribute to the UN activity in a field in which international law provides for obligations *erga omnes*, the latter has *always* prevailed, and there were no reasons

234 *M. Milanovic* (note 84).

why it should not have occurred also in the *Chagos* case, where the ICJ found a blatant violation of the *right* to self-determination.