DISPOSITION OF THE CHAGOS ISLANDS*: DELIMITATION OF THE MARITIME BOUNDARY BETWEEN MAURITIUS AND MALDIVES (PRELIMINARY OBJECTIONS)*

GINO NALDI*

In 2021, the International Tribunal for the Law of the Sea (ITLOS) ruled on preliminary objections raised by the Maldives in delimitation of the maritime boundary between Mauritius and the Maldives in the Indian Ocean. One of its principal arguments was that an unresolved sovereignty dispute persisted between Mauritius and the United Kingdom over the Chagos Archipelago, which fell outside the scope of ITLOS's jurisdiction under the UN Convention on the Law of the Sea. Rejecting the objections, ITLOS found it had jurisdiction. ITLOS attached weighty significance to the International Court of Justice's advisory opinion in the Chagos Case and UN General Assembly Resolution 73/295. Although advisory opinions are not legally binding, ITLOS ascribes them an authoritative status on relevant questions of international law. Moreover, Resolution 73/295, also non-binding, was deemed to have legal effect. The case is notable for ITLOS' reliance on hortatory sources to acknowledge that sovereignty over the Chagos lay with Mauritius.

I INTRODUCTION

In recent years the dispute between Mauritius and the United Kingdom *(UK)* concerning the legal status of the Chagos Archipelago in the Indian Ocean has escalated as Mauritius pursues its claims to sovereignty through various international fora, including judicial bodies. The latest momentous development in this diplomatic and legal campaign is the judgment in January 2021 of a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS) in the preliminary objections phase of the *Delimitation of the maritime boundary between Mauritius and Maldives Case.* In this ruling ITLOS found that it had jurisdiction over the dispute regarding the delimitation of the maritime boundary between the two states in the Indian Ocean, between the Chagos Archipelago and the southernmost tip of the

* LLM, PhD University of Birmingham (United Kingdom), former university senior lecturer in Law, United Kingdom.

Maldives archipelago, and the admissibility of Mauritius' claim.[1] The case brought into focus what may have been thought to be the, until then, unresolved question of sovereignty over the Chagos Archipelago. This undeniably controversial ruling is of considerable significance because it has a direct bearing on arguably the most fundamental right of a state in international law, that of sovereignty. ITLOS reached the conclusion that Mauritius can be considered the coastal state regarding the Chagos Archipelago for the purposes of delimitation of the maritime boundary[2] under the *United Nations Convention on the Law of the Sea* (*UNCLOS*).[3] It accepted that it was Mauritius that was the sovereign of the Chagos Archipelago and that the administration of the Chagos Islands by the UK, a non-party to the case, was a wrongful act of a continuing character which had to be brought to an end promptly.[4] ITLOS relied on the combined effect of an arbitral award,[5] the Advisory Opinion of the International Court of Justice (ICJ) in the *Chagos Case*[6] and a United Nations (UN) General Assembly resolution, Resolution 73/295 of 22 May 2019*,* as resolving the vexed issue of sovereignty and vesting it in Mauritius. ITLOS was merely recognising that fact and applying decided law. By a series of cumulative stages therefore, territory has effectively been transferred from one sovereign to another. The case raises important questions about the status, legal effect and precedential nature of advisory opinions of the ICJ, of resolutions of the UN General Assembly in the context of decolonisation, and of the disposition of territory. This article examines the Maldives' objections concerning the legal status of the Chagos Archipelago and ITLOS' response thereto. It focuses on ITLOS' controversial reliance on these hortatory sources, which raise long-standing issues of international law.

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[1] *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v Maldives) (Preliminary Objections) (Judgment)* (International Tribunal for the Law of the Sea, Case No 28, 28 January 2021) (*Mauritius/Maldives Case*). For comment see Craig D Gaver, 'Dispute concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)' (2021) 115(3) *American Journal of International Law* 519.

[2] *Mauritius/Maldives Case* (n 1) [250]-[251].

[3] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (*UNCLOS*).

[4] *Mauritius/Maldives Case* (n 1) [246]-[247].

[5] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (2015) 31 RIAA 359 (*Chagos Arbitration).*

[6] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep *95* (*Chagos Case).*

II BACKGROUND TO THE DISPUTE

The British Indian Ocean Territory (BIOT), a British Overseas Territory, is comprised of several island groups in the Chagos Archipelago, including Diego Garcia. The Chagos Archipelago had formed a dependent part of the British colony of Mauritius from 1814, but in 1965, a few years before Mauritius gained independence in 1968, the UK detached the Chagos Archipelago from Mauritius and established it as a separate overseas territory, the BIOT.[7] The devolution agreement that negotiated the independence of Mauritius, the Lancaster House Agreement of 1965, specified that in return for accepting the separation of the Chagos Archipelago the UK would, inter alia, pay Mauritius £3 million in compensation and relinquish sovereignty once it was no longer required for military use.[8] Mauritius resented, however, that its independence had been made conditional on its ceding the Chagos Archipelago and that it had had little option but to agree to the break-up of its territorial integrity. Indeed, Mauritius complained of duress, an accusation that appears to have been substantiated.[9] Between 1968 and 1973 the inhabitants of the Archipelago, the Chagos Islanders or Chagossians, were removed and effectively prohibited from returning, as Diego Garcia was

[7] For a detailed account on the historical background see ibid 119-28 [94]-[131].

[8] This commitment has been held to be legally binding, *Chagos Arbitration* (n 5) 548 [448].

[9] *Chagos Case* (n 6) [172]; *Chagos Arbitration* (n 5) 602 (Judge Kateka and Judge Wolfrum). See Gino J Naldi, 'Self-Determination in Light of the International Court of Justice's *Opinion in the Chagos Case'* (2020) 7(2) *Groningen Journal of International Law* 216, 228-9.

leased to the USA as a military base.[10] In 2016 it was announced that the US military base would continue until at least 2036.[11] Mauritius deemed that its right of self-determination had not been respected, considering the BIOT a residual colonial legacy, and latterly began to assert its claim to sovereignty over the Chagos Archipelago.[12] In 2010, Mauritius instituted arbitral proceedings pursuant to Article 287 and Annex VII of *UNCLOS*. Mauritius contested, inter alia, the legality of the British decision under *UNCLOS to* create a Marine Protected Area (MPA) around the Chagos Archipelago, over which waters Mauritius claimed sovereignty, on the ground that the UK was not a 'coastal state' as understood by *UNCLOS*.[13] The UK argued, inter alia,

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[10] Jon Lunn, *'The Chagos Islanders'* (House of Commons Library, 20 April 2012) 4 <https://researchbriefings.files.parliament.united kingdom/documents/SN04463/SN04463.pdf>. The Chagossians have been fighting unsuccessfully for a right to return for many years. In 2008 the United Kingdom's House of Lords held that the British Government's prohibition on returning was lawful, *R (Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No 2) [2009] 1 AC 453.* For comment see Peter H Sand, *'R (on the Application of Bancoult) v. Secretary of State for Foreign & Commonwealth Affairs'* (2009) 103(2) *American Journal of International Law* 317. An appeal to set aside the previous decision was dismissed by a bare majority of the Supreme Court in 2016, although the Supreme Court was of the view that new evidence meant that the ban on return should be revisited as it may no longer have been lawful, *R (on the Application of Bancoult) v Secretary of State for Foreign & Commonwealth Affairs (No 2) [2016] UKHL 35.* However, the British Government later decided against resettlement, Claire Mills, '*Disputes over the British Indian Ocean Territory: February 2021 Update',* Briefing Paper No 9134, House of Commons *Library, 8 February 2021) 7-8* <https://researchbriefings.files.parliament.uk/documents/SN06908/SN06908.pdf>. An appeal against this decision failed, *R (on the Application of Hoareau and Bancoult) v Secretary of State for Foreign & Commonwealth Affairs [2020] EWCA Civ 1010.* Little money of a compensation fund for the Chagossians appears to have been spent, Katie Armour, 'Just £12,000 of £40m fund for displaced Chagos islanders has been spent', *The Guardian* (online, 31 January 2012) <https://www.theguardian.com/world/2021/jan/31/just-12000-of-40m-fund-for-displaced-chagos-islanders-has-been-spent>.

[11] Mills (n 10) *28.*

[12] See *Chagos Arbitration* (n 5) 407-8 [103]-[104], 546-7 [442]-[444]; Malcolm N Shaw, *Title to Territory in Africa (*Oxford University Press, *1986) 130-4;* Timothy P Lynch, 'Diego Garcia: Competing Claims to a Strategic Isle' (1984) 16(1) *Case Western Reserve Journal of International Law 101, 103.*

[13] Under *UNCLOS* (n 3) art 287(1) a state party may at any time make a declaration choosing a means of dispute settlement, including the International Tribunal for the Law of the Sea (ITLOS), the ICJ or an arbitral tribunal under Annex VII. Article 287 also establishes a unilateral right to refer a dispute to arbitration, *Maritime Boundary (Barbados v Trinidad and Tobago) (Award)* (2006) 27 RIAA 147, 207.

that the Arbitral Tribunal lacked subject-matter jurisdiction because at issue was a bilateral dispute concerning territorial sovereignty which fell outside the scope of *UNCLOS*.[14] In 2015, the Arbitral Tribunal delivered its award in the Chagos Arbitration. Although the majority dismissed Mauritius' claims on the basis that it lacked jurisdiction insofar as aspects of the dispute concerned sovereignty over the Chagos Archipelago, it did find unanimously that the MPA was 'not in accordance' with *UNCLOS*. Moreover, in establishing the MPA the UK had breached its obligations under various provisions of *UNCLOS*.[15] The Tribunal held further that the UK's repeated pledges for eventual return of the Chagos Archipelago to Mauritius were binding in international law.[16] Failing progress between the two parties on the issue of sovereignty, and in light of the British reservation to the jurisdiction of the ICJ which excludes disputes with other Commonwealth states,[17] the

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[14] *Chagos Arbitration* (n 5) 444 [170]. See *UNCLOS* (n 3) art 288(1) which confers jurisdiction upon a court or tribunal over any dispute concerning the interpretation or application of UNCLOS.

[15] *Chagos Arbitration* (n 5) 581, 582 [544], [547]. See Robin Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2015, Part II and 2016' (2017) 32(3) *International Journal of Marine and Coastal Law* 379, 386-93; Géraldine Giraudeau, 'A Slight Revenge and a Growing Hope for Mauritius and the Chagossians: The UNCLOS *Arbitral Tribunal's Award of 18 March 2015 on* Chagos Marine Protected Area (Mauritius v. United Kingdom)' (2015) 12(2) *Brazilian Journal of International Law* 705; Milan J N Meetarbhan, 'The *2010* Declaration of a Marine Protected Area around *the Chagos Archipelago: Some Legal Reflections'* (2017) 28 *Yearbook of International Environmental Law* 15; Stefan Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of Part XV Courts and Tribunals' (2016) 65(4) *International and Comparative Law Quarterly* 927.

[16] *Chagos Arbitration* (n 5) 533-548, 583 [417]-[448], [547]. The UK has claimed that the Tribunal had held the Lancaster House Agreement 1965 with Mauritius, according to which Mauritius agreed to the detachment of the Chagos Archipelago, to be legally binding in international law, see eg United Kingdom, *Parliamentary Debates*, House of Lords, 5 November 2019, HLWS87 (Lord Ahmad). However, this claim not only misrepresents *the Tribunal's* conclusions, see Richard Dunne, 'Chagos Dispute: Is the 1965 Lancaster House Agreement legally binding under International Law?' (November 2019) <Dunne (2019) Legal Status of Lancaster House Agreement 1965.pdf - Google Drive> but was refuted by the ICJ, *Chagos Case* (n 6) 137 [172].

[17] Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-4&chapter=1&clang=_en#76>. This appears to be an application of the inter se doctrine. In response to claims by Mauritius that it was prepared to withdraw from the Commonwealth in order to circumvent this obstacle the UK amended its acceptance of the ICJ's jurisdiction in 2004 to exclude disputes with states which had been members of the Commonwealth, 'Written Statement of the United Kingdom', Legal Consequences of the Separation of the Chagos

UN General Assembly was persuaded in 2017 to refer a request for an Advisory Opinion from the ICJ to the questions of: (i) whether the process of the decolonisation of Mauritius had been lawfully completed when it achieved independence following the separation of the Chagos Archipelago; and (ii) what the consequences were under international law for the continued administration of the Chagos Archipelago by the UK.[18] The ICJ's Opinion was a setback for the UK, as it found that the process of the decolonisation of Mauritius had not been lawfully completed when it achieved independence*;* that at the time of its detachment from Mauritius the Chagos Archipelago was clearly an integral part of that territory; that the Chagos Archipelago had been unlawfully detached from Mauritius as international law required the UK to respect the territorial integrity of Mauritius during decolonisation; and that Mauritius had not consented freely to the detachment of the Chagos Archipelago, its acceptance of which was not based on the free and genuine expression of the will of the people concerned.[19] The UK was therefore obliged to terminate its administration of the Chagos Archipelago as soon as possible, the continued administration of which amounted to 'a wrongful act entailing the international responsibility of that State'.[20] Furthermore, since respect for the right to self-determination is an obligation *erga omnes*, all states had a legal interest in protecting that right.[21] It was for the UN General Assembly to determine the modalities required to ensure the completion of the decolonisation of Mauritius*,* and it was incumbent on all UN member states to co-operate with the UN to complete its decolonisation.[22] These latter conclusions were to have a key impact in the *Mauritius/Maldives Case.*

The UK responded defiantly to the ICJ's Opinion. It was stated in Parliament that, 'We have no doubt about our sovereignty over the Chagos Archipelago, which has been under continuous British sovereignty since 1814. Mauritius has never held sovereignty over the Archipelago and we do not recognise its

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Archipelago from Mauritius in 1965 (Advisory Opinion) [2019] ICJ [5.19(b)] <https://icj-cij.org/public/files/case-related/169/169-20180215-WRI-01-00-EN.pdf>.

[18] GA Res 71/292, UN Doc A/RES/71/292 (23 June 2017).

[19] *Chagos Case* (n 6) 136, 137 [170], [172], [174]. For comment see Naldi (n 9); Stephen Allen, 'Self-Determination, the *Chagos* Advisory *Opinion and the Chagossians'* (2020) 69(1) *International and Comparative Law Quarterly* 203; Victor Kattan, 'The Chagos Advisory Opinion and the Law of Self-Determination' (2020) 10(1) *Asian Journal of International Law* 12; Stephen Minas, 'Why the ICJ's Chagos Archipelago advisory opinion matters for global justice – and for 'Global Britain*'* (2019) 10(1) *Transnational Legal Theory* 123.

[20] *Chagos Case* (n 6) 138-9 [177]-[178].

[21] Ibid 139 [180].

[22] Ibid.

claim.'[23] This position was reiterated at the UN.[24] The UK Government also played down the importance of the case by dismissing it as non-binding.[25] In response to the Advisory Opinion the UN General Assembly adopted Resolution 73/295 welcoming the Opinion and affirming its dispositif. The Resolution contains a number of significant pronouncements which it is important to stress in light of the critical role it has assumed in the saga. It reiterates that the Chagos Archipelago forms an integral part of the territory of Mauritius, that respect for the right to self-determination is an obligation *erga omnes* and that all states therefore have a legal interest in protecting that right, and all member states are under an obligation to cooperate with the UN in order to complete the decolonisation of Mauritius. It proceeds to demand that the UK withdraw its colonial administration from the Chagos Archipelago unconditionally within six months, and calls upon all member states to cooperate with the UN to secure the speedy decolonisation of Mauritius and to refrain from any action which could hinder this objective. It further calls upon the UN, its specialised agencies,[26] other international, regional and intergovernmental organisations to recognise that the Chagos Archipelago forms an integral part of Mauritius, to support the prompt decolonisation of Mauritius, and to refrain from recognising or giving effect to any measure taken by the BIOT.[27] The UK again responded with defiance,

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[23] United Kingdom, *Parliamentary Debates*, House of Commons, 30 April 2019, WS1528 (Sir Alan Duncan) (Parliamentary Debates).

[24] UNGA Press Release, 'General Assembly Welcomes International Court of Justice Opinion on Chagos Archipelago, Adopts Text Calling for Mauritius' Complete Decolonization' (GA/12146, 22 May 2019). *See also Foreign & Commonwealth Office* Press Release, 'United Nations Secretary General's report on the implementation of Resolution 73/295: UK statement' (13 June 2020); *Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965: Report of the Secretary-General*, UN Doc A/74/834 (18 May 2020) 14.

[25] See Parliamentary Debates (n 23). See also *Report of the Secretary-General* (n 24) 15. Australia reiterated this point, GA/12146 (n 24).

[26] In 2021 the Universal Postal Union formally recognised Mauritian sovereignty over the Chagos Islands and as a result would no longer recognise stamps issued by the BIOT, Resolution C 15/2021 https://chagosarchipelago.govmu.org/Documents/statements/UPU%20resolution%20on%20implementation%20of%20UNGA%20Resolution%2073-295.pdf. See also Universal Postal Union, 'UPU adopts UN resolution on Chagos Archipelago' (Press release, 27 August 2021) <https://www.upu.int/en/Press-Release/2021/Press-release-UPU-adopts-UN-resolution-on-Chagos-Archipelago#.YTXqVbZdd-I.link>.

[27] GA Res 73/295, UN Doc A/RES/73/295 (24 May 2019, adopted 22 May 2019). The resolution was adopted by 116 votes to six, including Australia, with 56 abstentions.

declaring that Resolution 73/295 'cannot and does not create any legal obligations for the member states.'[28]

On the other hand, the Prime Minister of Mauritius, Pravind Jugnauth, stated at the UN General Assembly that the opinion had confirmed Mauritius' stance that decolonisation had not been completed, nor would it be until it could exercise sovereignty over the Chagos Archipelago.[29] Mauritius interprets the opinion as establishing that the UK has never had, nor has, sovereignty or sovereign rights over the Chagos Archipelago under *UNCLOS.*[30] In consequence Mauritius made further submissions to the Commission on the Limits of the Continental Shelf (CLCS) relating to the establishment of the outer limits of the continental shelf concerning the Southern Chagos Archipelago region.[31]

In September 2019 Mauritius and the Maldives submitted to a Special Chamber of ITLOS a dispute concerning the delimitation of their maritime

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[28] United Kingdom, *Parliamentary Debates*, House of Commons, 5 November 2019, vol 667, col 85WS (Christopher Pincher).

[29] GA/12146 (n 24).

[30] Submission by the Republic of Mauritius to the Commission on the Limits of the Continental Shelf concerning the Southern Chagos Archipelago Region, paras 6-4 <https://www.un.org/depts/los/clcs_new/submissions_files/mus1_82_2019/MCSS_ES_DOC.pdf>.

[31] Submission by Mauritius to the Commission on the Limits of the Continental Shelf (n 30); Commission on the Limits of the Continental Shelf, Progress of work in the Commission on the Limits of the Continental Shelf, UN Doc CLCS/50/2 (5 September 2019) paras 65-67. Mauritius submitted preliminary information on its claim to an extended continental shelf in May 2009, Preliminary Information Submitted by the Republic of Mauritius Concerning the Extended Continental Shelf in the Chagos Archipelago Region Pursuant to the Decision Contained in SPLOS/183

<https://www.un.org/depts/los/clcs_new/submissions_files/preliminary/mus_2009_preliminaryinfo.pdf>. The CLCS's purpose is to facilitate the implementation of *UNCLOS* regarding the establishment of the outer limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. The CLCS makes recommendations to coastal states on matters related to the establishment of those limits

<https://www.un.org/depts/los/clcs_new/commission_purpose.htm#:~:text=Purpose%20of%20the%20Commission.%20The%20purpose%20of%20the,continental%20shelf%20beyond%20200%20nautical%20miles%20%28M%29%20>. See further James Harrison, 'The Law of the Sea Convention Institutions', in Donald R Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 373, 382-5.

boundary in the Indian Ocean in accordance with its Statute.[32] However, in December of that year the Maldives submitted a series of preliminary objections in accordance with Article 294 of *UNCLOS* in which it sought to have Mauritius' claims dismissed for lack of jurisdiction and admissibility.[33] In January 2021, ITLOS rejected all of the Maldives' objections, finding that

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[32] *Statute of the International Tribunal on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 561, (entered into force 16 November 1994) art 15(2) (Statute). See Special Agreement of 24 September 2019 <https://www.itlos.org/fileadmin/itlos/documents/cases/28/C28_Special_Agreement.pdf>. Mauritius ratified *UNCLOS,* of which the Statute is an integral part, on 4 November 1994, and *the* Maldives on 7 September 2000. Neither State made a declaration under *UNCLOS* (n 3) art 287(1) choosing a particular means for the settlement of disputes, including ITLOS, the ICJ or an arbitral tribunal under Annex VII, concerning its interpretation or application. Consequently, the default procedure expressed in art 287(3) is that Annex VII *UNCLOS* arbitration applies. Mauritius had instituted arbitral proceedings against the Maldives in June 2019 under Annex VII but it was agreed to transfer the proceedings to ITLOS, ibid. ITLOS acceded to the request of the parties to form a special chamber of nine judges, including two judges ad hoc, ITLOS, Order 2019/4 of 27 September 2019 <https://www.itlos.org/fileadmin/itlos/documents/cases/28/C28_Order_20190927.pdf>.

[33] Ibrahim Riffath,'Written Preliminary Objections of the Republic of Maldives under Article 294 of the United Nations Convention on the Law of the Sea and Article 97 of the Rules of the International Tribunal for the Law of the Sea' *International Tribunal for the Law of the Sea* (Written submission, 18 December 2019) <https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_PO_Preliminary_Objections_Maldives.pdf>. It may appear prima facie curious that the *Maldives* raised preliminary objections in a case submitted by Special Agreement, or compromis, but in the context of the procedural law of the ICJ this fact does not prevent the parties from objecting to the ICJ's jurisdiction, *Borchgrave Case (Spain v Belgium) (Preliminary Objections)* [1937] PCIJ (ser A/B) No 72; Ibrahim F I Shihata, *The Power of the International Court to Determine its own Jurisdiction* (Martinus Nijhoff, 1965) 84, and in this particular case the Special Agreement was concerned with *transferring the proceedings to* ITLOS. It should be observed that while ITLOS is essentially modelled on the ICJ, and its procedural rules adhere to those of the ICJ, significant differences exist between the two organs in matters of jurisdiction, Carl-August Fleischhauer, 'The Relationship Between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg' (1997) 1 *Max Planck Yearbook of United Nations Law* 327; Susanne Wasum Reiner and Daniela Schlegel, 'The UNCLOS Dispute Settlement System – Between Hamburg and The Hague' (2005) 48 *German Yearbook of International Law* 187, 197-201, 206-11. However, the ITLOS case law on procedural matters follows closely that of the ICJ, Niki Aloupi, 'ITLOS procedural rules: Between change and stability' (2019) 61 *Questions of International Law* 21.

it had jurisdiction over the case.[34] For the purposes of this article only the first two of five objections, which are interlinked, are pertinent, that relating to the question of an indispensable third party, and that of lack of jurisdiction to decide the disputed sovereignty over the Chagos Islands. The other objections will first be considered for the sake of completeness but only briefly.

III PRELIMINARY OBJECTIONS RAISED BY THE MALDIVES

A *The Third, Fourth and Fifth Preliminary Objections*

The Maldives' third preliminary objection argued that the parties had failed to engage in negotiations to reach agreement concerning the delimitation of their maritime boundary as required by Articles 74 and 83 of *UNCLOS*. The Maldives put forward that its reluctance to negotiate a maritime boundary with Mauritius was because the sovereignty of the Chagos Archipelago was still the subject of a bilateral dispute and it, therefore, could not negotiate the boundary until that dispute was settled. ITLOS dismissed the objection overwhelmingly by eight votes to one on the ground that while these provisions of *UNCLOS* require an obligation to negotiate in good faith with a view to reaching agreement, that obligation does not compel states to actually reach an agreement.[35] The evidence before the court suggested that attempts, albeit unsuccessful, at engaging in negotiations had been made and that in fact it was the Maldives that had for the most part refused to negotiate with Mauritius. ITLOS considered that in situations where no agreement could be reached within a reasonable time, resort to the dispute settlement procedures of *UNCLOS* was not only justified but also an obligation of the states concerned.[36]

The fourth preliminary objection contended that no dispute over the delimitation of the maritime boundary existed between the parties on the grounds that Mauritius was not a state with a coast opposite or adjacent to the Maldives for purposes of Articles 74 and 83 of *UNCLOS. This* objection was rejected unanimously, with ITLOS finding that Mauritius did qualify as such a state as it had been found to hold sovereignty over the Chagos Archipelago, as explained below. In response to the argument of the Maldives that the two

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[34] See *Mauritius/Maldives Case* (n 1).

[35] *Mauritius/Maldives Case* (n 1) [273].

[36] Ibid [288]-[292]. In his Separate and Dissenting Opinion Judge ad hoc Oxman found that a reasonable period of time had not elapsed in view of the fact that the Maldives had indicated its readiness to proceed with negotiations once the dispute was resolved, ibid [38] (Judge Oxman).

states had not held definitely disparate claims to their respective maritime zones, ITLOS found that there was an overlap in the relevant national laws regarding their claims. Furthermore, Mauritius had protested at the Maldives' submission to the CLCS. The satisfaction of the criteria for the existence of a dispute is not demanding and ITLOS therefore had little difficulty in establishing that a dispute between the parties existed.[37]

The final preliminary objection asserted that Mauritius' claims constituted an abuse of process. It claimed that Mauritius was resorting to the *UNCLOS* compulsory dispute settlement procedures to obtain a ruling on a territorial dispute with a third state. This submission was also rejected unanimously. Having previously ruled that a dispute over a maritime boundary existed between the parties, ITLOS held that Mauritius having recourse to the *UNCLOS* compulsory dispute settlement procedures to settle issues under Articles 74 and 83 of *UNCLOS* could not constitute an abuse of process.[38]

B *The Legal Interests of a Third State*

At the heart of the first and second objections raised by the Maldives was the status of the Chagos Archipelago. Indeed, ITLOS considered the crucial question to be whether the legal status of the Chagos Archipelago had been clarified by the ICJ's Advisory Opinion.[39] The first objection raised by the Maldives was based on the submission that a third party, the UK, was 'indispensable' to the proceedings.[40] This argument is based on the so-called *Monetary Gold* principle whereby the ICJ will not exercise its jurisdiction where the legal interests of a third state 'would form the very subject-matter of the decision',[41] which had been previously accepted by ITLOS as 'a well-

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[37] *Mauritius/Maldives Case* (n 1) [322]-[336]. The definition of a legal dispute in international law is well established and universally accepted and for that reason has been adopted by ITLOS, ibid [322]-[324], 334. See further Gino Naldi and Konstantinos Magliveras, 'Jurisdictional Aspects of Dispute Settlement under the UN Convention on the Law of the Sea: Some Recent Developments' (2018) 16 *New Zealand Yearbook of International Law* 207, 226-7.

[38] *Mauritius/Maldives Case* (n 1) [345]-[350]. See further Naldi and Magliveras (n 37) 238-9.

[39] *Mauritius/Maldives Case* (n 1) [190], [243].

[40] Written Preliminary Objections of the Maldives (n 33) [47]-[52]. ITLOS first employed the term 'indispensable' in ITLOS, *M/V 'Norstar' (Panama v Italy) (Preliminary Objections) (Judgment)* (2016) ITLOS Rep 44 [160] (*'Norstar' Case*).

[41] As opposed to simply being affected by the decision, *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States of America) (Judgment)* [1954] ICJ Rep 19, 32.

established procedural rule in international judicial proceedings'. [42] According to the Maldives, proceeding with the case would inevitably have a direct impact on the rights of the UK as sovereign of the Chagos Islands.[43] Mauritius, on the other hand, argued that the *Monetary Gold* principle had no application in the present case since the UK had no sovereign rights in the disputed area as the ICJ had previously determined in the *Chagos Case*.[44]

The answer to this question would be crucial in determining the fate of the objection. ITLOS considered that if a dispute over the sovereignty of the Chagos Islands persisted then the UK would be regarded as an indispensable party and the *Monetary Gold* principle would apply. If, however, the dispute had been resolved in Mauritius' favour the UK could not be considered an indispensable party.[45] In order to answer this question, therefore, the legal status of the Chagos Islands had to be determined and ITLOS decided that the two objections should be examined as one.

C *The Dispute over Sovereignty*

The second objection put forward by the Maldives was that ITLOS had no jurisdiction to determine the issue of sovereignty over the Chagos Archipelago. Under Article 288(1) of *UNCLOS,* ITLOS' jurisdiction is limited to disputes concerning the interpretation or application of *UNCLOS*, which did not apply to this sovereignty dispute. The Maldives further objected to ITLOS' jurisdiction to entertain Mauritius' claims that it was the 'coastal state' for the purposes of *UNCLOS*, on the grounds that the issue at stake was actually one of sovereignty over land territory and that that matter did not

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[42] *Norstar Case* (n 40) [172].

[43] The question arises *why* in the circumstances the UK did not request to intervene under the ITLOS Statute art 31. The answer to this question almost certainly lies in paragraph 3 of this provision, whereby ITLOS's decision is binding upon the intervening state party in so far as it relates to matters in respect of which that state party intervened. This surmise is support by the British Government's response to the ITLOS ruling which stated that 'The UK is not a party to these proceedings, which can have no effect for the UK', United Kingdom, *Parliamentary Questions*, House of Commons, 8 February 2021, available at, https://questions-statements.parliament.uk/written-questions/detail/2021-02-03/148829. It is strictly the case that ITLOS decisions have no binding force except between the parties and in respect of that particular dispute, *UNCLOS* (n 3) art 296(2).

[44] 'Written Observations of the Republic of Mauritius on the Preliminary Objections Raised by the Republic of Maldives', paras [3.29]-[3.34]

<https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_PO_Written_Observations_Mauritius.pdf>.

[45] *Mauritius/Maldives Case* (n 1) [99].

engage the interpretation or application of *UNCLOS* as required by Article 288(1).[46] Mauritius, by contrast, argued that the question of sovereignty had been settled by the ICJ's Advisory Opinion, and that the Maldives' objection had no basis. ITLOS confirmed the correctness of the Maldives' submission regarding jurisdiction as a general proposition but observed that Mauritius' claims were based on the premise that it had sovereignty over the Chagos Archipelago. Since this assertion was at the heart of the disagreement between the parties over this objection ITLOS decided that an answer to this question was relevant to both the first and second objections.[47]

The Maldives argued that the bilateral sovereignty dispute over the Chagos Archipelago between Mauritius and the UK remained a live issue as it had not been resolved by the Arbitral Tribunal, the ICJ, nor the UN General Assembly. Regarding the Chagos Arbitration, the Maldives argued that the award had *res judicata* effect on that issue.[48] Although it is the case that the principle of *res judicata* applies to arbitral awards,[49] ITLOS observed that the Arbitral Tribunal had not actually recognised the UK as the coastal state with respect to the Chagos Archipelago and had made it plain that it lacked jurisdiction to determine the issue of sovereignty, and its consideration of the lawfulness of the MPA was without prejudice to the question of sovereignty. ITLOS therefore rejected the submission that the sovereignty dispute was *res judicata*.[50]

ITLOS recognised that the UN General Assembly's questions to the ICJ related to the lawfulness of the decolonisation process of Mauritius and the UK's continued administration of the Chagos Archipelago and not to the resolution of a territorial dispute.[51] It thus considered the decolonisation and

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[46] While disputes concerning territorial sovereignty are excluded from the jurisdiction of court or tribunals under *UNCLOS*, see *Chagos Arbitration* (n 5) 460 [219]-[220]; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russian Federation) (Preliminary Objections) (Judgment)* (Permanent Court of Arbitration, Case No 2017-06, 21 February 2020) [156] (*Coastal State Rights in the Black Sea Arbitration*), such disputes which are incidental or ancillary to matters governed by *UNCLOS*, mixed disputes, can bring the dispute within the scope of *UNCLOS (n 3)* art 288(1), *Chagos Arbitration* (n 5) 460 [220]; The 'Enrica Lexie Incident *(Italy v India) (Award)* (Permanent Court of Arbitration, Case No 2015-28, 21 May 2020) [808]-[811].

[47] *Mauritius/Maldives Case* (n 1) [113]-[115].

[48] Ibid [121].

[49] *Trail Smelter Case (United States v Canada) (Arbitral Award)* (1938, 1941) 3 RIAA 1905, 1950.

[50] *Mauritius/Maldives Case* (n 1) [138].

[51] Ibid [163]-[164].

sovereignty of Mauritius to be 'inseparably related.'[52] ITLOS observed that the fact that the ICJ had not been asked overtly to resolve a bilateral dispute over sovereignty did not mean that the Opinion had no bearing on the issue.[53] In fact, ITLOS opined that the ICJ's determinations with respect to the decolonisation of Mauritius 'have legal effect and clear implications for the legal status of the Chagos Archipelago.'[54] The UK's continued claim to sovereignty over the Chagos Archipelago was therefore contrary to those findings. While the right of self-determination had not been respected so that the process of decolonisation had yet to be completed, Mauritius' sovereignty over the Chagos Archipelago could be inferred from the ICJ's determinations.[55] ITLOS therefore held that these findings could be interpreted as suggesting that Mauritius had sovereignty over the Chagos Archipelago.[56]

This conclusion was reinforced by General Assembly Resolution 73/295. ITLOS observed that it demanded that the UK withdraw its administration over the Chagos Archipelago within six months of its adoption. In its view, '[t]he fact that the time-limit set by the General Assembly has passed without the UK complying with this demand further strengthens [ITLOS'] finding that its claim to sovereignty over the Chagos Archipelago is contrary to the authoritative determinations made in the advisory opinion'.[57]

In light of its findings that the question of sovereignty had been settled when ITLOS was seised of the case and that no dispute therefore existed between Mauritius and the UK, the latter's claim amounting as a result to no more than 'a mere assertion',[58] ITLOS rejected the first two objections. It thus concluded that the UK could not be considered an indispensable party to the proceedings and consequently the first preliminary objection was thrown out.[59] As to the second objection, considering Mauritius as the coastal state regarding the Chagos Archipelago for the purpose of the delimitation of a maritime boundary even before the process of the decolonisation of Mauritius

[52] Ibid [189].

[53] Ibid [166].

[54] Ibid [246].

[55] Ibid [171]-[174], [246].

[56] Ibid [173].

[57] Ibid [246].

[58] Ibid [243].

[59] Ibid [248].

was completed was consistent with the *Chagos Arbitration*, the *Chagos Case* and Resolution 73/295.[60]

IV ITLOS' RELIANCE ON THE ICJ'S ADVISORY OPINION AND GENERAL ASSEMBLY RESOLUTION

As has been observed, ITLOS based its conclusion that Mauritius was the lawful sovereign of the Chagos Archipelago principally on the combined effect of the ICJ's Advisory Opinion and a General Assembly resolution recognising a change in the rights of states, although its reliance on these happenings was not extensively reasoned. As Judge Oxman observed in his separate and dissenting opinion, ITLOS was being asked by Mauritius to attribute 'conclusive prescriptive and, in practical effect, *res judicata* consequences to the advisory opinion' and the resolution, which it effectively did.[61] Before examining the appropriateness of the extent of ITLOS' reliance on these factors, an initial question that must be posed but briefly is whether such an important conclusion regarding the attribution of sovereignty should have been based on 'inferences', 'implications' and 'suggestions'.[62] Mauritius had argued that the Advisory Opinion had resolved the sovereignty dispute 'by necessary implication'.[63] This is not an unreasonable conclusion to draw from the Advisory Opinion,[64] a reading shared by ITLOS. But the view expressed by the US delegate to the UN General Assembly that the ICJ did not actually say that Mauritius is sovereign over the Chagos Archipelago deserves serious consideration.[65] Indeed, Judge Oxman wondered whether Mauritius had correctly interpreted the 'intended meaning' of the Advisory Opinion.[66] The ICJ did say, inter alia, as has been observed previously, that the decolonisation of Mauritius had not been lawfully completed when it

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[60] Ibid [250].

[61] Ibid [27] (Judge Oxman).

[62] See *Mauritius/Maldives Case* (n 1) [166], [168], [171], [173], [174], [246].

[63] Ibid [177], [179].

[64] Kattan (n 19) 22. See also Roopanand Mahadew and Sarwankumar Aukhajah, 'The Advisory Opinion of the International Court of Justice on Chagos: a critical overview' (2013) 3 *African Human Rights Yearbook* 414, 430, where it is suggested that the ICJ's finding of 'the detachment as unlawful implies that the UK cannot exercise sovereignty over Chagos post-independence. It followed…that sovereignty could not have been excised from Mauritius by the creation of a new colony. The UK was therefore called upon to transfer administration of BIOT to Mauritius, and not sovereignty.'

[65] GA/12146 (n 24). Australia's delegate stressed the non-binding nature of the Advisory Opinion, GA/12146 (n 24).

[66] *Mauritius/Maldives Case* (n 1) [28] (Judge Oxman).

achieved independence, and that the Chagos Archipelago had been unlawfully detached from Mauritius. These pronouncements are certainly capable of being understood in the manner ITLOS did. Nevertheless, an alternative, more nuanced interpretation is possible in that sovereignty is not necessarily redistributed because a state of affairs is found unlawful. And the ICJ went on to say that it was for the UN General Assembly to decide how the decolonisation of Mauritius was to be realised, a fact stressed by Judge Oxman,[67] which may suggest that the transfer of sovereignty from the UK to Mauritius was a future event yet to be determined.[68]However, the better view may be that the ICJ simply considered that the actual details of decolonisation would be better settled elsewhere. Insofar as the ICJ considered the UK's continued administration of the Chagos Archipelago as a wrongful act entailing state responsibility,[69] previous case law suggests that such a conclusion follows from a determination of adverse occupation.[70] This is the crucial point, as decolonisation had not been completed in line with the right of self-determination because as a general rule self-determination does not invalidate colonial title.[71] The ICJ may have held back from pronouncing explicitly that the Chagos Archipelago was Mauritian sovereign territory in an attempt to build a 'a non-confrontational environment' which would enhance the prospects of an amicable resolution[72] but ITLOS did not appear to have such qualms and chose to take what it considered to be the next logical step. While some may have preferred ITLOS to have exercised judicial restraint it seems to have reached the correct conclusion.

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[67] Ibid [31].

[68] A comparison with UN General Assembly Resolution 40/62 on Mayotte is interesting because in that resolution, unlike Resolution 73/295, the General Assembly reaffirmed the sovereignty of the Comoros over Mayotte, which had also been separated from Comoros upon its independence to remain under French administration.

[69] An example of continuing wrongful acts include unlawful occupation of part of the territory of another state, Draft articles on Responsibility f States for Internationally Wrongful Acts, ith commentaries 2001 60 <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf#:~:text=%281%29%20%20Article%201%20states%20the%20basic%20principle,actions%20or%20omissions%20or%20a%20combination%20of%20both>.

[70] See e.g. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* [2002] ICJ Rep 303. And see Enrico Milano and Irini Papanicolopulu, 'State Responsibility in Disputed Areas on Land and at Sea' (2011) 71 *Zeitschrift für auslandisches öffentliches Recht und Volkerrecht* 587, 592-6.

[71] Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995) 186-7.

[72] Ibid 593-4.

A *The Binding Nature of an Advisory Opinion*

As has been mentioned above, the UK and other states such as Australia, dismissed the significance of the ICJ's Opinion by highlighting its advisory and non-binding nature. The Maldives reiterated this point before ITLOS, insisting they could not bind states.[73] This observation is in principle true, and it needs to be borne in mind that advisory opinions are addressed to the UN organs requesting them. Writing about the ICJ's predecessor, the Permanent Court of International Justice (PCIJ), Judge Hudson set out the conventional view:

> An advisory opinion given by the Court is what it purports to be. It is advisory. It is not in any sense a judgment…nor is it a decision…Hence it is not in any way binding upon any State…The Court is therefore without power to impose obligations upon any State by the conclusions stated in an advisory opinion, and the conclusions are not binding as formulations of a State's obligations...Though the authority of the Court is not to be lightly disregarded, it gives to the Court's opinion only a moral value.[74]

The ICJ has itself stated that an advisory opinion 'is only of an advisory character: as such it has no binding force.'[75] An eminent jurist puts it thus, that advisory opinions do not constitute per se 'a "decision" with which anyone is legally bound to comply' and that they are 'not formally final and "binding"'.[76] Significantly, advisory opinions 'cannot formally affect the legal position of subjects of international law whose rights and duties may, in

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[73] *Mauritius/Maldives Case* (n 1) [193]-[196].

[74] Manley O Hudson, *The Permanent Court of International Justice 1920-1942* (MacMillan, 1943) 511-2 (footnotes omitted). See also by the same author, 'The Effect of Advisory Opinions of the World Court' (1948) 42(3) *American Journal of International Law* 630. And further Alexander Pandelli Fachiri, *The Permanent Court of International Justice* (Scientia Verlag, 2nd ed, 1980 reprint) 80. Judge Moore described the PCIJ's advisory opinions as 'lacking any element of authority or of finality', PCIJ [1922] (ser D) No 2 383.

[75] *Interpretation of Peace Treaties (Advisory Opinion)* [1950] ICJ Rep 65, 71 (*Peace Treaties* Case). See also *Certain* Expenses *of the United Nations (Advisory Opinion)* [1962] ICJ Reports 151, 168 (*Certain* Expenses Case). According to the ICJ's *Handbook*, 'it is of the essence of the Court's advisory opinions that they are advisory, i.e., unlike the Court's judgments, by their nature they have no binding effect', ICJ, *Handbook* (Triangle Bleu, 7th ed, 2019) 92.

[76] Shabtai Rosenne, *The World Court: What it is and how it Works* (Martinus Nijhoff, 5th rev ed, 1995) 106, 110.

fact, have been the subject of the Court's scrutiny.'[77] There are many other observations in a similar vein.[78]

But as Mauritius argued,[79] this outlook underestimates the legal authority of such judgments as authoritative and reasoned expositions on points of law and their influence on the conduct of the UN,[80] particularly in areas, such as decolonisation, coming within the scope of the UN General Assembly. It stressed that states are bound not by the opinion as such but by the 'rules of international law identified and applied' by the ICJ.[81] It has therefore been said of advisory opinions that, '[I]t is quite wrong to regard them as mere recommendations having no legal weight.'[82] Another jurist writes that while advisory opinions are not legally binding, 'the authority of the ICJ as the principal judicial organ of the United Nations attaches to them.'[83]

Others have taken a more nuanced view. With regard to the binding nature of the PCIJ's opinions it has been averred that:

> The answer is partly in the negative, partly in the affirmative. The consulting body is under no obligation to give effect to the Court's opinion, and still less the States concerned…And the States can hardly defy public opinion and the moral effect of the Court's decision by openly refusing to be bound by the result.[84]

The view has been expressed that subject to a number of caveats relating to preserving the integrity of the ICJ, 'it does not matter much if the Opinion is

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[77] Georg Schwarzenberger and E D Brown, *A Manual of International Law* (Professional Books, 6th ed, 1976) 207.

[78] See e.g. Roberto Ago, '"Binding" Advisory Opinions of the International Court of Justice' (1991) 85(3) *American Journal of International Law* 439.

[79] *Mauritius/Maldives Case* (n 1) [197]-[201]. See further 'Written Observations of Mauritius' (n 44) [3.17]-[3.28] and authorities cited therein.

[80] Fachiri (n 74) 81; Anthony Aust, *Handbook of International Law* (Cambridge University Press, 2nd ed, 2010) 429; Vaughn Lowe, *International Law* (Oxford University Press, 2007) 131-2.

[81] 'Written Observations of Mauritius' (n 44) [3.25].

[82] Lowe (n 80) 131.

[83] Anthony Aust, 'Advisory Opinions' (2010) 1(1) *Journal of International Dispute Settlement* 123, 133. See also Ch De Visscher, 'Nature des avis consultatifs et limites de leur autorité' (1929) 26 *Collected Courses of the Hague Academy of International Law* 23, 27.

[84] J W Wheeler-Bennett and Maurice Fanshawe, *Information on the World Court 1918-1928* (George Allen & Unwin, 1929) 69.

characterised as "binding" or not. It will be clothed with the full authority of the law'.[85] Another distinguished jurist has written that:

> [A]dvisory Opinions have a role of great importance. Of course, there *are* no parties to a request for an advisory opinion, and an opinion is not technically binding on any state. But Judge Lauterpacht early (sic) said that there *is* a duty upon each state seriously to consider in good faith whether it should not accept what the Court has pronounced in an advisory opinion.[86]

There exists, therefore, a wide range of opinion on this topic.

ITLOS chose to give due prominence to the ICJ's opinions. It acknowledged that advisory opinions are not legally binding, indeed, it had recognised that fact in relation to its own opinions.[87] However, this did not mean that such judicial pronouncements were any the less authoritative since they are made with the 'same rigour and scrutiny' by the UN's principal judicial organ.[88] It noted that the Court of Justice of the European Union had also accepted the significance of the ICJ's opinions.[89] In its view 'determinations made by the ICJ in an advisory opinion cannot be disregarded simply because the advisory opinion is not binding.'[90] It therefore concluded that the ICJ's opinions had legal effect.[91]

ITLOS' findings on this issue have attracted criticism. Judge Oxman commented that Mauritius was in reality seeking to avoid the distinction between the authoritative nature of an ICJ advisory opinion and its legally binding effect.[92] A critic has made a similar point, observing that recognising that the ICJ makes authoritative assessments of what the law is, is not

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[85] Edvard Hambro, 'The Authority of the Advisory Opinions of the International Court of Justice' (1954) 3(1) *International and Comparative Law Quarterly* 2, 22.

[86] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994) 203.

[87] *Mauritius/Maldives Case* (n 1) [202]. The case in question was *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission (Advisory Opinion)* (2015), ITLOS Rep 4, [76].

[88] *Mauritius/Maldives Case* (n 1) [203].

[89] Ibid [204]. See e.g. *Council of the European Union v Front Polisario* (Court of Justice of the European Union, Case C-104/16 P, ECLI:EU:C:2016:973, 21 December 2016.

[90] *Mauritius/Maldives Case* (n 1) [205].

[91] Ibid.

[92] Ibid [28] (Judge Oxman).

equivalent to saying that the assessments have legal effect.[93] But surely, by stating what the law is, and that in this particular instance elements of that law have an *erga omnes* character, it is not illogical to suppose that that fact will have consequences for the international community; the opinion becomes akin to a declaratory judgment.[94]

It is evident that ITLOS has treated the ICJ's advisory opinion as the final and determinative statement of the law in various areas. This is not because advisory opinions are *res judicata*, they are not,[95] or because of a system of judicial precedent, which, as is known, does not exist formally in international law.[96] It is as a result of adherence to a consistent body of jurisprudence which is considered persuasive and authoritative.[97] In fact, ITLOS makes extensive references to ICJ case law in its own jurisprudence.[98] While no formal hierarchical judicial structure exists in international law, it is recognised that the ICJ occupies the paramount position, and fears that the increase in

[93] Sarah Thin, 'The Curious Case of the 'Legal Effect' of ICJ Advisory Opinions in the Mauritius/Maldives Maritime Boundary Dispute' *EJIL: Talk!* (Blogpost, 5 February 2021) 3 <https://www.ejiltalk.org/the-curious-case-of-the-legal-effect-of-icj-advisory-opinions-in-the-mauritius-maldives-maritime-boundary-dispute/>.

[94] See statement by ICJ, 'A distinction should…be drawn between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court', *Peace Treaties* Case (n 75) 71.

[95] Hudson (n 74) 512; Iain Scobbie, 'Res Judicata, Precedent and the International Court: A Preliminary Sketch' (1999) 20 *Australian Year Book of International Law* 299, 312.

[96] See eg Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 21-2.

[97] Ibid 21; Hudson (n 74) 628-30; Hersch Lauterpacht, *The Development of International Law by the International Courts* (Cambridge University Press, 1958) 9-15; Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2(1) *Journal of International Dispute Settlement* 5; Vladyslav Lanovoy, 'The Authority of Inter-State Arbitral Awards in the Case Law of the International Court of Justice' (2019) 32(3) *Leiden Journal of International Law* 561, 566-9.

[98] See eg *M/V Louisa (Saint Vincent and the Grenadines v Spain) (Judgment)* (2013) ITLOS Rep 4; *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (2017) ITLOS Rep 4; *Detention of Three Ukrainian Naval Vessels (Ukraine v Russian Federation) (Provisional Measures)* (International Tribunal for the Law of the Sea, Case No 26, 25 May 2019).

international courts and tribunals would lead to inconsistencies in the interpretation of the law have not materialised.[99]

B *The Effect of General Assembly Resolution 73/295*

ITLOS considered that General Assembly Resolution 73/295 had a vital role to play in assessing the legal status of the Chagos Archipelago.[100] The Maldives argued, inter alia, that the Resolution was not binding on states in its own right and that it could not be understood as providing an authoritative interpretation of the *Chagos Case.*[101] Mauritius, on the other hand, submitted that ITLOS should follow the calls in paragraphs 6 and 7 of the Resolution, inter alia, to recognise that the Chagos Archipelago forms an integral part of Mauritius, and to support the decolonisation of Mauritius.[102]

This raises the question of whether General Assembly resolutions can have legal consequences which are of decisive or determinative force and effect (the role of General Assembly resolutions in the formation of customary law is a separate question which is not at issue here). As has been noted above, the UK denied that Resolution 73/295 could create legal obligations for Member States.[103] Mauritius, on the other hand, argued that the Resolution, inter alia, was 'determinative'.[104] This issue, in fact, is not a new quandary.[105]

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[99] See e.g. Alan E Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46(1) *International and Comparative Law Quarterly* 37; Gilbert Guillaume, 'The Future of International Judicial Institutions' (1995) 44(4) *International and Comparative Law Quarterly* 848; Rosalyn Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55(4) *International and Comparative Law Quarterly* 791; Shigeru Oda, 'Dispute Settlement Prospects in the Law of the Sea' (1995) 44(4) *International and Comparative Law Quarterly* 863.

[100] It was assumed by all sides that ITLOS possessed the authority to interpret such documents. See also *Coastal State Rights in the Black Sea Arbitration* (n 46) [176].

[101] *Mauritius/Maldives Case* (n 1) [219].

[102] Ibid [223].

[103]United Kingdom, *Parliamentary Debates*, House of Commons, 5 November 2019, vol. 667, col. 85WS (Christopher Pincher).

[104] Written Observations of Mauritius (n 44) [1.5].

[105] See e.g. F Blaine Sloan, 'The Binding Force of a 'Recommendation' of the General Assembly of the United Nations' (1948) 25 *British Yearbook of International Law* 1; Gaetano Arangio-Ruiz, 'Introduction' (1972) 137 *Collected Courses of the Hague Academy of International Law* 431. The competing claims are reviewed by D H N Johnson, 'The Effect of Resolutions of the General Assembly of the United Nations' (1955-56) 32 *British Yearbook of International Law* 97.

As is well-known, the General Assembly is not an international legislature. It is authorised under the *UN Charter* to discuss any matter within its province and to make recommendations thereon to other UN organs or member states amongst others. Save for a few specific instances on internal matters, such as the admission of new members,[106] or the budget,[107] General Assembly resolutions are not legally binding according to a literal reading of the *UN Charter*.[108] The traditional position maintains that the General Assembly lacks the authority to take any conclusive decisions. This view found widespread expression as a result of the dispute over the South West Africa/Namibia mandate, although the controversy predates it.[109] Judge Lauterpacht had stated in a separate opinion in 1955 that:

> in general, [General Assembly resolutions] are in the nature of recommendations and it is in the nature of recommendations that, although on proper occasions they provide a legal authorization for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them.[110]

He went on to add that the 'paramount rule [is] that the General Assembly has no legal power to legislate or bind its Members'.[111] Judge Klaestad's sentiments were similar, that resolutions 'are…not of a legal nature in the usual sense, but rather of a moral or political character' and that they did not impose 'a binding legal obligation to comply with the recommendation.'[112] The General Assembly's termination of the mandate, under Resolution 2145 (XXI), on the grounds that South Africa had failed to fulfil its obligations, was disputed by South Africa which argued that it lacked the authority. This contention was supported by Judge Fitzmaurice who expressed the view in the *Namibia Case* that the General Assembly had been conferred 'executive or operative powers' by the *UN Charter* in only a few limited areas and as a

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[106] *Charter of the United Nations* art 4(2).

[107] Ibid art 17(1).

[108] See e.g. *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Second Phase) (Judgment)* [1966] ICJ Rep 6, 50 [98].

[109] Issues relating to mandates must be discussed with caution due to their 'special character', *Mavrommatis Palestine Concessions (Greece v Great Britain)* (*Preliminary Objections)* [1924] PCIJ (ser A) No 2, 30; Brownlie (n 96) 164.

[110] *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa (Advisory Opinion)* [1955] ICJ Rep 1955, 67, 115 (Judge Lauterpacht) (*Voting Procedure Case*). See also Hersch Lauterpacht, *Oppenheim's International Law* (Longmans, 8th ed, 1955) vol 1, 432.

[111] *Voting Procedure Case* (n 110) 116 (Judge Lauterpacht).

[112] Ibid 88 (Judge Klaestad).

result 'anything… else it does outside those specific powers, whatever it may be and however the relevant resolution is worded, can only operate as a recommendation…where no such power has been specifically given, it does not exist.'[113] He went on to stress that 'the Assembly has no power to terminate any kind of administration over any kind of territory'.[114] In the same case Judge Gros wrote that, '[W]ith certain exceptions, recommendations have no binding force on [UN] member States'.[115] This viewpoint receives widespread support from distinguished commentators.[116] More specifically, Brownlie maintains that the UN General Assembly has no power to dispose of territory and dismisses the notion of an implied power in this context.[117]

As always, there are opposing views, albeit more cautious in their approach.[118] It has been suggested that resolutions may have a legal effect even though they are not considered by states to be binding on them, that the scope of 'legal effect' is broader than that of 'legally binding'.[119] In the *Namibia Case,* the ICJ stated that the General Assembly is not debarred from adopting, within the framework of its competence, which decolonisation most definitely is, resolutions which make determinations or have operative

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[113] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 1971, 12, 281 (Judge Fitzmaurice) (*Namibia Case*). See also *Certain* Expenses Case (n 75) 253 (Judge Koretsky).

[114] *Namibia Case* (n 113) 283 (Judge Fitzmaurice) (italics in the original).

[115] Ibid 334 (Judge Gros). See further ibid 339-40. See also *Certain* Expenses Case (n 75) 232-4 (Judge Winiarski).

[116] See e.g. J L Brierly, *The Law of Nations* (Clarendon Press, 5th ed, 1955) 195-6; Brownlie (n 96) 15, 164; Hans Kelsen, The Law of the United Nations (London Institute of World Affairs, 1950) 195-6; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (Sweet & Maxwell, 6th ed, 2009) 27-30; Schwarzenberger and Brown (n 77) 233; John P Grant and J Craig Barker, *Encyclopaedic Dictionary of International Law* (Oxford University Press, 3rd ed, 2009) 238; Gaetano Arangio-Ruiz, 'The Theory of Assembly Resolutions (Declarations) as Special Law-Making Act' 137 *Collected Courses of the Hague Academy of International Law* 444.

[117] Brownlie (n 96) 164. Cf James Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2007) 551-2.

[118] See e.g. *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 52 (Judge Alvarez); Alex C Castles, 'Legal Status of U.N. Resolutions' (1967) 3(1) *Adelaide Law Review* 68.

[119] Obed Asamoah, 'The Legal Effect of Resolutions of the General Assembly' (1964) 3(2) *Columbia Journal of Transnational Law* 210, 214. See also Johnson (n 105) 111-2. See further *Voting Procedure Case* (n 110) 118-9 (Judge Lauterpacht).

design.[120] Thus, in the *East Timor Case,* Judge Weeramantry opined that legal consequences follow from General Assembly decisions within its field of competence.[121] Indeed, General Assembly Resolution 73/295 could be considered as furthering the principle of self-determination as set out in the *UN Charter* which would bestow upon it a greater authority.[122] The thesis developed by Johnson, that the course of action called for by the General Assembly is already required by international law, *in casu* decolonisation, has merit.[123] Resolution 73/295 would be considered authoritative were it to be deemed a 'decision' on 'important questions' under *UN Charter* art 18(2) although this does not seem possible because it narrowly missed reaching the required two-thirds majority of the members present and voting.[124] Charges of the Resolution being *ultra vires* for *excés de pouvoir* would be difficult to sustain.[125] Of course, the political impact of a General Assembly resolution cannot be easily dismissed.[126]

A recent arbitral decision, the *Coastal State Rights in the Black Sea Arbitration*, generally lends support to the former stance.[127] In this case Ukraine argued, inter alia, that 'international tribunals have consistently accorded weight to General Assembly resolutions…that expressly state and apply legal principles under the UN Charter and international law.'[128] It further maintained that neither the ICJ nor ITLOS contradict UN General Assembly resolutions.[129] The Arbitral Tribunal recalled that General Assembly resolutions are not formally binding under international law.[130] However, the effect of the factual and legal determination made in such resolutions depended largely on their content and the conditions and context

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[120] *Namibia Case* (n 113) 50 [105]. See also ibid [102].

[121] *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 186 (Judge Weeramantry). See Brownlie (n 96) 15, 692; Sloan (n 105) 23-4.

[122] See e.g. *Namibia Case* (n 113) 31 [52]; Asamoah (n 119) 221-3. Argentina maintains that 'when it comes
to the (exclusive) competence conferred on the General Assembly with regard to decolonization, a context in which its resolutions do not constitute mere recommendations, [they] are necessarily binding in nature', *Report of the Secretary-General* (n 24) 4. Cf Crawford (n 117) 113-4.

[123] Johnson (n 105) 117-8.

[124] See GA Res 73/295 (n 27). See further *Certain* Expenses Case (n 75) 163.

[125] See Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2nd ed, 2009) 218-9.

[126] *Voting Procedure Case* (n 110) 88 (Judge Klaestad).

[127] *Coastal State Rights in the Black Sea Arbitration* (n 46).

[128] Ibid [102]. See also ibid [103].

[129] Ibid [103].

[130] Ibid [172].

of their adoption, as does the weight to be given to such resolutions by an international court or tribunal. It pointed out cases where the ICJ had unequivocally declined to accept decisions reached in General Assembly resolutions.[131] While the Tribunal did not appear to rule out the possibility of General Assembly resolutions having determinative effect it was not bound to 'defer' to them as that would undermine its judicial function.[132]

ITLOS agreed with the Tribunal on the last point that General Assembly Resolution 73/295 could not be deemed as an instruction binding on international courts or tribunals, including ITLOS, as this would challenge their judicial independence.[133] It recognised that General Assembly resolutions are not usually binding but drew attention to the fact that the Tribunal had accepted that much depended on circumstances.[134] In this particular instance ITLOS was evidently prepared to consider Resolution 73/295 as authoritative on the matter. This was because, unlike the Arbitral Tribunal in the *Coastal State Rights in the Black Sea Arbitration*, ITLOS had the benefit of an earlier authoritative judicial determination of the principal issues concerning sovereignty.[135] It noted that, as affirmed in the Resolution, the General Assembly considered the Chagos Archipelago to form an integral part of Mauritius. In deciding how the Chagos Archipelago was to be decolonised it had demanded that the UK terminate its administration within a certain time-limit which the UK had chosen to ignore. It was ITLOS' view that this conduct reinforced its findings that the UK's claim to sovereignty over the Chagos Archipelago was unlawful.[136] Ultimately, ITLOS bestowed on the Resolution a normative effect.

V CONCLUSION

The *Mauritius/Maldives Case* dealt with a number of important topics, all of which are contentious to a greater or lesser degree, and is significant for a number of reasons. It firstly provides another example of ITLOS' preparedness to go to considerable lengths to find grounds to uphold its compulsory jurisdiction. Undoubtedly, this decision will attract negative claims of ITLOS unjustifiably expanding its jurisdiction, as previous

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[131] Ibid [174].

[132] Ibid [174], [176], [177].

[133] *Mauritius/Maldives Case* (n 1) [230].

[134] Ibid [224]-[225].

[135] Ibid [244].

[136] Ibid [227]-[229].

decisions have done.[137] It may rightly be argued that territorial sovereignty disputes do not come within the reach of *UNCLOS,* but ITLOS found that this was not at issue since the status of the Chagos Archipelago had already been decided; ITLOS was simply acknowledging that fact and applying the existing law. This conclusion, in itself, is inevitably contentious, based on the combined effect of an ICJ non-binding opinion, and a UN General Assembly resolution. There does not appear to be anything inappropriate in principle in ITLOS considering the jurisprudence of international court and tribunals as authoritative or compelling or in interpreting UN General Assembly resolutions as having determinative effect since these are established practices, but a question mark hangs over whether ITLOS drew the right conclusions. It is decidedly debatable whether the ICJ in fact stated that sovereignty of the Chagos Archipelago lay with Mauritius and it may therefore have been open to ITLOS to exercise judicial restraint and follow the conclusion in the *Chagos Arbitration* that the sovereignty dispute was still unresolved and that it therefore lacked jurisdiction. ITLOS could have followed the ICJ's approach in the *East Timor Case*. This would have enabled it to condemn the UK's stance, as the ICJ condemned Indonesia, reiterated the applicability of self-determination, as the ICJ did, but applied the *Monetary Gold* principle, as the ICJ did, to decline jurisdiction.

These particular developments signify that British claims to sovereignty over the Chagos Islands should no longer be recognised, reminiscent of the non-recognition of South Africa's claims over Namibia. The prospect of reparations for continuing breaches of international law cannot be discounted, but they are prompting other knock-on effects. The issue of BIOT postage stamps has been mentioned previously. The BIOT has been removed from the UN Special Committee on Decolonization's (C-24) list of non-self-governing territories and UN maps have been amended accordingly.[138] The Food and Agriculture Organization Fishery Country Profile for Mauritius now includes the Chagos Archipelago.[139] The UK's membership of the Indian Ocean Tuna Commission**,** an intergovernmental organisation responsible for the management of tuna and similar species in the Indian Ocean, is being challenged by Mauritius on the grounds that it no longer fulfils the geographical requirements of membership.[140] The European Union has issued a Declaration that reference to the BIOT in the Trade and

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[137] See e.g. Peter Tzeng, 'Jurisdiction and Applicable Law Under UNCLOS' (2016) 126(1) *Yale Law Journal* 242.

[138] See <https://www.un.org/dppa/decolonization/en/nsgt>.

[139] See <http://www.fao.org/fi/oldsite/FCP/en/MUS/profile.htm>.

[140] IOTC Circular, 2021-34, 25 June 2021, https://iotc.org/sites/default/files/documents/2021/06/Circular_2021-34_Communication_from_MauritiusE. pdf.

Cooperation Agreement between it and the UK 'is to be interpreted and implemented in full respect of applicable international law.'[141] Mauritius is also protesting at the UK's application of treaties to BIOT.[142] But Mauritius has raised the stakes by raising its flag on the Chagos Archipelago as concrete manifestation of its sovereignty.[143] The UK's dismissal of the ITLOS judgment is making little impression on the international community as a whole which is aligning itself with the new reality. The UK administration of the Chagos Archipelago is now considered by many as de facto and no longer de jure.

For the UK these latest developments in the Chagos saga constitute a diplomatic, political and legal debacle. It is now faced with two adverse international decisions and a hostile General Assembly.[144] It is left more or less isolated in defying international law and defending the indefensible, colonialism. The longer it resists the more it undermines its international standing. The nationalist bluster, bombast and imperial delusions which lie at the heart of 'Global Britain' cannot conceal the gap that exists between pretension and reality and that the UK's stance on the Chagos is simply alienating international opinion,[145] although defence and security interests continue to bind the US and Australia to it.[146] More broadly, rightly or

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[141] *Union declaration on Chagos Archipelago/British Indian Ocean Territory* [2021] OJ L 192/1.

[142] See e.g. <https://www.icao.int/secretariat/legal/List%20of%20Parties/AP3_EN.pdf>.

[143] BBC News, 'Chagos Islands: Mauritian flag raised on British-controlled islands' *BBC News* (News Article, 15 February 2022) <https://www.bbc.co.uk/news/uk-60378487>.

[144] The ITLOS case now proceeds to the merits, *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) (Order on 3 February 2021)* (International Tribunal for the Law of the Sea, Case No 28).

[145] The UK's continued occupation of the Chagos has been condemned by the African Union, Assembly of the African Union, Decision on Decolonisation of Mauritius, Doc No Assembly/AU/Dec.812(XXXIV), 34th ord sess, 6-7 February 2021. Indications of waning British influence have been highlighted by a Parliamentary Committee, Foreign Affairs Committee, *In the room: the UK's role in multilateral diplomacy* (House of Commons Paper No 199, Session 2021–22) para 22.

[146] Samuel Bashfield, 'Diego Garcia: The costs of defending an Indian Ocean outpost' *The Interpreter* (News Article, December 2019) <https://www.lowyinstitute.org/the-interpreter/diego-garcia-costs-defending-indian-ocean outpost #:~: text= UN%20Resolution%2073%2F295%20forced%20Australia%20to%20publicly%20%E2%80%9Cshow,in%20this%20case%2C%20the%20two%20are%20mutually%20exclusive>.

wrongly, the UK has long been perceived as a staunch advocate of a rules-based international order. The UK's defiance of international legality, and its indifferent attitude to law in general, signals an undesirable message that can only encourage unprincipled regimes.[147]

[147] One of the most egregious examples among many of the British Government's contempt for the law was the Internal Market Bill which the Government admitted was consciously in breach of its international obligations, BBC News, 'Northern Ireland Secretary admits new bill will 'break international law'' *BBC News* (News Article, 8 September 2020) <https://www.bbc.co.uk/news/uk-politics-54073836>. British Government proposals on the detention of refuge seekers have been criticised as incompatible with the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951) 189 UNTS 150 (entered into force 22 April 1954) and other international obligations, Joint Committee on Human Rights, *Legislative Scrutiny: National and Borders Bill (Part 3) – Immigration offences and enforcement* (House of Lords Paper No 112, House of Commons Paper No 885, Session 2021–22) 18-29.