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The Authority of ICJ Advisory Opinions as Precedents: The *Mauritius/Maldives* Case

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Abstract

The role played by precedents in international law is usually addressed with regard to their bearing on other judicial decisions and their contribution to the development of international law. Recently, the International Tribunal for the Law of the Sea ("ITLOS") has offered a novel interpretation of the legal effects of the International Court of Justice's ("ICJ") advisory opinions as precedents. In *Mauritius/Maldives*, the ITLOS rejected two of the Maldives' preliminary objections – based on the existence of a dispute between Mauritius and the United Kingdom over the sovereignty of the Chagos Islands – , arguing that the 2019 ICJ advisory opinion on the separation of the Chagos Archipelago from Mauritius had resolved the dispute in favour of the latter. In light of the ITLOS's decision, the present contribution is aimed to provide some reflections on the authority of ICJ advisory opinions as precedents and on their legal effects in international law.

Keywords

formal and normative Authority – ICJ advisory opinions – precedents – Chagos Islands – *Mauritius/Maldives* case – substantive *res judicata*

1 Introduction

The role of "judicial decisions"[1] as precedents is a classic topic of international law.[2] Although international practitioners (almost)[3] unanimously agree that the principle of *stare decisis* does not apply in international law,[4] there is no denying that precedents oftentimes exert an influence that goes far beyond the case in which they are decided. On the contrary, as one author puts it, "the invocation of international decisions as precedents is ubiquitous. […] Across international law, practitioners invoke [the precedent's apparent authority] and tribunals apply it".[5]

The role played by precedents in international law is usually addressed with regard to two main – and closely related – issues, that is, their bearing on other judicial decisions by the same and/or different international courts and tribunals,[6] and their contribution to the development of international law.[7]

Recently, however, the International Tribunal for the Law of the Sea ("ITLOS") has offered a novel interpretation of the legal effects of the International Court of Justice ("ICJ") advisory opinions as precedents. In the *Mauritius/Maldives*

1 The expression is understood here within the meaning of Art. 38 (1)(d) of the ICJ Statute, that is to say "without making any distinction between […] judgments and […] advisory opinions which are clearly placed on an equal footing even though the latter do not qualify as 'decisions' properly speaking", PELLET and MÜLLER, "Article 38", in ZIMMERMANN et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed., Oxford, 2019, p. 819 ff., p. 946, para. 309.

2 See, for instance, COHEN, "Theorizing Precedent in International Law", in BIANCHI, PEAT and WINDSOR (eds.), *Interpretation in International Law*, Oxford, 2015, p. 268 ff.; ANDENAS and LEISS, "The Systemic Relevance of 'Judicial Decisions' in Article 38 of the ICJ Statute", Heidelberg Journal of International Law, 2017, p. 907 ff.; CANNIZZARO (ed.), *Decisions of the ICJ as Sources of International Law?*, Roma, 2018 and MBENGUE, "Precedent", in D'ASPREMONT and SINGH (eds.), *Concepts for International Law: Contribution to Disciplinary Thought*, Cheltenham, Northampton, 2019, p. 708 ff.

3 See JENNINGS, "The Judiciary, International and National, and the Development of International Law", International and Comparative Law Quarterly, 1996, p. 1 ff., pp. 3–4.

4 ACQUAVIVA and POCAR, "Stare Decisis", in PETERS (ed.), *Max Planck Encyclopaedia of Public International Law*, online ed., Oxford, 2022.

5 COHEN, *cit. supra* note 2, p. 269.

6 See, for instance, SHAHABUDDEEN, "Consistency in Holdings by International Tribunals", in ANDO, MCWINNEY and WOLFRUM (eds.), *Liber Amicorum Judge Shigeru Oda*, Den Haag, 2002, Vol. I, p. 633 ff.

7 See, for instance, BOSCHIERO et al. (eds.), *International Courts and the Development of International Law*, Den Haag, 2013. With special reference to the ICJ see, for instance, LAUTERPACHT, *The Development of International Law by the International Court*, re-printed, Cambridge, 1982 and TAMS and SLOAN (eds.), *The Development of International Law by the International Court of Justice*, Oxford, 2013.

case,[8] the ITLOS rejected two of the Maldives' preliminary objections – which were based on the existence of a dispute between Mauritius and the United Kingdom (UK) over the sovereignty of the Chagos Islands – arguing that the 2019 ICJ advisory opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius (*Chagos*)[9] had resolved the dispute in favour of the latter.[10]

This decision has raised some perplexities.[11] Indeed, it provides an anomalous perspective on the role of ICJ advisory opinions as precedents vested with substantive *res judicata* effects. The ITLOS justified this anomaly by repeatedly referring to the "authority" of such advisory opinions.[12] Still, the decision does not define this concept, nor does it explain why ICJ advisory opinions, however authoritative, can produce legal effects analogous to that of binding decisions, even when one of the parties directly involved expressed its opposition to the giving of the advisory opinion,[13] and before a different jurisdiction.

In light of the ITLOS's decision, the goal of the present contribution is to provide some reflections on the legal effects of the authority of ICJ advisory opinions as precedents and, in particular, on the possibility that the latter produce legal effects analogous to that of substantive *res judicata*, thereby settling an underlying dispute between two or more States. The contribution will be divided into three parts: the first examines the concept of "authority" of judicial

8 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean* (*Mauritius/Maldives*), Judgment of 28 January 2021.

9 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (*Chagos*), Advisory Opinion of 25 February 2019, ICJ Reports, 2019, p. 95 ff.

10 *Mauritius/Maldives* case, *cit. supra* note 8, paras. 246–251.

11 THIN, "The Curious Case of the 'Legal Effect' of ICJ Advisory Opinions in the Mauritius/Maldives Maritime Boundary Dispute", EJILTalk!, 5 February 2021, available at: <https://www.ejiltalk.org/the-curious-case-of-the-legal-effect-of-icj-advisory-opinions-in-the-mauritius-maldives-maritime-boundary-dispute/>; ROEBEN and JANKOVIC, "Unpacking Sovereignty and Self-determination in ITLOS and ICC: A Bundle of Rights?", EJIL Talk!, 4 March 2021, available at: <https://www.ejiltalk.org/unpacking-sovereignty-and-self-determination-in-itlos-and-the-icc-a-bundle-of-rights/>; BURRI and TRINIDAD, "Introductory Note to Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean, Preliminary Objections (ITLOS)", International Legal Materials, 2021, p. 1 ff. and GAVER, "Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives). Case No. 28. Judgment", American Journal of International Law, 2021, p. 521 ff. See also *Mauritius/Maldives* case, *cit. supra* note 8, Separate and Dissenting Opinion of Judge *ad hoc* Oxman.

12 *Mauritius/Maldives* case, *cit. supra* note 8, paras. 202–203, 244 and 246.

13 As it was the case in *Chagos*, see Written Statement by the United Kingdom of Great Britain and Northern Ireland of 15 February 2018, p. 1 ff., especially p. 10 ff.

decisions in international law as composed of formal authority and normative authority and, within the latter, it distinguishes between *stricto sensu* authority, persuasive authority and semantic authority. The second part employs these categories to describe the legal effects of ICJ advisory opinions as precedents. The third part illustrates the *Mauritius/Maldives* case and provides an in-depth analysis of the relationship between *Chagos* and the ITLOS decision. This analysis will be conducted taking account of the concepts of formal and normative authority of ICJ advisory opinions in order to flesh out the reasons that led the ITLOS to treat the resolution of the dispute between Mauritius and the UK as *fait accompli*. It will be argued that this solution, although formally imperfect, reveals a pragmatic – and ultimately shareable – approach to the case at hand.

Finally, some concluding remarks on the broader implications of the ITLOS's decision will be presented. It will be argued that this decision might have controversial consequences on the proper exercise of the ICJ advisory function and that it could mark the beginning of a new era where international courts and tribunals recognise ICJ advisory opinions as having the (normative) authority to resolve a dispute.

2 The Authority of Judicial Decisions in International Law

2.1 *Formal Authority and Normative Authority*

The concept of "authority" is complex.[14] In general, it denotes a relationship in which a subject, in the absence of coercion by means of force, claims the power to impose its will on one or other subjects.[15]

International courts and tribunals exercise (and cast) their authority through the adoption of judicial decisions. International scholarship has explored and categorised such authority in different ways,[16] but for the purposes of this

14 On the concept of "authority", see, among others, ÇALI, "Authority", in D'ASPREMONT and SINGH (eds.), *Concepts for International Law: Contributions to Disciplinary Thoughts*, Cheltenham, Northampton, 2019, p. 40 ff.; SHAPIRO, "Authority", in COLEMAN, HIMMA and SHAPIRO (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford, 2004, p. 382 ff. and RAZ (ed.), *Authority*, New York, 1990.

15 ÇALI, *cit. supra* note 14, p. 41. See also the definition of "public authority" in VON BOGDANDY and VENZKE as the "capacity, based on legal acts, to impact others in the exercise of their freedom, be it legally, or only de facto", *In Whose Name? A Public Law Theory of International Adjudication*, Oxford, 2014, p. 112.

16 ALTER, HELFER and MADSEN, "International Court Authority in a Complex World", in ID. (eds.), *International Court Authority*, Oxford, 2018, p. 3 ff., p. 5. Indeed, the authors distinguish five types of approaches or models for studying the authority of international courts and tribunals.

contribution it seems pertinent to focus on the two main typologies of authority which, complementing each other, define the authority of judicial decisions in international law, that is: "formal" and "normative" authority.

Formal (*de jure*) authority is the authority that international courts and tribunals claim in accordance with a legal norm.[17] The ICJ Statute and the United Nations (UN) Charter,[18] for example, grant the ICJ the authority both to "decide, in accordance with international law, such disputes as are submitted to it"[19] in a "binding",[20] "final" and non-appealable manner,[21] and to "give an advisory opinion on any legal question at the request of whatever body may be authorized [...] to make such a request".[22]

Normative (*de facto*) authority, on the other hand, is the authority that international courts and tribunals claim irrespective of the existence of a legal norm.[23] This authority is explained by considering the concept of *legitimacy*, i.e., to recall Thomas M. Franck's definition, the capacity of a judicial decision to "exert a powerful pull toward compliance on those to whom it is addressed".[24] Normative authority is thus primarily a matter of *perception*. However, it has the concrete potential to complement formal authority. This means that the legitimacy of a judicial decision is likely to increase its legal effects.[25]

This is evident precisely in relation to the role of judicial decisions as precedents in international law.[26] In fact, it is the normative authority of judicial decisions – that is, their perceived legitimacy – that determines the subject's acceptance/conviction that, irrespective of the existence of a specific obligation to do so (formal authority), it must act in accordance with what has been established therein.

17 *Ibid.*, p. 6.

18 UN Charter, adopted 26 June 1945, entered into force 24 October 1945.

19 ICJ Statute, Art. 38(1).

20 ICJ Statute, Art. 59. And see UN Charter, Art. 94(1).

21 ICJ Statute, Art. 60.

22 ICJ Statute, Art. 65. See also UN Charter, Art. 96.

23 ALTER, HELFER and MADSEN, "How Context Shapes the Authority of International Courts", in ID. (eds.), *International Court Authority,* Oxford, 2018, p. 24 ff., p. 28.

24 FRANCK, *The Power of Legitimacy among Nations*, Oxford, 1990, p. 25.

25 The noun "auctoritas" derives from the verb "*augēre*", i.e., "to increase" or "to augment", see ARENDT, "Che cos'è l'autorità?", in ID., *Tra passato e futuro*, 2nd ed., Milano, 2017, p. 157 ff., p. 167.

26 On this point see HERNÁNDEZ, *The International Court of Justice and the Judicial Function*, Oxford, 2014, p. 180 ff. and VON BOGDANDY and VENZKE, "The Spell of Precedents: Lawmaking by International Courts and Tribunals", in ROMANO, ALTER and SHANY (eds.), *The Oxford Handbook of International Adjudication*, Oxford, 2013, p. 504 ff.

To better understand this phenomenon, it is necessary to further break down the category of normative authority into those factors that, at the same time, compose it and justify the perception of legitimacy of judicial decisions, or, in other words, explain how the "compliance pull" of precedents works in international law. These factors coincide with two subtypes of normative authority: the *stricto sensu* authority of international courts and tribunals and the persuasive authority of judicial decisions. To these one may also add the analytical category of semantic authority.

2.2 *Stricto Sensu and Persuasive Authority*

"*Stricto sensu* authority" (authoritativeness) is a quality intrinsic to the subject (*auctor*).[27] It is here called "*stricto sensu*" because it is often understood as authority *tout court.*[28] In this sense, and to recall the lexicon of H. L. A. Hart, this type of authority is content-independent,[29] since the legitimacy of the judicial decision depends exclusively on the fact that it comes from a particularly authoritative subject.

The ICJ certainly enjoys *stricto sensu* authority. Its authority is constantly remarked by scholars,[30] other international courts and tribunals[31] and, more generally, international institutions and practitioners.[32] This authority is based on a number of factors: the ICJ is "the principal judicial organ of the United Nations"[33] and, as such, it can rightly be considered the most prestigious international judicial body;[34] it is also the only international judicial body with

27 ALLOTT, "The Rule of Law", in D'ASPREMONT and SINGH (eds.), *Concepts for International Law: Contribution to Disciplinary Thought*, Cheltenham, Northampton, 2019, p. 806 ff., p. 806.

28 See VENZKE, "Between Power and Persuasion: On International Institutions' Authority in Making the Law", Transnational Legal Theory, 2013, p. 354 ff., p. 362. HERNÁNDEZ defines the *stricto sensu* authority of precedents as "normative persuasiveness", *cit. supra* note 26, p. 183.

29 HART, *Essays on Bentham*, Oxford, 1982, p. 254.

30 PELLET and MÜLLER, *cit. supra* note 1, p. 948, para. 316.

31 For instance, in *Mauritius/Maldives* case, *cit. supra* note 8, paras. 202–203, 244 and 246. See other cases in MILLER, "An International Jurisprudence? The Operation of Precedents Across International Tribunals", Leiden Journal of International Law, 2002, p. 492 ff.

32 See PALCHETTI, "The Authority of the Decisions of International Judicial or Quasi-judicial Bodies", in CANNIZZARO (ed.), *Decisions of the ICJ as Sources of International Law?*, Roma, 2018, p. 107 ff., pp. 107–108.

33 UN Charter, Art. 92.

34 PELLET and MÜLLER, *cit. supra* note 1, p. 948, para. 316. It is however worth noting that, "whatever the considerable prestige of the ICJ and its moral authority, both fluctuating according to its case law, the Court is far from being recognized as an international supreme court", DUPUY, "Competition among International Tribunals and the Authority of the International Court of Justice", in FASTENRATH et al. (eds.), *From Bilateralism to Community Interests: Essays in Honour of Bruno Simma*, Oxford, 2011, p. 862 ff., p. 864.

general competence[35] and, since the establishment of the Permanent Court of International Justice ("PCIJ") nearly a century ago, it has produced quantitatively and qualitatively outstanding jurisprudence;[36] furthermore, the ICJ is composed of fifteen "independent judges, elected [...] from among persons of high moral character and [...] jurisconsults of recognized competence in international law"[37] and this composition ensures "the representation of the main forms of civilization and of the principal legal systems of the world";[38] finally, the ICJ decision-making procedure tends to be regarded as the standard-reference when it comes to addressing procedural issues not specifically provided for, in compliance with the general principles of equality of arms and proper administration of justice,[39] as other international courts and tribunals often quote ICJ decisions in this respect.[40]

The second type of authority is "persuasive authority" (persuasiveness). It depends on the degree to which the judicial decision is able to convince the widest possible number of international actors of the correctness of what it establishes. Persuasive authority, to paraphrase Hart again, is thus content-dependent, since "between the reason and the action there is a connection of content".[41]

35 ICJ Statute, Arts. 36(1) and 65(1).

36 PELLET and MÜLLER, *cit. supra* note 1, p. 948, para. 316.

37 ICJ Statute, Art. 2.

38 ICJ Statute, Art. 9.

39 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Judgment of 27 June 1986, ICJ Reports, 1986, p. 14 ff., para. 31. It is also worth noting that, pursuant to Art. 68 of the 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". Despite the implicit flexibility of this provision, it is clear that the ICJ will be inclined to apply the procedural rules on litigation by analogy when faced with a request for an advisory opinion on a legal issue underlying an international dispute, see KOLB, *The International Court of Justice*, Cheltenham, Northampton, 2014, p. 1103. See also *Interpretation of Peace Treaties*, Advisory Opinion of 30 March 1950, ICJ Reports, 1950, p. 65 ff. (*Peace Treaties*), p. 72.

40 See, for instance, the reference made by the World Trade Organisation Appellate Body and the Inter-American Court of Human Rights to the ICJ practice in relation to questions concerning the standards of proof in Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 25 April 1997, WT/DS33/AB/R, p. 14 and Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, Judgment of 29 July 1988, para. 127, respectively. For further examples see RUIZ FABRI and PAINE, "The Procedural Cross-Fertilization Pull", in GIORGETTI and POLLACK (eds.), *Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals*, Cambridge, 2022, p. 39 ff.

41 HART, *cit. supra* note 29, p. 255. HERNÁNDEZ defines the persuasive authority of precedents as "rational persuasiveness", *cit. supra* note 26, p. 183.

Some scholars have criticized the possibility of qualifying persuasiveness as a form of authority and have questioned the very idea of persuasive authority.[42] This is a corollary of a narrow conception of authority as (only) *stricto sensu*, whereby "authority needs to persist in the absence of agreement in substance[, o]therwise it would amount not to authority but to persuasion".[43] But, regardless of the definition of authority chosen, *stricto sensu* authority in itself cannot explain the fact that "there are awards and awards, some destined to become brighter beacon, others to flicker and die near-instant deaths".[44] Persuasiveness therefore constitutes a source of *lato sensu* authority, if only because it increases the normative authority of the decision.[45]

The factors that bestow persuasive authority on a judicial decision are various. Two general distinctions can be drawn here. The first is between *per relationem* authority and autonomous persuasive authority. The second distinction, within the latter, is between authority of form and authority of content.

"Persuasive authority *per relationem*" may be summarised in the idea that "consistency is the essence of judicial reasoning".[46] The international judicial body will tend to support its conclusions (also) on the basis of one or more references to "subsidiary means for the determination of rules of law", i.e. "the teachings of the most highly qualified publicists" or, more frequently, other judicial decisions.[47] This gives the judicial decision the legitimacy of consistency and predictability in the application of law.[48] The ICJ, for example, is

42 See VENZKE, *cit. supra* note 28, p. 362.

43 *Ibid*. See also ARENDT, *cit. supra* note 25, p. 132.

44 PAULSSON, "International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law", in VAN DEN BERG (ed.), *International Arbitration 2006: Back to Basic?*, Den Haag, 2007, p. 878 ff., p. 881.

45 "The more persuasive the judgment is, the more the authority of the judicial organ will be reinforced, and its credibility and prestige enhanced", BIANCHI, "International Adjudication: Rhetoric and Storytelling", Journal of International Dispute Settlement, 2018, p. 28 ff., p. 43. VENZKE himself recognizes that "international actors can further thrive on the appeal of the outcome of their decisions, either because it is legally convincing or because it resonates with what is right and just", *cit. supra* note 28, p. 364.

46 *Legality of the Use of Force* (*Serbia and Montenegro v. Belgium*), Judgment of 15 December 2004, Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, ICJ Reports, 2004, p. 279 ff., para. 3.

47 ICJ Statute, Art. 38(1)(d).

48 *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*), Judgment of 3 June 1985, ICJ Reports, 1985, p. 13 ff., para. 45. And see VENZKE, "International Courts' De Facto Authority and Its Justification", in ALTER, HELFER and MADSEN (eds.), *International Court Authority,* Oxford, 2018, p. 391 ff., p. 396 and HERNÁNDEZ, *cit. supra* note 26, p. 159.

used to refer to its own case law to support even those aspects of the decision that are not particularly controversial.[49]

"Autonomous persuasive authority", on the other hand, derives from the persuasiveness of the judicial decision itself and is composed of the authority of form and the authority of content. The "authority of form" is based on the argumentative techniques and styles used to draft the decision. This topic is beyond the scope of this contribution.[50] Suffice it to emphasise here that, since form and content are inextricably linked, the rhetorical manner in which the text is written constitutes a crucial moment in defining the legal effects of the decision. In this sense, a decision that lacks a logical structure, contains inconsistencies, gaps or contradictions, or employs obscure, ambiguous or fragmented language is likely to be perceived as less authoritative.[51]

The "authority of content" concerns the interpretation and application of international law. This topic is also beyond the scope of this contribution.[52] It is clear, however, that the judge will have to lay out a sound reasoning in order to increase the normative authority of his/her decision. As has been observed, "a decision is not binding, valid or legitimate merely because of the authority whence it originates; rather, a decision derives authority from the fact that it applies rules or principles that can be defended".[53]

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49 See, among others, the twenty-eight precedents recalled in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports, 2004, p. 136 ff. (*Wall*), paras. 38–45. However, it is questionable whether this practice really increases the persuasiveness of the decision, see PELLET and MÜLLER, *cit. supra* note 1, p. 946, para. 310.

50 For further discussion see GASBARRI, "Courtspeak: A Method to Read the Argumentative Structure Employed by the International Court of Justice in its Judgments and Advisory Opinions", in RUIZ FABRI et al. (eds.), *International Judicial Legitimacy: New Voices and Approaches*, Baden-Baden, 2020, p. 91 ff.; D'ASPREMONT, "Wording in International Law", Leiden Journal of International Law, 2012, p. 575 ff. and NAFZINGER, "Some Remarks on the Writing Style of the International Court of Justice", in BUERGENTHAL (ed.), *Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn*, Kehl am Rhein, 1984, p. 325 ff.

51 For some examples, see BIANCHI, *cit. supra* note 45, pp. 34–36. For an illustration of the most frequent criticism of the drafting techniques of ICJ decisions, see HERNÁNDEZ, *cit. supra* note 26, p. 108.

52 See, as *locus classicus*, LAUTERPACHT, *cit. supra* note 7. See also FORLATI, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body?*, Berlin, 2014.

53 HERNÁNDEZ, *cit. supra* note 26, p. 99. It is worth noting that the authority of the content of a judicial decision does not depend so much on the correct application as on a convincing application of international law. In this sense, an ICJ decision that does not fully comply with the applicable law may nevertheless enjoy normative authority, triggering an evolution of the *lex lata*. In this context, an application of the rule consonant with the international community's emerging interests and values can boost the normative authority of the judicial decision, see CANNIZZARO, "Customary International Law on

2.3 *Semantic Authority*

The third type of authority is "semantic authority". This concept has been elaborated by Armin von Bogdandy and Ingo Venzke.[54] In particular, the latter defines semantic authority as "an actor's capacity to find acceptance for its interpretative claims or to establish its own statements about the law as content-laden reference points for legal discourse that others can hardly escape".[55] The use of this concept is helpful in order to "elucidate whose voice is particularly influential in international legal discourse".[56]

The reference to the idea of "voices" in the "international legal discourse" is significant. It is corollary of a conception of the rule-forming process as a "communicative practice" that manifests itself in a constant "semantic struggle" between the different actors of international law.[57]

The "semantic struggle" is the struggle to acquire the legitimacy to impose one's own interpretation/application of the rules, or of a given legal reality, on one or other subjects;[58] moreover, it is a struggle for regulatory authority, since it also ends up shaping the content of the rules.[59]

Semantic authority does not coincide with *stricto sensu* authority. In fact, *stricto sensu* authority depends on the qualities of the subject, while semantic

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the Use of Force: Inductive Approach vs. Value-Oriented Approach", in CANNIZZARO and PALCHETTI (eds.), *Customary International Law on the Use of Force*, Leiden, Boston, 2005, p. 255 ff.

54 VON BOGDANDY and VENZKE, *cit. supra* note 15, p. 119.

55 VENZKE, "Semantic Authority", in D'ASPREMONT and SINGH (eds.), *Concepts for International Law: Contribution to Disciplinary Thought*, Cheltenham, Northampton, 2019, p. 815 ff., p. 815.

56 *Ibid.* It is worth noting that, apart from the coining of a specific term – such as "semantic authority" – this idea is certainly not new, especially when it comes to analysing the exercise of the judicial function in a legal system. In this regard, Josef Esser's *Wertungsjurisprudenz* comes to mind. In his seminal *Ermeneutica e giurisprudenza*, Milano, 1984, ZACCARIA expounds Esser's theory in the following terms: "Precedents have [...] an argumentative weight, they signal the reasonableness and social adequacy of the arguments which they employ. The chain of interpretations [...] performs a ceaseless mediating role in the transition of the text to the actual norm, highlighting a constant understanding of the norm in the light of practice and in an effort to respond adequately to the expectations of social consciousness. This is why 'case law' (*orientamento giurisprudenziale*) represents an indispensable point of reference for the interpretation of the norm: because, by conveying evaluative relations previously thought of by courts and tribunals, precedents guide the interpreter between theory and practice and emerge as a decisive means of knowledge between the 'law' and 'decisions'", pp. 134–135 (author's translation). (The author is grateful to Prof. Palombino for this valuable suggestion).

57 VENZKE, *cit. supra* note 55, pp. 815 and 817.

58 *Ibid.*

59 *Ibid.*, p. 816. And see HERNÁNDEZ, *cit. supra* note 26, p. 185 ff.

authority grows and diminishes in a continuous encounter/clash of views on the legitimacy of an international court or tribunal. Nor does semantic authority coincide with persuasive authority. Venzke points out in this regard that "an actor enjoys semantic authority if it has the capacity to find acceptance for its statements about international law *even if others do not agree in substance*".[60] This position is consistent with a narrow conception of authority as necessarily content-independent.[61]

On the other hand, it is clear that both *stricto sensu* authority and persuasive authority increase semantic authority: the greater the authoritativeness of the judicial body and the persuasiveness of the decision, the greater the chances that that decision will become a point of reference in the "international legal discourse".[62]

3 The Authority of ICJ Advisory Opinions

3.1 *Formal Authority*

The analysis of the authority of judicial decisions in international law provides the conceptual tools to better understand the legal effects of ICJ advisory opinions as precedents.

ICJ advisory opinions are "judicial statements on legal questions submitted to the Court by organs of the UN and other international legal bodies so authorized"[63] and, as all judicial decisions, their overall authority results from the combined effects of their formal and normative authority.

As to formal authority, advisory opinions do not constitute a "decision" within the meaning of Articles 59 of the ICJ Statute[64] and 94(1) of the UN

60 VENZKE, *cit. supra* note 55, p. 819 (emphasis added).

61 See *supra* Subsection 2.2.

62 One might also wonder whether semantic authority constitutes a subtype of normative authority or instead ends up coinciding with the concept of normative authority itself. It is believed that the former offers a more nuanced perspective of the dynamics behind the legal effects of judicial decisions in international law. In particular, normative authority, *per se*, does not adequately convey the idea that the authoritative decision becomes an inescapable point of reference of the "international legal discourse" on a given subject. Thus, an often-overlooked effect of precedents emerges: namely, that they claim the power to impose themselves in the concrete case *regardless* of the will of the judicial body or the parties involved.

63 OELLERS-FRAHM, "Article 96", in SIMMA et al. (eds.), *The Charter of the United Nations: A Commentary*, 3rd ed., Oxford, 2012, Vol. II, p. 1976.

64 "The decision of the Court has no binding force except between the parties and in respect of that particular case".

Charter,[65] "even where the Request for an Opinion relates to a legal question actually pending between States".[66] As explained by the ICJ in *Peace Treaties*: "The consent of States, parties to the dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings, [where] the Court's reply is only of an advisory character: as such, it has no binding force".[67]

Instead, according to Article 38(1)(d) of the ICJ Statute, advisory opinions constitute "subsidiary means for the determination of rules of law", that is to say "material sources having a special degree of authority".[68] The full extent of this may be better understood in the light of the normative authority of ICJ advisory opinions as precedents that bear on the determination of future decisions and contribute to the development of international law.[69]

Another formal effect of an advisory opinion is that the requesting organ "must duly take account of it".[70] This formula translates into the obligation, following from both customary UN law and a conventionally oriented interpretation of Article 2(2) of the UN Charter,[71] according to which, "if the requesting organ must find a purely legal solution to the dispute, or desire to do so, it will [have] to accept as authoritative the conclusion expressed in the opinion".[72] This effect is also further complemented and enhanced by the normative authority of advisory opinions as precedents.

3.2 *Normative Authority*

As regards normative authority – which, as said, should be considered as composed of the ICJ *stricto sensu* authority and of both the persuasive and semantic authority of the advisory opinion itself – ICJ advisory opinions legitimise the adoption of any conduct in accordance with them.[73]

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65 "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party".

66 *Peace Treaties* case, *cit. supra* note 39, p. 71.

67 *Ibid.* Specific legal instruments may provide for the advisory opinion to have binding effects, see AGO, "'Binding' Advisory Opinions of the International Court of Justice", American Journal of International Law, 1991, p. 439 ff.

68 THIRLWAY, *The Sources of International Law*, 2nd ed., Oxford, 2014, p. 131.

69 See *infra* Subsection 3.2.

70 KOLB, *cit. supra* note 39, p. 1097.

71 *Ibid.* Art. 2(2) of the UN Charter establishes that "all Members [...] shall fulfil in good faith the obligations assumed by them in accordance with the present Charter".

72 Quoted and translated in *ibid.* This does not, however, limit the *political discretion* of the requesting body to resolve the issue in a different manner, *ibid.*, p. 1098.

73 OELLERS-FRAHM, *cit. supra* note 63, p. 1987.

This legitimation leads to the production of different effects depending on which "legal question"[74] is the subject of the request. In theory, the ICJ can render an advisory opinion on "any legal question".[75] In practice, it is useful to distinguish three types of legal questions:[76] legal questions centred on the interpretation/application of conventional and/or customary rules of international law;[77] those relating to the interpretation/application of UN law;[78] and those underlying a dispute between two or more States or other entities.[79]

Advisory opinions on the first type of legal question enjoy an obvious normative authority. On the one hand, as precedents they represent a yardstick that is difficult to circumvent in the determination of future questions/disputes.[80] As emphasised by the ICJ in *Croatia v Serbia*:

> [The Court] will not depart from its settled jurisprudence unless it finds very particular reasons to do so. [W]hile '[t]here can be no question of holding [a State] to decisions reached by the Court in previous cases' which do not have binding effect for that State, in such circumstances

74 By "legal question" is understood, in a very general way, "a request […] to examine a situation by reference to international law", *Chagos* case, *cit. supra* note 9, para. 58.

75 ICJ Statute, Art. 65(1) and UN Charter, Art. 96(1).

76 This distinction is borrowed from FROWEIN and OELLERS-FRAHM, "Article 65", in ZIMMERMANN et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 2nd ed., Oxford, 2012, Vol. II, p. 1065 ff., p. 1628, para. 64.

77 Among others, *Reservations to the Convention on Genocide*, Advisory Opinion of 18 May 1951, ICJ Reports, 1951, p. 15 ff. (*Convention on Genocide*) and *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports, 1996, p. 226 ff. (*Nuclear Weapons*).

78 Among others, *Admission of a State to the United Nations* (*Charter, Art. 4*), Advisory Opinion of 28 May 1948, ICJ Reports, 1948, p. 57 ff. (*Admission of a State*) and *Competence of Assembly regarding Admission to the United Nations*, Advisory Opinion of 3 March 1950, ICJ Reports, 1950, p. 4 ff. (*Competence of Assembly*).

79 Among others, *Wall* case, *cit. supra* note 49 and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, ICJ Reports, 2010, p. 403 ff. (*Kosovo*). However, this distinction is merely illustrative and several advisory opinions deal with more than one type of legal question at a time, among others, *Reparations for Injuries Suffered in the Service for the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports, 1949, p. 174 ff. (*Reparations for Injuries*) and *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*), Advisory Opinion of 21 June 1971, ICJ Reports, 1971, p. 16 ff. (*Namibia*).

80 See *supra* Section 2.

> '[t]he real question is whether [...] there is cause not to follow the reasoning and conclusions of earlier cases'.[81]

On the other hand, while not constituting a source of production, advisory opinions contribute to the development of international law.[82] For instance, in *Convention on Genocide* the ICJ introduced the innovative criterion of the conformity with the object and purpose of the treaty in order to scrutinise the legitimacy of making reservations to it.[83] This criterion quickly became the generally accepted one and made its way through the work of the International Law Commission on the law of treaties,[84] and the 1969 Vienna Convention on the Law of Treaties.[85]

Another example is *Nuclear Weapons*, where the ICJ found that "the protection of the International Covenant on Civil and Political Rights does not cease in times of war"[86] and that "the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law".[87]

Advisory opinions on the second type of legal question, that is, those relating to the interpretation/application of UN law, are a subset of those on the first. They nevertheless produce substantially binding effects vis-à-vis the requesting organ and other UN bodies.[88] For instance, in *Admission of a State* and in the ensuing *Competence of the Assembly*, the ICJ clarified that the conditions for the admission of States to the UN laid out under Article 4(2) of the UN Charter[89] are exhaustive – in the sense that a UN Member is not legally

81 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*), Judgment of 18 November 2008, ICJ Reports, 2008, p. 412 ff., para. 53 quoting *Land and Maritime Boundary between Cameroon and Nigeria*, Judgment of 11 June 1998, ICJ Reports, 1998, p. 275 ff., para. 28. The ICJ is obviously referring to its decisions in general, not only to advisory opinions.

82 On the contribution of ICJ advisory opinions to the development of international law, see MAYR and SINGER, "Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law", Heidelberg Journal of International Law, 2016, p. 425 ff.

83 *Convention on Genocide* case, *cit. supra* note 77, pp. 29–30.

84 See International Law Commission, Draft Articles on the Law of Treaties with commentaries, 1966.

85 Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, Art. 19(c).

86 *Nuclear Weapons* case, *cit. supra* note 77, para. 25.

87 *Ibid.*, para. 29.

88 KOLB, *cit. supra* note 39, p. 1098.

89 "The admission of any such State to membership in the United Nations will be effected by a decision of the General Assembly upon recommendation of the Security Council".

entitled to make admission dependent on conditions not expressly provided for therein – [90] and that the lack of the Security Council's ("SC") recommendation cannot be interpreted as representing an "unfavourable recommendation".[91]

Again, in *Reparation for Injuries*, the ICJ famously established that the UN, as an international organisation endowed with functional legal personality, enjoys the implied power of acting in diplomatic protection in favour of its officials,[92] also against those States which are not parties to it.[93]

Advisory opinions on the third type of legal question, that is, those underlying a dispute between two or more States or other entities, are the most problematic. An advisory opinion can undoubtedly deal with a legal question underlying an international dispute. This is confirmed by the ICJ Rules of Court,[94] the ICJ own case law[95] and international scholarship.[96] However, this circumstance risks contradicting the fundamental principle of consensual jurisdiction in international law.[97] In this regard, the ICJ qualifies the absence of consent of one of the parties to the dispute as a potential "compelling reason" for choosing not to answer the legal question in order to protect its judicial integrity.[98]

This could be the case if the legal question has a markedly bilateral character and the request for an advisory opinion embodies a stratagem to circumvent the principle of consensual jurisdiction.[99] Conversely, the ICJ will respond to the issues raised by the request whenever the legal question can be located in a broader frame of reference which presents some trait of multilateralism – such as, for example, a legal question pertaining to a dispute threatening international peace and security or the violation of rules *erga omnes* (*partes*) – [100]and

90 *Admission of a State* case, *cit. supra* note 78, pp. 61–62.
91 *Competence of the Assembly* case, *cit. supra* note 78, p. 9.
92 *Reparations for Injuries* case, *cit. supra* note 79, pp. 178–180 and 182–184.
93 *Ibid.*, p. 185.
94 ICJ Rules of Court (1978), Art. 102(3).
95 See *Namibia* case, *cit. supra* note 79, para. 34 and *Chagos* case, *cit. supra* note 9, para. 89.
96 See D'ARGENT, "Article 65", in ZIMMERMANN et al. (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed., Oxford, 2019, p. 1787 ff., p. 1798. See also CRESPI REGHIZZI, "The International Court of Justice's Advisory Jurisdiction, Dispute Settlement and State Consent: An Historical Perspective", Rivista di diritto internazionale, 2021, p. 139 ff.
97 See HAMBRO, "The Authority of the Advisory Opinions of the International Court of Justice", International and Comparative Law Quarterly, 1954, p. 2 ff., p. 11.
98 See *Kosovo* case, *cit. supra* note 79, para. 30 and *Chagos* case, *cit. supra* note 9, para. 65.
99 KOLB, *cit. supra* note 39, p. 1073.
100 D'ARGENT, *cit. supra* note 96, p. 1807.

from which those issues are inseparable.[101] In such cases, "the common interest [...] overrides any bilateral concern, so that the circumvention argument should fail".[102]

This approach allows the ICJ to influence the legal and political development of a dispute independently of the consent of the parties involved. After all, by answering the legal question, the ICJ will inevitably also tend to "rule" on the merits of the relevant dispute.[103] The advisory opinion will thus enjoy a normative authority with uncertain legal effects.

First, if the ICJ finds that a State is to be held responsible for a violation of international law, the advisory opinion will legitimise the adoption of consistent measures. In *Namibia*, for instance, the ICJ, having confirmed that South Africa was in continuing breach of SC Resolution 276 (1970), enjoined it to withdraw its administration from Namibia and set out the legal consequences of its finding for third States, namely that they should recognise the illegality and invalidity of South Africa's presence in Namibia and abstain from sending diplomatic missions or consular agents there and/or suspend their economic or other relationships with South Africa concerning Namibia.[104]

Similarly, in *Chagos*, having found that the decolonization of Mauritius has not been conducted in compliance with the principle of self-determination, the ICJ requested the UK to immediately put an end to its administration of the Chagos Islands and called third States to co-operate to achieve this end.[105] In *Wall*, the ICJ also noted that Israel was under an obligation to make reparation for the damages arising from the unlawful construction of the wall in the Occupied Palestinian Territory.[106] The fact that, in these cases, the ICJ qualified the violation as of *erga omnes* in nature,[107] would also legitimise the adoption of countermeasures/lawful measures by third States against the wrongdoer.[108]

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101 See *Western Sahara*, Advisory Opinion of 16 October 1975, ICJ Reports, 1975, p. 12 ff., para. 38, *Wall* case, *cit. supra* note 49, para. 50 and *Chagos*, case, *cit. supra* note 9, para. 88.

102 D'ARGENT, *cit. supra* note 96, p. 1807.

103 As HAMBRO notes, "if the Court is asked to give an Advisory Opinion, either about an entire conflict between two States or on the legal issues at stake in such a conflict, the case will in very many respects be like a contentious case", *cit. supra* note 97, p. 7.

104 *Namibia* case, *cit. supra* note 79, paras. 119 and 123–124.

105 *Chagos* case, *cit. supra* note 9, para. 182.

106 *Wall* case, *cit. supra* note 49, paras. 152–153.

107 *Namibia* case, *cit. supra* note 79, para. 126; *Chagos* case, *cit. supra* note 9, para. 180 and *Wall* case, *cit. supra* note 49, para. 155.

108 D'ARGENT, *cit. supra* note 96, p. 1809. The adoption of "lawful measures" by third States requires that the act violates an *erga omnes* obligation, see International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 54.

Second, and most importantly for the present analysis, although it is common knowledge that "[advisory] opinions do not have the authority of *res judicata*",[109] the relationship between the normative authority of ICJ advisory opinions and the principle of *res judicata* remains ambiguous. It is worth recalling that this principle entails that international courts and tribunals' final adjudication is "conclusive", both in the sense that the issue so decided may not be "relitigated" (formal *res judicata*),[110] and that the decision is binding upon the parties and must be implemented in good faith (substantive *res judicata*).[111]

From a formal point view, it does not seem too far-fetched to contend that, actually, ICJ advisory opinions do "enjoy a kind of factual *res judicata* status".[112] In fact, even in the absence of a specific prohibition, it is hard to imagine that the ICJ would accept to render more than one opinion on the same legal question.[113] Such a request would appear to be contrary to Article 2(2) of the UN Charter and the ICJ judicial integrity.[114]

On the other hand, arguing that the normative authority of ICJ advisory opinions produces legal effects analogous to that of substantive *res judicata* is more controversial. This is because, as said, advisory opinions have no binding effect on the parties and, therefore, cannot resolve the underlying dispute.[115]

In the past, however, the possibility that advisory opinions could produce such an effect had not been ruled out. In *Eastern Carelia*, for example, the PCIJ, requested to give an advisory opinion on the legal status of the region of Eastern Carelia in accordance with the 1920 Treaty of Peace between Finland and the Soviet Union, noted that "answering the question would be substantially equivalent to deciding the dispute between the parties".[116] International

109 *Peace Treaties* case, *cit. supra* note 39, Dissenting Opinion of Judge Winiarski, p. 91. See also *ibid*., Dissenting Opinion of Judge Zorčič, p. 101.

110 See, for instance, ICJ Statute, Art. 60: "The judgment is final and without appeal (…)".

111 See, for instance, ICJ Statute, Art. 59: "The decision of the Court has (…) binding force (…) between the parties and in respect of that particular case". As noted above, advisory opinions do not constitute a "decision" within the meaning of Art. 59, see *supra* Subsection 3.1. On the principle of *res judicata* see DODGE, "Res Judicata", in PETERS (ed.), *Max Planck Encyclopaedia of Public International Law*, online ed., Oxford, 2006 and KULICK, "Article 60 ICJ Statute, Interpretation Proceedings, and the Competing Concepts of *Res Judicata*", Leiden Journal of International Law, 2015, p. 73 ff.

112 KOLB, *cit. supra* note 39, p. 1096.

113 D'ARGENT, *cit. supra* note 96, pp. 1809–1810.

114 This point is further discussed in KOLB, *cit. supra* note 39, p. 1096.

115 See *supra* Subsection 3.1.

116 *Status of Eastern Carelia*, Advisory Opinion of 23 July 1923, PCIJ Reports, Series B, No. 5, p. 1 ff., p. 29. International scholarship tends to disregard this advisory opinion as of little significance due to the special circumstances surrounding it (D'ARGENT, *cit. supra* note 96, p. 1084). However, the passage quoted does not relate to the reasons behind the

judges and authors also likened advisory opinions to declaratory judgments,[117] and qualified them as "quasi-judicial appraisal" and "some kind of judgment".[118]

It is true that the ICJ has been much more cautious in this respect,[119] but it has also implicitly admitted that an advisory opinion can *indirectly* resolve a dispute.[120] Moreover, as noted, the ICJ has never hesitated to give its opinion on the international responsibility of the parties involved, including the ensuing legal consequences. All in all, it seems therefore reasonable to argue that the fact that advisory opinions do not enjoy the authority of *res judicata*, "is not sufficient to deprive [them] of all the moral consequences which are inherent in the dignity of the organ delivering the opinion, or even of its legal consequences".[121]

In order to solve this conundrum and to assess whether ICJ advisory opinions as precedents can produce legal effects analogous to that of substantive *res judicata*, the present contribution will now provide an in-depth analysis of the impact that *Chagos* had in determining the ITLOS's decision to retain its jurisdiction in the *Mauritius/Maldives* case. It is believed that this case is of particular significance since, for the first time, an international tribunal has recognised to an ICJ advisory opinion the legal effect of settling a dispute between two States.

4 The Mauritius/Maldives Case

4.1 *The ITLOS's Decision*

On 28 January 2021, the Special Chamber established within the ITLOS handed down its decision on the admissibility of the dispute concerning the delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (*Mauritius/Maldives*).

PCIJ's refusal to render an advisory opinion on the dispute between Finland and the Soviet Union. Rather, it is an *obiter dictum* on the substantive *res judicata* effects of an advisory opinion.

117 GOODRICH, "The Nature of the Advisory Opinions of the Permanent Court of International Justice", American Journal of International Law, 1938, p. 738 ff., p. 756.

118 *Certain Expanses of the United Nations* (*Article 17, paragraph 2, of the Charter*), Advisory Opinion of 20 July 1962, Dissenting Opinion by Judge Koretsky, ICJ Reports, 1962, p. 151 ff., para. 2.

119 Note the ICJ's remarks on the existence of a dispute between Mauritius and the UK in *Chagos*, see *infra* Subsection 4.2.

120 "The purpose of the advisory function is not to settle – *at least directly* – disputes between States", *Nuclear Weapons* case, *cit. supra* note 77, para. 15 (emphasis added).

121 *Peace Treaties* case, *cit. supra* note 39, Separate Opinion of Judge Azevedo, para. 3.

Two of the Maldives' preliminary objections to the ITLOS jurisdiction were related, as they were based on the "core premise" of the existence of a dispute between Mauritius and the UK over the sovereignty of the Chagos Islands, an archipelago located at the maritime border between Mauritius and Maldives.[122]

More specifically, the Maldives' first preliminary objection concerned the ITLOS's jurisdiction *ratione personae*. In particular, Maldives invoked the application of the "indispensable third party" in relation to the absence of the UK from the proceedings.[123] The UK has claimed (and exercised) its sovereignty over the Chagos Islands since 1814.[124] On the other hand, the second preliminary objection concerned the ITLOS's jurisdiction *ratione materiae*. In particular, Maldives noted that in order to delimitate the maritime boundary with Mauritius, the ITLOS would have to rule on the continuing dispute between Mauritius and the UK over sovereignty over the Chagos Islands.[125]

Mauritius did not deny the existence of a past dispute with the UK over the legal status of the Chagos Islands. However, it argued that "[t]he issue of whether the Chagos Archipelago is an integral part of the territory of Mauritius [...] was resolved definitely, and *as a matter of international law*", in *Chagos*,[126] where the ICJ found that the decolonisation process of Mauritius was not fully completed and that the UK should bring to an end the administration of the Chagos Islands as soon as possible.[127] Mauritius insisted that, by responding to the request of the General Assembly ("GA"), the ICJ had implicitly but consciously agreed to settle the dispute at the basis of the legal question.[128] Accordingly, "Mauritius is the only State entitled to claim sovereignty over Chagos" and "the United Kingdom [...] has no legal rights that could be affected

122 *Mauritius/Maldives* case, *cit. supra* note 8, paras. 99, 110 and 115.

123 *Ibid.*, para. 81 ff. This principle entails that "[w]here [...] the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it", *Monetary Gold Removed from Rome in 1943*, Judgment of 15 June 1954, ICJ Reports, 1954, p. 19 ff., p. 33. On the indispensable third party principle see, among others, BONAFÉ, "Indispensable Party", in PETERS (ed.), *Max Planck Encyclopaedia of Public International Law*, online ed., Oxford, 2018 and PAPARINSKIS, "Revisiting the Indispensable Third Party Principle", Rivista di diritto internazionale, 2020, p. 49 ff.

124 *Mauritius/Maldives* case, *cit. supra* note 8, paras. 56–61.

125 *Ibid.*, para. 101 ff.

126 *Ibid.*, para. 152 (emphasis added).

127 *Chagos* case, *cit. supra* note 9, para. 183.

128 *Mauritius/Maldives* case, *cit. supra* note 8, paras. 154–155.

by the delimitation of the maritime boundary between the Archipelago and the Maldives".[129]

Maldives, on the contrary, contended that "the resolution of the sovereignty dispute is not an implied or necessary consequence"[130] of the advisory opinion and that, in any case, "even if the Court had purported to advise on the sovereignty disputes its opinion did not have binding force on the UNGA or any State (including the United Kingdom and the Maldives)".[131] Therefore, "it is beyond doubt that there is a sovereignty dispute between the UK and Mauritius *as a matter of fact*".[132]

The ITLOS observed that "the decolonization and sovereignty of Mauritius, including the Chagos Archipelago, are inseparably related"[133] and affirmed that a careful reading of the advisory opinion might suggest that the latter recognises the sovereignty of Mauritius over the Chagos Islands.[134] The most interesting part of the ITLOS's reasoning, however, relates to the legal effects of this recognition.

The ITLOS drew a general distinction between bindingness and authority of a judicial decision. In this respect, it considered that "determinations made by the ICJ in an advisory opinion cannot be disregarded simply because the advisory opinion is not binding" and that "those determinations do have legal effect".[135] In particular, the ITLOS noted that the ICJ had "clarified" the legal status of the Chagos Islands and that the claims made by the UK were now reduced to a "mere assertion" in itself incapable of giving rise to a dispute.[136] It then established that: "The determinations made by the ICJ with respect to the issues of the decolonization of Mauritius in the Chagos advisory opinion have legal effect and clear implications for the legal status of the Chagos Archipelago",[137]and rejected the first and second preliminary objections, concluding that: "Mauritius can be regarded as the coastal State in respect of the Chagos Archipelago for the purpose of the delimitation of a marine boundary even before the process of the decolonization of Mauritius is completed".[138]

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129 *Ibid.*, para. 183.
130 *Ibid.*, para. 176 (inverted commas omitted).
131 *Ibid.*, para. 195.
132 *Ibid.*, para. 232 (emphasis added).
133 *Ibid.*, para. 189.
134 See, in particular, the ITLOS's analysis of *Chagos* case, *cit. supra* note 9, paras. 173 and 178, *ibid.*, para. 174.
135 *Ibid.*, para. 205.
136 *Ibid.*, para. 243.
137 *Ibid.*, para. 246.
138 *Ibid.*, para. 250.

4.2 *The Normative Authority of Chagos as Entailing Substantive Res Judicata Effects*

From a strictly formal point of view, the ITLOS's reasoning may be criticised for some sort of misunderstanding. Indeed, the crux of the matter does not seem to lie in the distinction between bindingness and authority, but in the very definition of the authority of ICJ advisory opinions.

The ITLOS observed that, although it does not produce binding legal effects, "it is equally recognized that an advisory opinion entails an authoritative statement of international law on the questions with which it deals".[139] However, the fact that ICJ advisory opinions enjoy (normative) authority does not entail, *per se*, that they are capable of resolving a dispute between two or more parties. As illustrated above,[140] whether the normative authority of ICJ advisory opinions produces substantive *res judicata* effects is far from being self-evident, to say the least, especially considering that, in *Chagos*, the UK had contested the exercise of the ICJ's advisory function.[141]

Therefore, the ITLOS's decision on the first and second preliminary objections cannot convincingly be based on the sole argument that advisory opinions produce such legal effects because they are authoritative. The ITLOS should have taken one more step, explaining why the (normative) authority of ICJ advisory opinions produces legal effects similar to that of binding decisions, even against the consent of one of the parties directly involved.[142]

It is possible that the ITLOS deliberately avoided addressing such a complex topic as the authority of ICJ advisory opinions.[143] In this regard, it merely noted that: "Judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of international law".[144]

This passage combines the ICJ's *stricto sensu* authority ("the 'principal judicial organ' of the United Nations") and the persuasive authority of the advisory opinion ("made with […] rigour and scrutiny") to support the view that *Chagos* has definitely settled the dispute between the UK and Mauritius. Still, apart

139 *Ibid.*, para. 202.
140 See *supra* Subsection 3.2.
141 See Written Statement by the United Kingdom of Great Britain and Northern Ireland of 15 February 2018, p. 1 ff., especially p. 10 ff.
142 As it has been pointed out, "given how much authority the Special Chamber invests in the ICJ's Advisory Opinion, it is curious that it has so little to say about the nature of advisory opinions more generally", GAVER, *cit. supra* note 11, p. 525.
143 *Ibid.*
144 *Mauritius/Maldives* case, *cit. supra* note 8, para. 203 (emphasis added).

from this generic reference not further elaborated upon, the ITLOS's unusual solution of granting an ICJ advisory opinion the normative authority to resolve a dispute does not appear satisfactorily substantiated. Recourse to the different types of authority outlined above may then be useful in order to rationalise and explain the reasons behind it.

The starting point of the analysis is that the *Chagos* advisory opinion does not have the formal authority to resolve the dispute over the sovereignty of the Chagos Islands. As said, advisory opinions are subsidiary means for the determination of rules and will be "taken into duly account" by the requesting organ.[145] The combination of these two legal effects should not be underestimated, however. *Chagos* enjoys the formal authority to indicate the content of the rules applicable to the dispute and to impose the resulting solution as the legal solution to the GA.[146] In other words: the advisory opinion does not resolve the dispute, but establishes how the dispute should be resolved under international law.

Chagos also enjoys normative authority, as composed of *stricto sensu*, persuasive and semantic authority. Firstly, because it is an ICJ advisory opinion. The *stricto sensu* authority of the ICJ has already been described.[147] Suffice it to add here that the ICJ judges voted unanimously/by a large majority on the five points that make up the answer to the legal question.[148] This circumstance increases the overall normative authority of the advisory opinion, since "in a legal order that places no formal value on judicial decisions as an authority source of law, reliance on the voting record has been invoked as a means to enhance the authority of certain [decisions]".[149]

The persuasive authority of *Chagos* is certainly questionable.[150] For what is of interest here, one may wonder whether the risk of circumventing the principle of consensual jurisdiction over the dispute between Mauritius and the UK did not amount to a "compelling reason" for the ICJ to exercise its discretion to

145 See *supra* Subsection 3.1.
146 See *supra* Subsection 3.1.
147 See *supra* Subsection 2.2.
148 *Chagos* case, *cit. supra* note 9, para. 183.
149 See HERNÁNDEZ, *cit. supra* note 26, p. 117 and HAMBRO, *cit. supra* note 97, p. 20: "If many judges dissent and if their dissent is cogently reasoned, it is quite clear that the authority of the legal views set forth by the majority of the Court will seriously suffer".
150 For an in-depth analysis on the various aspects of international law touched upon by *Chagos* case see BURRI and TRINIDAD (eds.), *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion*, Cambridge, 2021.

decline the GA's request. It is possible to argue both in favour[151] and against[152] this point, although the ICJ's decision to uphold its advisory jurisdiction seems correct, as its rationale "may be ultimately found in the tight links between the request [...] and the institutional functions of the General Assembly in decolonisation matters, and the material content and *erga omnes* structure of the legal relationships involved".[153]

The ITLOS, understandably, did not venture into a critical analysis of *Chagos*. It merely observed that an accurate reading of the text would suggest that the ICJ recognised the sovereignty of Mauritius over the Chagos Islands. For the rest, the ITLOS stated that it would "recognise" and "take into consideration" what has been set out in the advisory opinion in order to assess the legal status of the Chagos Islands.[154]

This statement reflects the last "side" of the normative authority of *Chagos*, that is its remarkable semantic authority. This means that this advisory opinion – which has also been endorsed by a GA resolution – [155] is today an inescapable point of reference with respect to any decision concerning the legal status of the Chagos Islands: it has the authority to impose itself in the concrete case regardless of the jurisdiction resorted to and of the will of the parties involved.[156]

This also emerges from how the ITLOS interprets the relationship between the advisory opinion and the previous arbitral award between Mauritius and the UK on the establishment of a marine protected area around the Chagos Archipelago (*Chagos Marine Protected Area*).[157] The arbitral tribunal had established the existence of a dispute between the parties and had denied

151 See *Chagos* case, *cit. supra* note 9, Dissenting Opinion of Judge Donoghue, para. 10 ff. and Declaration of Judge Tomka, paras. 6–9.

152 See *Chagos* case, *cit. supra* note 9, Separate Opinion of Judge Gaja, para. 4 and Declaration of Vice-President Xue, para. 4 ff.

153 CRESPI REGHIZZI, "The *Chagos* Advisory Opinion and the Principle of Consent to Adjudication", in BURRI and TRINIDAD (eds.), *The International Court of Justice and Decolonisation: New Directions from the Chagos Advisory Opinion*, Cambridge, 2021, p. 51 ff., pp. 69–70. See also *supra* Subsection 3.2.

154 *Mauritius/Maldives* case, *cit. supra* note 8, para. 206.

155 UNGA, Advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, Resolution 73/925, UN Doc. A/RES/73/295 (2019).

156 As GAVER notes, "it would have been extraordinary for the ITLOS Special Chamber to start its analysis from scratch rather than at least begin its analysis by accepting the decisions previously rendered by those two bodies", *cit. supra* note 11, p. 525.

157 *Chagos Marine Protected Area Arbitration* (*Mauritius v. United Kingdom*), Case Number 2011-03, Award of 18 March 2015.

jurisdiction over the request to recognise Mauritius as a "coastal State" under the UN Convention on the Law of the Sea.[158] Maldives argued that the arbitral award had crystallised the existence of the dispute with *res judicata* effect, and that the ICJ, in rendering its advisory opinion, "could not have considered itself to be overturning an existing award with binding effect".[159]

This objection was dismissed by the ITLOS as follows: "Regardless of whether or not the advisory opinion has resolved the sovereignty dispute, there can be no question of the advisory opinion overruling the arbitral award, as there was no determination in the award to that effect".[160]

However, the ITLOS could have addressed the Maldives' objection from a different angle, namely by emphasising the fact that the arbitral award confirms the existence of a dispute between Mauritius and the UK. On the other hand, in *Chagos* the ICJ avoided taking a clear stance in this regard, stating that "a bilateral dispute over sovereignty [...] *might exist*",[161] that "the General Assembly has not sought the Court's opinion to resolve a territorial dispute between two States",[162] and that "by replying to the request, the Court is [not] dealing with a bilateral dispute".[163] A joint interpretation of the two judicial decisions would thus seem to endorse, rather than deny, the continuing existence of the dispute. By recalling the relevant passages from the arbitral award and the advisory opinion, the ITLOS could possibly have been able to develop a valid argument, substantiating the (hypothetical) decision to reject its jurisdiction *ratione personae/materiae*. If anything, it could at least have considered – and then discarded – such an argument.

The semantic authority of ICJ advisory opinions may perhaps explain why this did not happen. In fact, stressing the continuing existence of the dispute would seem to legitimise the content of *Chagos Marine Protected Area* (which unequivocally confirms it) more than that of *Chagos* (more ambiguous on this point). And indeed, it appears difficult to reconcile the ICJ's declaration of intent to refrain from settling a bilateral dispute with its finding that the UK is responsible for the commission of an internationally wrongful act.[164] As Judge Gevorgian observed, "such a statement crosses the thin line separating the Court's advisory and contentious jurisdiction".[165] In sum: in the "semantic

158 *Ibid.*, para. 209 ff. and, in particular, para. 221.
159 *Mauritius/Maldives* case, *cit. supra* note 8, para. 209.
160 *Ibid.*, para. 215.
161 *Chagos* case, *cit. supra* note 9, para. 136 (emphasis added).
162 *Ibid.*, para. 86.
163 *Ibid.*, para. 89.
164 *Ibid.*, para. 177.
165 *Ibid.*, Declaration of Judge Gevorgian, para. 5. And see *ibid.*, Declaration of Judge Tomka, paras. 6–9. THIRLWAY makes the point that if the ICJ "advises" that a State is responsible

struggle" over the uncertainties characterising the legal status of the Chagos Islands, an ICJ advisory opinion on the decolonisation process of Mauritius will tend to be perceived as preeminent over a more dated arbitral award on the establishment of a marine protected area.[166]

To conclude, in *Mauritius/Maldives*, the ITLOS found itself in the tricky position of having to deal with what was decided in *Chagos* in order to ascertain its jurisdiction in a dispute only incidentally related to the sovereignty over the Chagos Islands. The ICJ advisory opinion does not enjoy the (formal) authority to settle the dispute between Mauritius and the UK "as a matter of international law",[167] but it does enjoy the (normative) authority to determine how the dispute should be settled and to impose such a solution "as a matter of fact".[168]

The ITLOS had two options to resolve this contradiction: stress the non-binding nature of the advisory opinion and, emphasising the continuing existence of the dispute and the principle of the indispensable third party, reject its jurisdiction; or, in the words of Mauritius "recognize and respect the ICJ's authoritative determination of this issue and proceed to delimit the maritime boundary between the Parties".[169] Its choice, however formally imperfect, reveals a pragmatic – and ultimately shareable – approach to this unusual legal conundrum: "A bit of legal trickery or magic that allows the Special Chamber to ignore jurisdictional obstacles rooted in a discredited colonial claim".[170]

5 Concluding Remarks

ICJ advisory opinions as precedents enjoy a strong authority in international law. This authority is the result of both their formal and normative authority. This latter, in turn, is explained by and composed of the *stricto sensu* authority

for a violation of international law, that State "will be in a weak position if it seeks to argue that the considered opinion of the Court does not represent a correct view of the law", *The International Court of Justice*, Oxford, 2016, p. 139.

166 In other words, "minimizing the effect of the Arbitral Award allowed the Special Chamber to emphasize the Advisory Opinion and subsequent General Assembly resolution", GAVER, *cit. supra* note 11, p. 524.

167 See *supra* Subsection 4.1.

168 See *supra* Subsection 4.2.

169 *Mauritius/Maldives* case, *cit. supra* note 8, para. 114.

170 THIN, *cit. supra* note 11, p. 4. And see BURRI and TRINIDAD, *cit. supra* note 11, p. 3: "The Special Chamber's Decision will be welcomed by those who view the ICJ's advisory function as a means of addressing arbitrary exercises of power and correcting the nefarious legacies of colonialism".

of the ICJ and the (usual) persuasive and semantic authority of the advisory opinion itself, and legitimises the production of different legal effects lacking a specific provision. These effects depend on which legal question is the subject of the request. When it comes to legal questions underlying a dispute between two or more States or other entities, the advisory opinion will legitimise any action consistent with the eventual existence of a wrongful act, including bringing a claim for damages and adopting countermeasure/lawful measures against the wrongdoer.

In *Mauritius/Maldives*, however, an international tribunal has, for the first time, admitted the possibility that an ICJ advisory opinion could produce a further legal effect, that is that of actually solving a dispute, essentially endowing it with the authority of substantive *res judicata*. Only time will tell whether *Mauritius/Maldives* represents an isolated case or it will mark the beginning of a new era where international courts and tribunals recognise ICJ advisory opinions as precedents having the (normative) authority to resolve a dispute.[171] For now, the analysis of the ITLOS's decision allows for some concluding remarks.

First, the ITLOS's decision enjoys the formal authority to resolve the Maldives' preliminary objections with binding effect and to open the merits phase of the proceedings. Moreover, it further increases the normative authority of *Chagos*. Recently, for instance, the Universal Postal Union declared the use of British stamps in the Chagos Islands invalid.[172] The episode is symbolic, but bears witness to the ubiquity achieved by the advisory opinion in the international legal discourse on the legal status of the Chagos Islands.

Secondly, despite the ITLOS's attempt to contain the implications of its findings to the specific case,[173] the *Mauritius/Maldives* ruling could have wider and more problematic consequences, in particular in relation to the legal nature of ICJ advisory opinions, the definition of the concept of "dispute", and the scope of application of the indispensable third party principle.

Finally, granting an ICJ advisory opinion the normative authority to resolve a dispute might encourage states (and the GA) to more frequently request an

171 This will essentially depend on the perceived legitimacy of the ITLOS's decision, i.e. its capacity to command the attention of international actors as a more or less authoritative precedent. On the authority of ITLOS's decisions see NGUYEN, "The Public Authority of the International Tribunal for the Law of the Sea", in RUIZ FABRI et al. (eds.), *International Judicial Legitimacy: New Voices and Approaches*, Baden-Baden, 2020, p. 147 ff.

172 Universal Postal Union, "UPU adopts UN resolution on Chagos Archipelago", 27 August 2021, available at: <https://www.upu.int/en/Press-Release/2021/Press-release-UPU-adopts-UN-resolution-on-Chagos-Archipelago>.

173 *Mauritius/Maldives* case, *cit. supra* note 8, paras. 191–192.

advisory opinion and then invoke any advantageous finding as it were substantially binding, even before different jurisdictions. Conversely, the ITLOS's decision might prompt the ICJ to employ a tighter control of discretion in order to avoid such instrumentalization of its advisory function. Therefore, as also observed by Judge Oxman, the fact that the ITLOS treated the settlement of the dispute between Mauritius and the UK as *fait accompli* "risks complicating the exercise by the General Assembly of its political functions and the exercise by the ICJ of its discretion with respect to requests for advisory opinions".[174]

174 *Chagos* case, *cit. supra* note 9, Separate and Dissenting Opinion of Judge *ad hoc* Oxman, para. 32. And see HAMBRO, *cit. supra* note 97, p. 19: "Political questions should be settled by political means in the political organs of the United Nations and it is believed that very little good can be achieved by trying to solve these questions by legal procedures, dressing them out as legal questions and referring them to the Court".