**The *Chagos* request: Does it herald a rejuvenation of the International Court of Justice’s advisory function?**

ABSTRACT

The International Court of Justice has been open for business for over seventy years and has given twenty six advisory opinions. There have been peaks and troughs of activity and at times the issues the Court has addressed have seemed ill-matched to its position as the principal judicial organ of the United Nations. This factor, taken together with periods of low activity, could foster the perception that the advisory jurisdiction is increasingly irrelevant, particularly in the context of a proliferation of other international and also regional courts.

In June 2017, the General Assembly asked the Court’s opinion on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. This request offers the stimulating prospect of the Court turning its attention back to substantive matters of real weight and importance: *inter alia* sovereignty, self-determination, territorial integrity and human rights.

Now is an opportune moment to take stock and this article will assess the scope of the Court’s advisory opinion process, how it has been used to date and whether it can be better used in the future. It will conclude that change in itself is not needed and that the Court’s response to the *Chagos* request, with its focus on fundamental questions of international law, could revitalise the Court’s advisory function and help to reinforce its standing in the international community.

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I. INTRODUCTION

The International Court of Justice (ICJ or Court) is the “principal judicial organ” of the United Nations (UN).[[1]](#footnote-1) This description carries with it gravitas and a presumption that the Court will be involved in matters of weight and moment to the international community; it is an integral part of the machinery put in place in 1945 to achieve the aims of the peoples of the UN and should sit ready to deal with significant legal questions alongside its primary function as a forum for dispute settlement.

How the Court is perceived by states and what they want from it underpins consideration of its current and potential future activities. Since February 2012, when its most recent advisory opinion was given,[[2]](#footnote-2) the advisory function of the ICJ has been in one of its hiatus periods. The request on 15 June 2017 from the General Assembly (Assembly) for an advisory opinion “on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965” (*Chagos* request)[[3]](#footnote-3) is an opportune moment to reflect on the scope of the ICJ’s advisory function, its activity over the years and whether it can be better used in the future to address and clarify questions of international law of fundamental importance. It will be seen that although states are not the direct users of the advisory process, the mechanics for implementing change mean that if they have no appetite for reform, however attractive a proposal is, it will only be of academic interest.

The main body of this article will be split into two parts, the first examining the purpose of the Court’s advisory jurisdiction, its scope and the factors that limit its ability to respond to questions put to it. Although in principle these factors could act as a brake on activity, in the more than seventy years of its life the ICJ has found only once that it does not have jurisdiction to give an advisory opinion.[[4]](#footnote-4)

Once jurisdiction is established it is widely understood that the Court has discretion to choose *not* to answer a question. Analysis of the issues the Court takes into account will show that although this is a valuable potential restraint, it has never been used, and was used only once by its predecessor Court.[[5]](#footnote-5) The alternative view, that the exercise of the advisory function is not truly discretionary, will also be examined briefly.

The second part of the article will focus on whether the advisory jurisdiction can and should be expanded to better exploit its potential and allow the Court to enhance its advisory opinion service while maintaining its standing. An overview of use to date will be followed by a look at expansion proposals, then at the *Chagos* request, along with other questions that may come before the Court in the future, to see if any future developments are likely to allow that dual objective to be achieved. Finally, factors which militate against expansion of the advisory jurisdiction will be assessed.

Bringing all these elements together will show that an expansion *per se* of the advisory function is not needed for the Court to better fulfil its role. What is required is a consistently clear-sighted, discriminating approach on the part of those organs and specialised agencies authorised to ask for opinions. Use that is appropriate to the unique status of the Court, which addresses questions of real substance and import for the international community - as the *Chagos* request does - could breathe new life into the advisory jurisdiction of the Court.

II. PURPOSE OF THE ADVISORY JURISDICTION

Advisory opinions are not another “form of judicial recourse for states”.[[6]](#footnote-6) They are a means by which the Security Council (Council) and Assembly may seek advice on legal questions. Additionally, three other organs of the UN, fifteen specialised agencies and one related organisation[[7]](#footnote-7) “may obtain the Court’s opinion in order to assist them in their activities”.[[8]](#footnote-8) .

Of the twenty six advisory opinions given by the ICJ, fifteen requests have come from the Assembly, one from the Council and two from the Economic and Social Council.[[9]](#footnote-9) Five others relate to employment matters, the World Health Organization has requested two[[10]](#footnote-10) and the International Maritime Organization one.[[11]](#footnote-11)

Advisory opinions are not binding, but certain opinions are by virtue of separate agreements. For example, the *Convention on the Privileges and Immunities of the United Nations* 1946 provided that where a difference arose between the UN and a Member, and was not settled by another means, a request should be made for an advisory opinion and the opinion given by the Court would be accepted as decisive.[[12]](#footnote-12) There is therefore opportunity for a binding opinion where this is necessary.

Commenting in its *Nuclear Weapons* opinion the Court confirmed that “it states the existing law and does not legislate and this is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend”.[[13]](#footnote-13) That said, on the issue of reservations, Lauterpacht reflected that the ICJ in the *Genocide[[14]](#footnote-14)* opinion “devoted itself mainly to the development of law in this sphere”[[15]](#footnote-15) while (in something of a reversal of roles) the International Law Commission “limited itself substantially to a statement of existing law.”[[16]](#footnote-16) Although the *Genocide* opinion dealt with very particular circumstances this does illustrate the flexibility the Court has in in exercising its advisory function.

III. SCOPE

The Statute of the International Court of Justice (Statute) provides that the Court “may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”.[[17]](#footnote-17) The use of the word ‘may’ suggests an element of discretion and this will be returned to later.

The question must be clearly stated and “all documents likely to throw light upon the question” should also be submitted.[[18]](#footnote-18) States can participate by way of written or oral statements and if any international organisations are considered by the Court “as likely to be able to furnish information on the question”,[[19]](#footnote-19) Article 66 of the Charter of the United Nations (Charter) makes provision for them also to participate. Any states and international organisations which present oral and/or written statements may comment on other statements.[[20]](#footnote-20)

Non-governmental organisations (NGOs) have not so far directly participated in the advisory process as “international organizations”[[21]](#footnote-21) although there was a step in that direction when the volume of material received in connection with the two *Nuclear Weapons* opinions[[22]](#footnote-22) led to a decision by the Court to place these in the Peace Palace library, available for the judges to consult if they wished to do so.[[23]](#footnote-23) Former President of the Court, Rosalyn Higgins has flagged this as a matter requiring further attention as using this indirect route carries a risk that one or more judges might take factors into account that are not picked up either by the other judges or by parties making written and oral statements.[[24]](#footnote-24)

There is, however, one precedent for direct participation by NGOs. In the 1950 *International Status of South-West Africa* opinion the Court accepted that an NGO, the International League for the Rights of Man (the League), was an “international organization” for the purposes of Article 66(2) and confirmed that it was prepared to receive from them a written statement of information likely to assist it in its examination of the legal questions before it.[[25]](#footnote-25) Unfortunately the opportunity was wasted, the League did not send a written statement within the time prescribed[[26]](#footnote-26) but the example is there and the *Chagos* request is a clear example of where such participation could be beneficial. The situation of people of Chagossian origin is fundamental to the two questions raised in the request.[[27]](#footnote-27) How they themselves can have a voice within a process where *prima facie* they have no standing is a concern which could be overcome by the mechanism of allowing appropriate NGOs, who ask permission, to submit information to the Court[[28]](#footnote-28) and to comment on statements made by other states and organisations.[[29]](#footnote-29) This could also strengthen the opinion the Court ultimately gives and help avoid any criticism that it has not founded its decision on full information[[30]](#footnote-30).

IV. PERCEPTION OF THE COURT AND ITS ADVISORY OPINIONS

Taking account of the increasing role of NGOs in civil society may be one factor in keeping the ICJ and its work prominent and relevant. A high calibre of subjects addressed, which in turn generates a significant level of interest and debate, would be another. Professor Alain Pellett, at the seminar held at the Peace Palace in April 2016 to mark the 70th anniversary of the Court, noted that states’ perception of the court is closely linked to their enthusiasm for international law itself, “which was high after the Second World War and in the mid-1990s, but is now waning.”[[31]](#footnote-31) In his view the Court should be encouraged to look outwards but “must remain itself; it has no need to tout for business.”[[32]](#footnote-32) While this was said in the context of the contentious jurisdiction, it is equally applicable in the advisory context.

Although states remain the primary international players, how the ICJ is perceived in the eyes of international and regional organisations, NGOs and civil society as a whole is important too. Judge Weeramantry, in his dissenting opinion in *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons)*, commented that the case from the start “has been the subject of a wave of global interest unparalleled in the annals of this court” [[33]](#footnote-33) with a “groundswell of global public opinion…not without legal relevance.”[[34]](#footnote-34) Such interest can dissipate and be lost and it is therefore important that the advisory function is not sidelined by virtue of focus shifting away from vital issues to those of more peripheral concern.

 The effectiveness of the advisory opinions given also feeds in to the perception of the Court. As noted briefly above, the *Genocide* opinion was important in the development of the law on reservations and it had a significant influence on the drafting of the Vienna Convention on the Law of Treaties.[[35]](#footnote-35) If advisory opinions are demonstrated as effective and useful despite their non-binding character this may encourage more use or the expansion of the advisory function.

The mixed reception in the Council to the one opinion the Council sought on the presence of South Africa in Namibia may be one reason why recourse to the Court has not been made by the Council since.[[36]](#footnote-36) More positively, for example, the *Western Sahara[[37]](#footnote-37)* and the *Immunity from Legal Process[[38]](#footnote-38)* opinions requested by the Assembly have been identified as remaining useful to the UN in its work many years on.[[39]](#footnote-39) The framework established by the former is still relevant to the Office of Legal Affairs in advising other UN entities[[40]](#footnote-40) and the arrangements for privileges and immunities of the UN and its officials remain crucial and are relied on a daily basis.[[41]](#footnote-41)

V. JURISDICTION: WHO CAN REQUEST AN OPINION AND ON WHAT?

The Assembly and Council can ask for an opinion “on any legal question.”[[42]](#footnote-42) Other organs of the UN and specialised agencies must ask legal questions “within the scope of their activities”.[[43]](#footnote-43)

The ICJ confirmed in *Kosovo* that “[a] question which expressly asks the Court whether or not a particular action is compatible with international law certainly appears to be a legal question.”[[44]](#footnote-44) The Court referred back to *Western Sahara* to underline this point, confirming that questions “framed in terms of law and rais[ing] problems of international law…are by their very nature susceptible of a reply based on law.”[[45]](#footnote-45)

The Court has consistently reaffirmed that political elements do not serve to strip a question of its legal nature; this is the nature of things in international life,[[46]](#footnote-46) in *WHO/Egypt*:

“Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate, especially when these may include the interpretation of its constitution.”[[47]](#footnote-47)

Any political motives which inspired the request and possible political implications of the opinion are likewise not relevant to jurisdiction.[[48]](#footnote-48) There is no leeway here for an expansion of jurisdiction around the types of question asked as the law, not anything else, is the Court’s *raison d’être*.

What constitutes a legal question for the Assembly and Council is very broad. In *Nuclear Weapons* the ICJ made a thorough examination of the competence of the Assembly to seise the Court.[[49]](#footnote-49) It has general competence under Article 10 of the Charter,[[50]](#footnote-50) specific competences under Articles 11(1) and (2)[[51]](#footnote-51) and a *lex ferenda* aspect under Article 13.[[52]](#footnote-52)In *Namibia* in 1970, the only time the Council requested an opinion, the Court affirmed “Article 96 of the Charter…empowers the Security Council to request advisory opinions on any legal question.”[[53]](#footnote-53)

The “scope of activities” condition gave rise to the first, and only, time the Court found it did not have jurisdiction to give an opinion. It declined to answer the WHO’s question on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.[[54]](#footnote-54) The Court essentially found that whether nuclear weapons were used legally or illegally was irrelevant to the WHO’s performance of its functions and this question was outside the scope of its activities.[[55]](#footnote-55)

This decision has been criticised as taking an unnecessarily restrictive view of the organisation’s functions and of failing to appreciate the reality of the UN structure with its network of bodies with interlocking and overlapping mandates.[[56]](#footnote-56) A potential concern is that if a tighter interpretation of functions continues to be used, other UN organs and specialised agencies will be less, not more, inclined to seek advisory opinions.[[57]](#footnote-57)

It can be expected that the ‘political’ argument will be aired again in the written and oral statements put before the Court and when it considers jurisdiction in *Chagos* but as both questions in the request have been very carefully framed as legal questions[[58]](#footnote-58) there is no reason to suggest the Court will deviate from its consistent approach here.

VI. DISCRETION *NOT* TO GIVE AN OPINION

Once jurisdiction is established it is widely understood that the Court has discretion to refuse to give an opinion. The ICJ has not exercised this discretion, conversely, the Permanent Court of International Justice (PCIJ) did so in the much quoted *Eastern Carelia*.[[59]](#footnote-59) As noted above, the concept of a discretionary element forming part of the Court’s considerations, after jurisdiction is confirmed and before the merits, comes from the Statute: “The Court *may* give an advisory opinion”.[[60]](#footnote-60)

The possible overlap with disputes between states is the lodestone here. In *Interpretation of Peace Treaties* the Court confirmed that there is no question of state consent being required for an advisory opinion:

The Court’s Opinion is given not to the states but to the organ which is entitled to request it; the reply of the Court …represents its participation in the activities of the Organization, and, in principle, should not be refused.[[61]](#footnote-61)

Other issues raised, but not accepted by the Court, are *inter alia*, that the question is vague or abstract, under consideration elsewhere, would be of no practical use or has potential to undermine progress being made elsewhere.[[62]](#footnote-62) One or more of these arguments are likely to be aired when the *Chagos* request is considered as issues around, *inter alia*, the separation of the Chagos archipelago from Mauritius and its administration by the United Kingdom (UK) as the British Indian Ocean Territory, the re-settlement of the Chagossian people and the decision by the UK to establish a Marine Protected Area around the archipelago have all been brought before other courts and tribunals.[[63]](#footnote-63)

The UK position on the *Chagos* request is that this referral is an attempt to bring a bilateral dispute before the Court without its consent.[[64]](#footnote-64) It can be expected therefore that it will push hard for the Court to decline to give an opinion. However, overall, over its long life, consistent jurisprudence of the Court indicates that refusal would only be on the basis of “compelling reasons” and/or propriety.[[65]](#footnote-65) This is a basis which allows the Court not to provide an opinion where it would be inappropriate to do so. As far as the *Chagos* request is concerned it seems unlikely that, again, in light of the judicious wording of the questions, the Court will choose this as the first request it declines.

One final point on discretion which should be mentioned here is that there is an alternative view that the Court does not have unfettered discretion. Georges Abi-Saab (a former *ad hoc* judge in the ICJ)[[66]](#footnote-66) initially advanced this argument representing Egypt in the joint oral proceedings on the two *Nuclear Weapons* requests.[[67]](#footnote-67) He based this on *Eastern Carelia*, where Russia had made it clear that it did not accept any intervention by the League of Nations in its dispute with Finland.[[68]](#footnote-68) As Russia was not a member of the League, submission of a dispute to the League could only be on the basis of consent, which Russia plainly had not given. The League had no authority to ask for an advisory opinion and for the PCIJ it was “impossible to give its opinion on a dispute of this kind.”[[69]](#footnote-69)

Abi-Saab saw the PCIJ’s use of the word ‘impossible' as unambiguous, leaving no choice and no discretion. He also drew the distinction between a *right* which may be exercised and the *function* the ICJ has which “combines a power with a charge or an obligation to exercise it in the pursuit of a specific finality.”[[70]](#footnote-70) This is a persuasive argument and Abi-Saab points to eminent authority Sir Hersch Lauterpacht as confirming it.[[71]](#footnote-71) Nevertheless, the Court was not persuaded and in *Nuclear Weapons* it considered the use of its discretion to give an opinion and concluded “there exist no “compelling reasons” which would lead the Court to exercise its discretion not to do so.”[[72]](#footnote-72)

This brief look at discretion concludes the review of the operation of the ICJ’s advisory jurisdiction which began with a look at the purpose, scope and perception of this part of the Court’s activities. It was then seen that although the potential barriers to an opinion being given, jurisdiction and discretion, have been widely discussed by the Court over the years, in only one case has the Court actually found it is unable to give the advisory opinion requested.[[73]](#footnote-73)

Looking forward now, the question of whether the Court can expand its advisory jurisdiction and better use its capacity will be assessed.

VII. POTENTIAL ENHANCEMENT OF THE ADVISORY JURISDICTION

Taking stock on the ICJ’s fiftieth anniversary, Rosalyn Higgins went to the heart of the question of use of the advisory jurisdiction when she commented:

“Little purpose is served by artificially inventing new business for the Advisory Opinion, whether in the context of interstate dispute settlement or through new powers to be afforded to the Secretary-General. Recourse to the court must work with the seams of political and institutional realities and not against the grain.”[[74]](#footnote-74)

This is as true now as then and must be kept in mind when considering the potential for expanding the Court’s advisory jurisdiction. How, and if, the bodies currently able to request advisory opinions could make better use of this capacity will be reviewed first. Secondly, whether this pool of users could, and should, be expanded will be considered. The possible impact of a *Chagos* opinion will then be touched on along with other issues which may come before the bench in the future. Finally, factors which militate against any expansion will be evaluated.

*Additional use by those authorised under Article 96 of the Charter*

Although not expanding jurisdiction, additional use by those authorised to do so would boost the level of activity in the ICJ and, if the subject matter is of sufficient importance, enhance its international profile. As seen above, the Council and the Assembly have the most freedom of action in raising questions by virtue of Article 96(1).

(a) General Assembly

There is no question of under-utilisation here, the Assembly is the main user[[75]](#footnote-75) of the Court’s advisory jurisdiction although a potential block on use when the Council is seised of a situation was asserted in *Kosovo*. The argument made was that in such circumstances Article 12(1) of the Charter operates, barring the Assembly from making any recommendation unless requested to do so by the Council, with any Assembly request made then falling outside the authorisation of Article 96(1).[[76]](#footnote-76)

This was not accepted by the ICJ. Referring to the *Wall*, the Court reiterated its view that “[a] request for an advisory opinion is not in itself a ‘recommendation’ by the General Assembly ‘with regard to [a] dispute or situation’”. [[77]](#footnote-77) Thus while Article 12 may restrain the Assembly’s ability to act following *receipt* of an opinion, it does not limit the operation of Article 96(1) which enables the Assembly to request an advisory opinion on “any legal question”.

The Assembly remains the most likely channel for advisory opinions, allowing as it does the opportunity for states, given sufficient support, to funnel requests through this route and for NGOs to engage in the sort of “[h]eavy and well-organised lobbying” that powered the two *Nuclear Weapons* requests.[[78]](#footnote-78) The discussions in, and outside, the Assembly which precede an Assembly request also give questions an exposure and visibility throughout the international community which might not otherwise be the case with questions taking other paths and this seems likely to be so with the *Chagos* request.

 (b) Security Council

With the same possible reach as the Assembly, the Council has in contrast barely touched the advisory process. As noted above, it has so far requested only one opinion.[[79]](#footnote-79) A recent report, *The Rule of Law: Can the Security Council make better use of the International Court of Justice?* concluded that the connection between the Council and the Court falls far short of the symbiotic relationship envisaged by the Charter. [[80]](#footnote-80) It recommends that the Council should, when appropriate, request advisory opinions to assist it in resolving disputes, or elements of disputes, that threaten international peace and security or in clarifying “the legal standing of certain Council actions”.[[81]](#footnote-81)

However, sensitivities both within the Council and between parties involved in a dispute may well continue to stand in the way. The report itself identified the main issue which has inhibited Council use of the Court over the years, the reluctance of the Council “to resort to other UN organs and external actors that are independent of it – actors that it does not control and whose actions it cannot necessarily predict**.”[[82]](#footnote-82)** It seems almost certain that there will be no change to the status quo and consequently it is very unlikely that the Council will request any advisory opinions in the foreseeable future.

*Should new users be authorised?*

Article 96(2) of the Charter allows for new users by providing that these may at any time be authorised by the Assembly.[[83]](#footnote-83)

(a) UN Secretary-General access

As Rosalyn Higgins notes, proposals for the Secretary-General to be authorised by the Assembly to request advisory opinions have been mooted from the very early days of the UN.[[84]](#footnote-84) In 1950 the suggestion was made to enable the Secretary-General to act as a conduit for the Human Rights Committee (a treaty body, not qualifying as either an organ of the UN or a specialised agency).[[85]](#footnote-85) A later proposal in the 1990s envisaged a role for the Secretary-General in settlement of disputes.[[86]](#footnote-86)

None of these proposals have progressed. Thomas Franck observed that in light of the US having made it clear that it did not want the International Criminal Court “second-guessing its decisions about choice of weapons and targets in armed conflict” it was “highly doubtful that the US – or the Russian Federation or China – “would welcome the Secretary-General’s raising similar questions of the ICJ.”[[87]](#footnote-87) Derek Bowett also noted that the argument for the Secretary-General to have the power to request an opinion presupposes that neither the Council nor the Assembly would wish to and that this would indicate a lack of political support for the Secretary-General:

“The grant of the power would therefore seem to heighten the risk of conflict between the Secretary-General and those main organs, and this may be too high a price to pay for the advantage gained.” [[88]](#footnote-88)

Both Franck and Bowett’s points remain pertinent and there is no compelling counter argument supporting why Secretary-General access is needed when the Assembly option is there.

(b) State access

The Inter-American Court of Human Rights (IACtHR) provides a precedent here.[[89]](#footnote-89) States may consult the court on matters of interpretation or for review of compatibility of their domestic legislation with the regional human rights instruments.[[90]](#footnote-90) The Inter-American Commission on Human Rights has a broader access analogous to that of the Council and Assembly, and states have a similar limitation to that imposed on other UN organs and specialised agencies, matters must be within their “sphere of competence” and must have a “legitimate institutional interest”.[[91]](#footnote-91) The court uses the same principle of “compelling interests” to exercise its jurisdiction to the fullest extent.[[92]](#footnote-92)

The rate of advisory opinion activity is much higher in the IACtHR than in the ICJ which suggests an appetite for such a facility.[[93]](#footnote-93) It will be interesting also, in the European setting, to see whether Protocol No. 16 has an impact when it enters into force.[[94]](#footnote-94)

Perhaps, however, looking to human rights courts given their very particular focus is something of a theoretical exercise. Although there have been calls over the years for states to have direct access to the advisory jurisdiction, including proposals at the Charter drafting stage not adopted, none of these have gained traction.[[95]](#footnote-95) In 1976 a US Department of State study recommended states be enabled to ask the Court’s opinion on important questions of international law and the US House of Representatives, by a 1982 resolution, urged the President to consider pursuing this.[[96]](#footnote-96) It is evidence of how much perceptions of the Court have changed that the renewal of such a call today is extremely improbable.

The Assembly is available and has already been used as the means for a state to request an opinion.[[97]](#footnote-97) Additionally, the *Chagos* request is the result of a letter from Mauritius’ Permanent Representative to the UN asking for inclusion of the request for an advisory opinion on the Assembly’s Agenda.[[98]](#footnote-98) In this way states can indirectly use the advisory process and because there has been no recent push from states for direct access this does not seem a likely development area.

(c) Access for other international bodies

Putting aside opinions relating to the constitutions of organisations (concentrated in the UN’s early years) and appeals from tribunals, only one opinion requested by a specialised agency is arguably substantive and ‘meaty’, the WHO’s question on nuclear weapons which, as indicated above, the Court declined to answer on jurisdictional grounds. It is one of only five requests made by such bodies during the ICJ’s life. Given such a poor record of use by organs (other than the Assembly) and specialised agencies it looks unlikely that Assembly authorisation of additional bodies would generate an increase in requests.[[99]](#footnote-99)

*Expansion of the Court’s activities: Judicial review*

Moving from who can request opinions to subject matter: the ICJ does not have an express judicial review function, although a limited power on an implied basis has been noted by commentators.[[100]](#footnote-100) There is a possibility to expand its jurisdiction into this area and it could take the form of a review of actions of UN organs or of decisions of external tribunals or courts.

Outside the UN, there is limited precedent for a hierarchy of international courts.[[101]](#footnote-101) In 2000, then President of the ICJ, Judge Gilbert Guillaume, was pessimistic in commenting on suggestions that the ICJ act as a court of appeal for judgements of other international courts:

“This would, however, require a powerful political will on the part of states and far-reaching changes in the Court, which would need to be given substantial resources. I am not certain whether such a will exists.”[[102]](#footnote-102)

This pessimism seems justified as there is no strong political drive in that direction. Within the UN, there is a sensitivity that pushes against the idea of a hierarchy and would obstruct any development there. The Somalian representative’s comments at the Council vote on the *Namibia* opinion are illustrative:

“[T]he Afro-Asian group of sponsors would have liked to see the term “endorses” employed…However, it was drawn to our attention…that the word “endorses” could have a different connotation. The International Court of Justice and Security Council are two of the four main organs of the United Nations, and it might connote that one of those two was subordinate to the other. If recognition of the equal status of those two organs is to be maintained the word “endorses” would not be the correct term, “agrees” would be more suitable.”[[103]](#footnote-103)

This discussion of a quite subtle difference in language and the care taken in choice of words to precisely project the desired meaning is a neat illustration of the depth of concern that obstructs any development towards placing the ICJ above the Council.

All in all then, although there have been efforts in the past to broaden access to the advisory jurisdiction, there are currently no pressing claims and expansion therefore seems very unlikely. In addition, procedural factors would provide an obstacle should any proposal garner support. If a change needed amendment of the Statute[[104]](#footnote-104) the procedure is the same as that provided by the Charter[[105]](#footnote-105) for Charter amendments and it is not straightforward,[[106]](#footnote-106) requiring a two-thirds majority in the Assembly and ratification of two-thirds of the members of the UN, including *all* five permanent members (P5) of the Security Council. It has barely been used[[107]](#footnote-107) and the P5 ratification requirement means it is unlikely to be used for the Court. Compulsory jurisdiction has been accepted by only one permanent member, the UK,[[108]](#footnote-108) and the attitude of the others seemingly lies on a spectrum from indifference (China) through degrees of antipathy based on bruising encounters in the contentious arena (France, the US and the Russian Federation). It is likely therefore that any changes to the operation of the advisory proceedings would be capable of implementation only if no Statute amendment was required.

*Review of tribunal judgements: an anomaly of the advisory jurisdiction now eliminated*

A review of the ICJ’s advisory jurisdiction inevitably prompts enquiry into possible contraction as well as expansion. A longstanding anomaly was recently addressed when the ability of the Court to review judgements of the Administrative Tribunal of the International Labour Organization (ILOAT) was withdrawn through action by the ILO. This review power had been out of line with the stature of the Court’s other activities, and, more importantly, the principle of equality before a court was not *prima* facie met in such cases.

This issue of equality had been raised in *Judgement No. 2867*[[109]](#footnote-109) and canvassed four times previously without being resolved.[[110]](#footnote-110) The Assembly’s decision in 1995 to remove the provision for review of UNAT decisions had meant that it was no longer relevant there.[[111]](#footnote-111) The inequality had arisen because in proceedings reviewing judgements of administrative tribunals it was not possible for the official making the complaint, *in Judgement No. 2867* Miss Saez García, to address communications directly to the ICJ.[[112]](#footnote-112) Noting this, the Court had taken two steps to redress the imbalance.[[113]](#footnote-113) Miss Saez García’s views were routed via the President of the International Fund for Agricultural Development and there were no oral proceedings. While these measures allowed the Court to determine that the principle of equality had been met,[[114]](#footnote-114) this state of affairs remained unsatisfactory in that equality before the law was delivered by a ‘workaround’ rather than a firm solution.[[115]](#footnote-115) The Court indicated that it “maintained its concern about the inequality of access.”[[116]](#footnote-116)

The use of the ICJ to give opinions on these sorts of matters was anomalous given the mismatch between the scale of issues and the Court’s status and the increased availability of other judicial fora. Action was taken by the ILO in June 2016 by repeal of the provisions enabling review by the ICJ.[[117]](#footnote-117) No other obvious anomalies now remain.

*Efficient use of resources*

A further impetus for change might be the wish to use existing resources within the UN more efficiently. In 1992, in *An Agenda for Peace*, then Secretary-General, Boutros Boutros-Ghali, commented that the World Court was an under-utilised resource for the peaceful settlement of disputes.[[118]](#footnote-118) As well as calling for greater use of the Court’s potential to contribute to peacemaking by way of dispute resolution[[119]](#footnote-119) and recommending that the Secretary-General be authorised by Article 96(2) of the Charter to request advisory opinions, Boutros-Ghali also encouraged organs already authorised to make more frequent use of that capability.[[120]](#footnote-120)

Although the Secretary-General’s proposals were not just prompted by a wish to better use the Court’s capacity, the desire to utilise the expertise of the Court more fully is a valid consideration in that if the Court stands idle or under-employed it does not reflect particularly well either on the Court or the UN as a whole. That said, under-utilisation of the Court is not at the moment a concern.[[121]](#footnote-121) The current President, Judge Ronny Abraham, noted in 2016 that the Court’s efforts to increase its productivity had allowed it to clear the backlog of cases that had accumulated.[[122]](#footnote-122) Were that not so, as seen above under-capacity is not in itself a sufficient driver to expand the court’s advisory jurisdiction. There need to be other more persuasive reasons and also a lack of viable alternatives.[[123]](#footnote-123)

*Militating factors*

Finally, briefly, there are factors which militate against any expansion in jurisdiction. State control of the mechanisms for change has been discussed. Perceived unhelpful opinions may discourage use and the composition of the Court, enduring influence of the Great Powers, and the proliferation of other options are also relevant.

Discussion of possible expansion in activity must also be accompanied by contemplation of the costs of doing so. If the Court’s advisory jurisdiction was expanded, would it have the means to meet that demand? There has been a history of unpaid or late contributions to the UN, with the US, the main contributor and leading defaulter. At mid-December 2017 it remained the only P5 state whose contribution to that year’s regular budget had not been paid in full.[[124]](#footnote-124) The Court’s budget[[125]](#footnote-125) is a small part of the UN budget as a whole but this highlights the fact that any proposed change would need to stand up to scrutiny in a financial as well as a substantive sense.

*Looking forward*

Turning now to view what is ahead for the Court’s advisory jurisdiction, as discussed above the *Chagos* request is next on the slate. This is extremely controversial, a case before the European Court of Human Rights was found inadmissible on the basis that the Chagos Islanders’ claims had been raised and settled at UK domestic level.[[126]](#footnote-126) More recently Mauritius brought a case before an Arbitral Tribunal and findings to the extent that the tribunal found it had jurisdiction, were in Mauritius’ favour.[[127]](#footnote-127)

As noted, the UK government made its opposition to any reference to the Court very clear[[128]](#footnote-128) and jurisdiction and discretion will inevitably be canvassed but this is the sort of question the ICJ is uniquely qualified to consider, dealing as it does with issues of sovereignty, decolonisation, self-determination and fundamental human rights.[[129]](#footnote-129) In doing so, the Court will continue to demonstrate its unique status in the international community.

Not on the agenda but in the future perhaps so, a number of areas have been identified where the Court could contribute to key debates by way of its advisory capability.

(a) Human Rights

Ex-ICJ judge Bruno Simma sees real potential for the ICJ’s advisory jurisdiction to take forward a process already underway : the ‘mainstreaming’ of human rights into international law as one half of a symbiotic process whereby “human rights and general international law mutually impact upon one another: human rights ‘modernize’ international law, while international law ‘mainstreams’, or ‘domesticates’ human rights.”[[130]](#footnote-130) Simma believes that the *Nuclear Weapons* opinion was pioneering[[131]](#footnote-131) with the later *Wall* opinion moving from the “abstract to the concrete”.[[132]](#footnote-132)

Simma acknowledges that further advancing this process is dependent on the questions asked of the Court. He believes the Court will not hesitate to take full advantage of opportunities here, not least because it “is particularly well-equipped and has practically no competition”.[[133]](#footnote-133) Advisory opinions also offer a possibility of greater freedom of action with less of the limitations inherent in the contentious jurisdiction.[[134]](#footnote-134)

Abraham also sees the Court’s contribution to clarifying the status and scope of human rights and the relationship between human rights and other areas of law as worthy of note[[135]](#footnote-135) and he expressed a wish for wider use of the advisory jurisdiction:

“Advisory Opinions have shown themselves to have considerable potential as a means of clarifying and harmonizing international law, and remain in that respect a promising instrument.”[[136]](#footnote-136)

Abraham also highlights increasing interactions between the ICJ and other judicial bodies and envisages the Court playing a key part in the “fruitful institutional dialogue” and “mutual enrichment of the jurisprudence.”[[137]](#footnote-137)Although the primary positioning of dispute settlement, and the greater level of business there, means this is likely to feed most into a ‘mutual enrichment’ process, the scope for advisory opinions to do so could also be significant and a reason to encourage activity.

(b) Climate change

Philippe Sands recently talked about the potential of the advisory process to address key legal issues around climate change.[[138]](#footnote-138) The genesis of this was a call in 2011 by the President of Palau to the General Assembly for it to seek an advisory opinion from the ICJ “on the responsibilities of States under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other states.”[[139]](#footnote-139)

Having initially been sceptical,[[140]](#footnote-140) Sands notes that a combination of factors now places the ICJ in a unique position to deal with “the totality of the key legal questions that arise in relation to climate change.”[[141]](#footnote-141) While ITLOS has capability too, this is more limited in scope.[[142]](#footnote-142) Also significant for future Court activity, Sands notes its first, and very effective, use of cross-examination of expert scientific witnesses in the *Whaling in the Antarctic* case.[[143]](#footnote-143)

Events have moved on with the signing of the Paris Agreement[[144]](#footnote-144) but the potential remains. With the initiative more actively seized politically, momentum so far generated for an advisory opinion may dissipate, although the US withdrawal from the Paris Agreement could impact the other way.[[145]](#footnote-145) In principle climate change seems eminently suitable for consideration by the ICJ. The magnitude and reach of the issues, the blindness to borders and the challenges this raises in a Westphalian setting all point to something for the Court really to get its teeth into.

(c) Environmental matters

Finally, the *Nuclear Weapons* opinion has been praised as marking a very significant step in international law “by beginning to articulate general environmental obligations in international law”, and more steps may follow.[[146]](#footnote-146)

VIII. CONCLUSION

Notwithstanding that states’ interest in the Court’s advisory jurisdiction is indirect, what states want from the Court is the key determining factor around use of the Court. The initial appraisal of the scope of the ICJ’s advisory jurisdiction showed that the Court is *not* required to accept all requests for advisory opinions and to do so might undermine its integrity and standing. While the ICJ has so far not exercised its discretion to refuse to give an opinion, the ability to do so is an important safety mechanism and any suggestion that the Court give an opinion whenever it is asked would not therefore be endorsed.

In terms of past activity, the Assembly has made good use of the advisory opinion process and can be expected to continue to do so. Conversely, the *realpolitik* of the Council points away from any further use by that body. At best the P5 - who by virtue of the veto hold sway - are indifferent to the Court. Other UN organs and specialised agencies have barely scratched the surface of the potential of advisory opinions, and the tightening of interpretation around “scope of activities” in the Court’s response to the WHO’s *Nuclear Weapons* question is more likely to dissuade than assist here.

Although demand for an expansion of the Court’s advisory jurisdiction has not been demonstrated for any of the options explored, allowing submissions by appropriate NGOs could enhance perception of the Court. However, the likely volume of material risks overwhelming the process, so a balance must be struck. The *Chagos* request offers an ideal opportunity to test this out and build on the (incomplete) precedent established by the Court in the *Status of South-West Africa*.

To sustain and improve the perception of the ICJ it is essential the Court remains concerned with issues of real substance and value to the international community which match its standing and its unique position in the judicial landscape. The trimming of the Court’s ILOAT review function has assisted here. In the *Nuclear Weapons* and *Wall* opinions, the Court came under pressure to exercise its discretion to refuse to give an opinion but a turning away from such major issues would send a hammer blow to its status as the principal judicial organ of the UN.[[147]](#footnote-147) The *Chagos* request is weighty, challenging and addressees issues of real significance. Whether, and how, the Court chooses to answer the two questions in the request will undoubtedly have a substantial impact on the international plane and could serve to revitalise the Court’s advisory function.

Opinions on matters of lesser importance risk undermining not only the Court’s reputation - showing it as relegated to dealing with minor issues – but also that of international law itself. If the Court gives more advisory opinions, but what it deals with is small beans, there is a danger that international law is increasingly side-lined and unable to act as an effective counter-weight to politics in international debate.

1. Charter of the United Nations 1945, Article 92; Statute of the International Court of Justice 1945, Article 1. [↑](#footnote-ref-1)
2. *Judgement No.2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint filed against the International fund for Agricultural Development*, Advisory Opinion, ICJ Reports 2012, p.10. [↑](#footnote-ref-2)
3. A/71/L.73, 15 June 2017 and see International Court of Justice, Press Release Unofficial, No. 2017/27, *The General Assembly requests an advisory opinion from the Court on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965* (*Chagos* request),29 June 2017, <http://www.icj-cij.org/files/case-related/169/169-20170629-PRE-01-00-EN.pdf>, (all links last accessed on 16/17 December 2017). [↑](#footnote-ref-3)
4. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO Nuclear Weapons)*, Advisory Opinion, ICJ Reports 1996, p.66. [↑](#footnote-ref-4)
5. *Status of Eastern Carelia*, Advisory Opinion, 1923 PCIJ, (ser. B), No. 5(July 23). [↑](#footnote-ref-5)
6. *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Kosovo)*, Advisory Opinion, ICJ Reports 2010, p.403, 417, para.33. [↑](#footnote-ref-6)
7. <http://www.icj-cij.org/en/organs-agencies-authorized>. One of the organs, the Trusteeship Council, suspended its operations on November 2014, a month after the last UN trust territory, Palau, gained independence <http://www.un.org/en/sections/about-un/trusteeship-council/index.html>. [↑](#footnote-ref-7)
8. *Kosovo* (n6) 417, para.33. [↑](#footnote-ref-8)
9. ICJ, *Judgements, Advisory Opinions and Orders* <http://www.icj-cij.org/en/decisions/advisory-opinion/1946/2017/asc>. [↑](#footnote-ref-9)
10. *WHO Nuclear Weapons* (n4) and *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, p73. [↑](#footnote-ref-10)
11. *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion of 8 June 1960, ICJ Reports 1960, p150, 1959, for assistance with interpretation of the Convention for its establishment. [↑](#footnote-ref-11)
12. *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999, p62, 69, para.10 and section 30 of the Convention. [↑](#footnote-ref-12)
13. *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons)*, Advisory Opinion, ICJ Reports 1996, p.226, 237, para.18. [↑](#footnote-ref-13)
14. *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports 1951, p15. [↑](#footnote-ref-14)
15. Elihu Lauterpacht (ed) *Hersch Lauterpacht, International Law Collected Papers, 4.The Law of Peace, Parts VII - VIII* (Cambridge University Press, Cambridge 1978), 235. [↑](#footnote-ref-15)
16. *Ibid*. [↑](#footnote-ref-16)
17. Article 65(1). [↑](#footnote-ref-17)
18. Statute (n1) Article 65(2). [↑](#footnote-ref-18)
19. *Ibid*. Article 66(2). [↑](#footnote-ref-19)
20. *Ibid*. Article 66(4). [↑](#footnote-ref-20)
21. *Ibid*. Article 66(2). [↑](#footnote-ref-21)
22. *WHO Nuclear Weapons* (n4) and *Nuclear Weapons* (n13). [↑](#footnote-ref-22)
23. Rosalyn Higgins, ‘Remedies and the International Court of Justice: An Introduction’ in Malcolm D Evans (ed) *Remedies in International Law, The Institutional dilemma* (Hart Publishing, Oxford 1998), 2-3. [↑](#footnote-ref-23)
24. *Ibid*. [↑](#footnote-ref-24)
25. *International Status of South-West Africa*, Advisory Opinion, ICJ Reports 1950, p.128, Correspondence, 327, para. 18, The Registrar to Mr Robert Delson, League for the Rights of Man (*telegram*) [↑](#footnote-ref-25)
26. *Ibid*., *International Status of South-West Africa* opinion 130. [↑](#footnote-ref-26)
27. *Chagos* request (n3). [↑](#footnote-ref-27)
28. Statute (n1) Article 66(2). [↑](#footnote-ref-28)
29. *Ibid*. Article 66(4). [↑](#footnote-ref-29)
30. eg Judge Buergenthal in his Declaration, 240, para. 1, Legal *Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004 p.136. [↑](#footnote-ref-30)
31. ‘Outcome Paper for the Seminar on the International Court of Justice: In Retrospect and in Prospect’, 7 *Journal of International Dispute Settlement* (2016) 238–265, 243. [↑](#footnote-ref-31)
32. *Ibid*. [↑](#footnote-ref-32)
33. *Nuclear Weapons* (n13) Dissenting Opinion of Judge Weeramantry at 438. [↑](#footnote-ref-33)
34. *Ibid*. [↑](#footnote-ref-34)
35. 1969 and see Arthur Eyffinger, *The International Court of Justice 1946–1996* (Kluwer Law International, The Hague 1996) 361. [↑](#footnote-ref-35)
36. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p16 and see 1598th meeting of the Security Council, S/PV 1598 20 October 1971. [↑](#footnote-ref-36)
37. *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p12. [↑](#footnote-ref-37)
38. *Immunity from Legal Process* (n12). [↑](#footnote-ref-38)
39. *Outcome Paper* (n31) 240–241. [↑](#footnote-ref-39)
40. *Ibid*., 240. [↑](#footnote-ref-40)
41. *Ibid*., 240-241. [↑](#footnote-ref-41)
42. *Charter* (n1) Article 96(1). [↑](#footnote-ref-42)
43. *Ibid*. Article 96(2). [↑](#footnote-ref-43)
44. *Kosovo* (n6) 414–415, para.25. [↑](#footnote-ref-44)
45. *Ibid. and Western Sahara* (n37), 18, para. 15: “indeed, they are scarcely susceptible of a reply otherwise than on the basis of law.” [↑](#footnote-ref-45)
46. eg *Nuclear Weapons* (n13) 234, para.13 and *Kosovo* (n6) 415, para.27. [↑](#footnote-ref-46)
47. *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, p73, 87, para.33. [↑](#footnote-ref-47)
48. *Nuclear Weapons* (n13) 234, para.13. [↑](#footnote-ref-48)
49. *Ibid*.232-233, para.11. [↑](#footnote-ref-49)
50. *Ibid*. “any questions or any matters within the scope of the present Charter…”. [↑](#footnote-ref-50)
51. *Ibid*. “consider the general principles…in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments”. [↑](#footnote-ref-51)
52. *Ibid*. “shall initiate studies and shall make recommendations for the purpose of…encouraging the progressive development of international law and its codification.” [↑](#footnote-ref-52)
53. *Namibia* (n36)23, para.31. [↑](#footnote-ref-53)
54. *WHO Nuclear Weapons* (n4) 84 para.31. [↑](#footnote-ref-54)
55. *Ibid.*77, para.22. [↑](#footnote-ref-55)
56. eg Virginia Leary ,’The WHO case: Implications for Specialised Agencies’ in Laurence Boisson de Chazournes and Philippe Sands (eds) *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, Cambridge 1999), 119. [↑](#footnote-ref-56)
57. *Ibid*.126. [↑](#footnote-ref-57)
58. *Chagos* request (n3): In (a) “Was the process of decolonization of Mauritius lawfully completed…” and (b) “What are the consequences under international law…”. [↑](#footnote-ref-58)
59. *Eastern Carelia* (n5). [↑](#footnote-ref-59)
60. Article 65(1). [↑](#footnote-ref-60)
61. *Interpretation of Peace Treaties*, Advisory Opinion: ICJ Reports 1950, p65, 71. [↑](#footnote-ref-61)
62. *Nuclear Weapons*, (n13) 236, para.15. [↑](#footnote-ref-62)
63. eg the inadmissibility ruling by the European Court of Human Rights: *The Chagos Islanders v the United Kingdom*, application no. 35622/04, Press Release ECHR 460 (2012) 20 December 2012 and *In the Matter of the Chagos Marine Protected Area Arbitration before an Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea between the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland*, Award, 18 March 2015. [↑](#footnote-ref-63)
64. British Indian Ocean Territory: Written Statement – HCWS10, Foreign and Commonwealth Office, Made by: Sir Alan Duncan (The Minister of State for Foreign and Commonwealth Affairs), 28 June 2017, para. 1 <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-06-26/HCWS10>. [↑](#footnote-ref-64)
65. *Nuclear Weapons*, (n13) 234-235, para.14. [↑](#footnote-ref-65)
66. In two contentious cases, <http://legal.un.org/avl/pdf/ls/Abi-Saab_bio.pdf>. [↑](#footnote-ref-66)
67. Verbatim Record, CR 95/23, 1 November 1995, <http://www.icj-cij.org/files/case-related/95/095-19951101-ORA-01-00-BI.pdf> 18 - 26. [↑](#footnote-ref-67)
68. *Eastern Carelia* (n5) 28. [↑](#footnote-ref-68)
69. *Ibid*. and Georges Abi-Saab, ‘Reflections on the nature of the consultative function of the International Court of Justice’ Boisson de Chazournes and Sands (n56) 40. [↑](#footnote-ref-69)
70. Abi-Saab, *Ibid*.44. [↑](#footnote-ref-70)
71. *Ibid*.43. [↑](#footnote-ref-71)
72. *Nuclear Weapons* (n13) 238, para.19. [↑](#footnote-ref-72)
73. *WHO Nuclear Weapons* (n4) 84. [↑](#footnote-ref-73)
74. Rosalyn Higgins, ‘A comment on the current health of Advisory Opinions’ in Lowe V and Fitzmaurice M (eds), *Fifty years of the International Court of Justice: essays in honour of Sir Robert Jennings*, (Cambridge University Press, Cambridge 1996), 581. [↑](#footnote-ref-74)
75. *Judgements, Advisory Opinions and Orders* (n9). [↑](#footnote-ref-75)
76. *Kosovo* (n6) 414, para.24. [↑](#footnote-ref-76)
77. *Ibid*. [↑](#footnote-ref-77)
78. *Remedies* (n23) 2. [↑](#footnote-ref-78)
79. *Namibia* (n36). [↑](#footnote-ref-79)
80. Security Council Report, Special Research Report, 2016 No. 5, 20 December 2016, 13 <http://www.securitycouncilreport.org/special-research-report/the-rule-of-law-can-the-security-council-make-better-use-of-the-international-court-of-justice.php>. [↑](#footnote-ref-80)
81. *Ibid*. [↑](#footnote-ref-81)
82. *Ibid*.9. [↑](#footnote-ref-82)
83. *Charter* (n1) Article 96(2). [↑](#footnote-ref-83)
84. *Health of Advisory Opinions* (n74) 569. [↑](#footnote-ref-84)
85. *Ibid*. [↑](#footnote-ref-85)
86. *Ibid*.570, Higgins traces this back to the call to the Security Council in General Assembly Resolution *Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field*, para.15,A/RES/43/51,5 December 1988 <http://www.un.org/documents/ga/res/43/a43r051.htm>. [↑](#footnote-ref-86)
87. Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press Inc., New York 1990),150. [↑](#footnote-ref-87)
88. D W Bowett, ‘The Court’s role in relation to international organizations’ in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty years of the International Court of Justice*, (Cambridge University Press, Cambridge 1996) 187-188. [↑](#footnote-ref-88)
89. See also the African Court of Human and Peoples’ Rights with its somewhat counter-intuitive approach (in a human rights context) to competence <http://en.african-court.org/>. [↑](#footnote-ref-89)
90. Article 64(1) and (2), American Convention on Human Rights “Pact of San José, Costa Rica” B-32, 1969. [↑](#footnote-ref-90)
91. Dinah Shelton, ‘The Jurisprudence of the Inter-American Court of Human Rights’ 10(1) *American University International Law Review* (1996) 333-372, 337. [↑](#footnote-ref-91)
92. *Ibid*. [↑](#footnote-ref-92)
93. *Ibid*.336. [↑](#footnote-ref-93)
94. Protocol No.16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.214, it will enter into force with 10 ratifications, there are currently 7 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=CsGuZK9E>. [↑](#footnote-ref-94)
95. *Security Council Report* (n80) 4. [↑](#footnote-ref-95)
96. Stephen R Crilly, ‘A nascent proposal for expanding the advisory opinion jurisdiction of the International Court of Justice’, 10 *Syracuse Journal of International Law* (1983) 215–221. [↑](#footnote-ref-96)
97. eg Serbia, the *Kosovo* (n6) opinion. [↑](#footnote-ref-97)
98. *Request for the inclusion of an item in the provisional agenda of the seventy-first session, Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, Letter dated 14 July 2016 from the Permanent Representative of Mauritius to the United Nations addressed to the Secretary-General, A/71/142, 14 July 2016. [↑](#footnote-ref-98)
99. Consideration was given to the inclusion of a provision in the *Relationship Agreement between the United Nations and the International Criminal Court* to allow for any dispute as to interpretation to be settled by way of advisory opinion via the General Assembly, Paul C Szasz & Thordis Ingadottir, ‘The UN and the ICC: The Immunity of the UN and Its Officials’, 14 *Leiden Journal of International Law* (2001) 867 – 885, 884-885. [↑](#footnote-ref-99)
100. eg Elihu Lauterpacht ‘Judicial Review of the acts of International Organisations’ in Boisson de Chazournes and Sands (n56) 95–96. [↑](#footnote-ref-100)
101. eg Appellate Body of the World Trade Organization. [↑](#footnote-ref-101)
102. Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000, ‘The proliferation of international judicial bodies: the outlook for the international legal order’. <http://www.icj-cij.org/files/press-releases/1/3001.pdf>. [↑](#footnote-ref-102)
103. 1598th meeting of the Security Council, S/PV 1598 20.10.71, 4, para.29. [↑](#footnote-ref-103)
104. Statute (n1), Article 69. [↑](#footnote-ref-104)
105. Charter (n1) Article 108. [↑](#footnote-ref-105)
106. Article 69 Statute and Articles 108 and 109 Charter and see *International Court of Justice, Charter of the United Nations, Introductory Note*, paras. 2-4 <http://www.icj-cij.org/en/charter-of-the-united-nations>. [↑](#footnote-ref-106)
107. *Ibid*., *Introductory Note.* [↑](#footnote-ref-107)
108. On 31 December 2014. [↑](#footnote-ref-108)
109. *ILOAT* (n2) 25, para.35. [↑](#footnote-ref-109)
110. *Judgements of the Administrative Tribunal of the ILO upon complaints made against the UNESCO*, Advisory Opinion of October 23rd, 1956, p77; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, p166; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1982, p325 and *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1987, p18. [↑](#footnote-ref-110)
111. General Assembly resolution 50/54 of 11 December 1995, preamble. [↑](#footnote-ref-111)
112. *ILOAT* (n2) 18, para.10. [↑](#footnote-ref-112)
113. *Ibid*.30, para.45. [↑](#footnote-ref-113)
114. *Ibid*.30, para.47. [↑](#footnote-ref-114)
115. The involvement of non-state entities in the *Kosovo* and *Wall* proceedings was dealt with informally but the situations are not analogous, state/state relations are conducive to a more flexible approach than individual/state interactions. [↑](#footnote-ref-115)
116. *ILOAT* (n2) 31, para.48. [↑](#footnote-ref-116)
117. Rosalyn Higgins et al., *Oppenheim’s International Law United Nations Volume II (Oxford University Press, Oxford 2017) 1167, para. 29.114.* The opportunity can now be taken to equalise the position of individual *vis-à-vis* organisation. [↑](#footnote-ref-117)
118. A/47/277,S/24111, 17 June 1992, 11, para.38. [↑](#footnote-ref-118)
119. *Ibid*. and calling on the Security Council to encourage States to do so by means of its powers in Articles 36 and 37 Charter. [↑](#footnote-ref-119)
120. *Ibid*. [↑](#footnote-ref-120)
121. Regarding advisory opinions Dapo Akande notes that in the last 2 decades the Court received only 4 requests for an advisory opinion (of a total of 26 requests in its first 70 years) but this was also the case in the 20 year period from 1960 to 1979. ‘Selection of the International Court of Justice as a Forum for Contentious and Advisory Proceedings (Including Jurisdiction)’ 7 *Journal of International Dispute Settlement* (2016) 320 -344, 339. This may therefore be cyclical rather than a downward trend. [↑](#footnote-ref-121)
122. Judge Ronny Abraham ‘Presentation of the International Court of Justice’ 7 *Journal of International Dispute Settlement* (2016) 297–307, 300. [↑](#footnote-ref-122)
123. eg seeking an advisory opinion on the *Reparations* matter (*Reparation for Injuries suffered in the service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p174) was one of three possible options, Antonio Cassese, *International Law in a Divided World* (Oxford University Press Inc., New York 1986), 87 referring to *Yearbook of the UN 1948–49*, 936. [↑](#footnote-ref-123)
124. *Contributions received for 2017 for the United Nations Regular Budget* <http://www.un.org/en/ga/contributions/honourroll.shtml>. [↑](#footnote-ref-124)
125. *Report of the International Court of Justice 1 August 2016 – 31 July 2017*, A/72/4, 10-11, see para 27, Supplementary Budget *Chagos*. [↑](#footnote-ref-125)
126. Press Release ECHR 460 (n63). [↑](#footnote-ref-126)
127. Arbitral Tribunal (n63) 215, para 547 B. [↑](#footnote-ref-127)
128. *BIOT Written Statement* (n64) and *Mauritius threatens to take Chagos Islands row to UN court*, The Guardian, 17 November2016, <https://www.theguardian.com/world/2016/nov/17/mauritius-threatens-to-take-chagos-islands-row-to-un-court>. [↑](#footnote-ref-128)
129. *Mauritius letter* (n98) Annex, Explanatory Memorandum, 2–3. [↑](#footnote-ref-129)
130. Bruno Simma, ‘Mainstreaming Human Rights: The Contribution of the International Court of Justice’ 3(1) *Journal of International Dispute Settlement* (2012) 7–29, 29. [↑](#footnote-ref-130)
131. *Ibid*.18, and see *Nuclear Weapons* (n13) 226. [↑](#footnote-ref-131)
132. *Ibid*. and see *Wall* (n30) eg, 179-180, paras.109-111 and 191-194, paras.134–137. [↑](#footnote-ref-132)
133. Simma (n130) 27. [↑](#footnote-ref-133)
134. *Ibid.*25, “traditional inter-state ‘reflexes’, jurisdictional straitjackets and procedural hurdles”. [↑](#footnote-ref-134)
135. Abraham (n122) 304. [↑](#footnote-ref-135)
136. *Ibid*. [↑](#footnote-ref-136)
137. *Ibid*.301. [↑](#footnote-ref-137)
138. Philippe Sands, ‘Climate Change and the Rule of Law: Adjudicating the Future in International Law’ 28 *Journal of Environmental Law* (2016) 19-35 (based on a lecture given on 17 September 2015). [↑](#footnote-ref-138)
139. Statement by the Honourable Johnson Toribiong President of the Republic of Palau to the 66th Regular Session of the United Nations General Assembly, 22 September 2011, 3, <https://gadebate.un.org/sites/default/files/gastatements/66/PW_en.pdf>. [↑](#footnote-ref-139)
140. Sands (n138) 19. [↑](#footnote-ref-140)
141. *Ibid*.32-33. [↑](#footnote-ref-141)
142. International Tribunal for the Law of the Sea. *Ibid*.25, [↑](#footnote-ref-142)
143. *Ibid*.29 and *(Australia v. Japan: New Zealand intervening)* Judgement, ICJ Reports 2014, 226. [↑](#footnote-ref-143)
144. FCCC/CP/2015/L.9/Rev.1, 12 December 2015. <http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf>. [↑](#footnote-ref-144)
145. *Statement by President Trump on the Paris Climate Accord*, The White House, 1 June 2017, <https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord>. [↑](#footnote-ref-145)
146. Edith Brown Weiss, ‘Opening the door to the environment and to future generations’ in Boisson de Chazournes and Sands (n56) 343. [↑](#footnote-ref-146)
147. Although trenchant criticism by Vice-President Schwebel in his Dissenting Opinion (322) in *Nuclear Weapons* (n13) takes the opposite view: [↑](#footnote-ref-147)