

I. Introduction

1.1 In its Order of 14 July 2017, the Court invited United Nations Member States to submit written statements regarding the request for an advisory opinion on the question of the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. The present Written Statement is submitted pursuant to that Order.

1.2 Israel voted against the adoption of General Assembly resolution A/RES/71/292, entitled “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”. Israel’s representative explained at the General Assembly that:

“Without addressing the substantive issues raised in resolution 71/292, Israel is of the view that the resolution seeks to refer a bilateral dispute to the International Court of Justice. In our view, it is inappropriate to have recourse to the advisory opinion mechanism in order to involve the International Court of Justice in a territorial dispute that is essentially bilateral in nature. The underlying approach reflected in the resolution represents, in our view, a misuse of the advisory opinion provision under Article 96 of the Charter of the United Nations and undermines the principal distinction between the jurisdiction of the Court in contentious cases and its advisory jurisdiction — a distinction that should be maintained for the sake of the United Nations and the International Court of Justice itself. It is for that reason that Israel voted against the resolution”.¹

1.3 A considerable number of other States voiced similar concerns in explaining their position. Also noteworthy is the voting record (94 votes in favor to 15 against, with 65 abstentions), which revealed a General Assembly very much divided over the propriety of the resolution.

1.4 As this written statement will explain, Israel continues to believe that the circumstances of the present case are of such a character as to lead the Court to

¹ A/71/PV.88 (22 June 2017), p. 21.

exercise its discretionary power under Article 65 of its Statute and decline to give the requested advisory opinion. This position is primarily informed by Israel's concern for the need to uphold the Court's judicial character and prevent abuse of its advisory function, particularly when giving the requested opinion "would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent".²

1.5 Without prejudice to other considerations, the present Written Statement is limited to issues of judicial propriety. In particular, it does not intend to deal with jurisdictional issues or the merits of the dispute underlying the case, which Israel indeed considers to be one of a purely bilateral nature.

1.6 With these initial remarks in mind, Chapter II of this statement recalls the Court's jurisprudence affirming its discretion to decline to give an advisory opinion. Chapter III details the reasons why the present circumstances are such that the Court's discretion ought to lead it to decline to give the requested opinion. Israel's conclusions are briefly set out in Chapter IV.

II. The Court's discretion to decline to give the advisory opinion requested

2.1 As the Court has consistently held in a long line of decisions, the permissive character of Article 65 of its Statute affords it discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met.³ This discretion, as

² *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 25, para. 33.

³ *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, at pp. 24-25, para. 33; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at pp. 415-416, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 156, para. 44; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 78, para. 28; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at pp. 234-235, para. 14; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 21, para. 23; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166, at p. 175, para. 24; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 27, para. 41; *Certain expenses of the United Nations (Article*

the Court recently put it, “exists for good reasons”.⁴ At issue is the imperative need to “protect the integrity of the Court’s judicial function and its nature as the principal judicial organ of the United Nations”.⁵ In the Court’s own words:

“The Court and its predecessor have emphasized that, in their advisory jurisdiction, they must maintain their integrity as judicial bodies. The Permanent Court of International Justice as long ago as 1923, in recognizing that it had discretion to refuse a request, made an important statement of principle: “The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding [its] activity as a Court”.”⁶

2.2 The Court’s pronouncement to this effect in the *Western Sahara* case bears mentioning in this context as well:

“Article 65, paragraph 1, of the Statute, which establishes the power of the Court to give an advisory opinion, is permissive and, under it, that power is of a discretionary character. In exercising this discretion, the International Court of Justice, like the Permanent Court of International Justice, has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions. If the question is a legal one which the Court is undoubtedly competent to answer, it may none the less decline to do so. As this Court has said in previous Opinions, the permissive character of Article 65, paragraph 1, gives it the power to examine

17, paragraph 2, of the Charter), *Advisory Opinion of 20 July 1962: I.C.J. Reports 1962*, p. 151, at p. 155; *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of October 23rd, 1956: I.C.J. Reports 1956*, p. 77, at p. 86; *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p. 15, at p. 19; *Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950*, p. 65, at p. 72.

⁴ *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, at p. 25, para. 33.

⁵ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 416, para. 29 (citing additional cases as well).

⁶ *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, at p. 25, para. 34 (citing to *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 29, and noting that “for the most recent statement on this matter see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, pp. 415-416, para. 29, and the authorities referred to there”). See also *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment of 2 December 1963: I.C.J. Reports 1963*, p. 15, at p. 30.

whether the circumstances of the case are of such a character as should lead it to decline to answer the request”.⁷

2.3 While the Court has made it clear that requests for an advisory opinion should generally not be refused,⁸ it has been equally consistent in emphasizing that “compelling reasons” may well justify a refusal.⁹ In each and every case the Court must, indeed, “satisfy itself as to the propriety of the exercise of its judicial function”.¹⁰

2.4 As described below, the Court’s jurisprudence provides some guidance as to reasons that may be sufficiently compelling as to constitute grounds for declining to give the opinion requested. If this case-law and the discretion under Article 65 of the Court’s Statue are actually to guide the Court’s decisions, then the present case is clearly one where reasons that could lead the Court to decline to give an advisory opinion are sufficiently compelling to require it to do so.

⁷ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 21, para. 23.

⁸ See, most recently, *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, at p. 25, para. 33.

⁹ *Id.*; see also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 416, para. 30; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 156, para. 44 and p. 157, para. 45; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999*, p. 62, at p. 78, para. 29; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 235, para. 14; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 21, para. 23; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 166, at p. 183, para. 40; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 27, para. 41; *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of October 23rd, 1956: I.C.J. Reports 1956*, p. 77, at p. 86; *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962: I.C.J. Reports 1962*, p. 151, at p. 155; *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of October 23rd, 1956: I.C.J. Reports 1956*, p. 77, at p. 86.

¹⁰ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 416, para. 31. See also, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 144, para. 13 and p. 157, para. 45. In its advisory opinion on the *Administrative Tribunal of the I.L.O.* the Court posed the question as follows: “The Court is a judicial body and, in the exercise of its advisory functions, it is bound to remain faithful to the requirements of its judicial character. Is that possible in the present case?” (*Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., Advisory Opinion of October 23rd, 1956: I.C.J. Reports 1956*, p. 77, at p. 84).

III. Compelling reasons for declining to give the advisory opinion requested

3.1 In Israel's view, at least two cogent reasons embodying the "essential rules guiding [the Court's] activity as a Court"¹¹ mandate that the Court should decline to give the advisory opinion requested in the present case. First, the fundamental principle of consent to jurisdiction must not be circumvented. This is particularly so where (i) the question placed before the Court goes to the heart of a dispute pending between States; and/or (ii) the essence of the dispute concerns matters of territorial sovereignty. Secondly, the advisory opinion procedure is ill-equipped for the determination of complex and disputed issues of fact that is required in the present case, given the lack of adversarial procedures and protections available in contentious proceedings.

A. To give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent

3.2 The Court has observed that even if the absence of consent of a State to advisory proceedings can have no effect on the jurisdiction of the Court, "it is a matter to be considered when examining the propriety of the Court giving an opinion".¹² This owes to the fact, long ago recognized by the Permanent Court of International Justice when it declined to give an advisory opinion in the *Eastern Carelia* case, that:

"[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement".¹³

3.3 In that case, as the Court has had occasion to explain (and endorse) in its

¹¹ *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, Advisory Opinion, I.C.J. Reports 2012*, p. 10, at p. 25, para. 34 (citing *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 29).

¹² *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177, at pp. 190-191, para. 37.

¹³ *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 27.

advisory opinion on *Interpretation of Peace Treaties*, the Permanent Court of International Justice:

“declined to give an Opinion [*inter alia*] because it found that the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties”.¹⁴

3.4 In the *Western Sahara* case, the Court observed that it has indeed:

“recognized that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court’s competence, but for the appreciation of the propriety of giving an opinion”.¹⁵

The Court further explained that:

“In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction”.¹⁶

¹⁴ *Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950*, p. 65, at p. 72. See also Judge Owada’s Separate Opinion in *Wall* case: “the critical criterion for judicial propriety in the final analysis should lie in the Court seeing to it that giving a reply in the form of an advisory opinion on the subject-matter of the request should not be tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute that currently undoubtedly exists” (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 265, para. 13).

¹⁵ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 25, para. 32.

¹⁶ *Id.*, at para. 33. See also *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 90, at p. 101, para. 26 (where the Court recalled that “one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction”).

3.5 The present case presents precisely such a situation, and, accordingly, the Court should exercise its power to ensure respect for the fundamental principle of consent to jurisdiction.

3.6 Upholding the fundamental principle of consent to jurisdiction is of critical importance in advisory proceedings. In ensuring that the judicial integrity of the Court is not compromised, it also supports the clear and essential distinction in the Court's Statute between contentious and advisory jurisdiction. Even if the Court has thus far construed this principle narrowly in advisory proceedings, the present circumstances are plainly such where it ought to constitute a ground for declining to give the opinion requested.

3.7 The United Kingdom has persistently maintained over the years that it does not accept judicial intervention, including by the Court, in its longstanding bilateral dispute with Mauritius as to the Chagos Archipelago. The records of the discussion in the General Assembly confirm that it has not and "would not" give such consent.¹⁷ The United Kingdom also raised objections to the Court's being asked for an advisory opinion on the matter, for the very reason that it does not consent to the adjudication of the issues arising under the scope of General Assembly resolution A/RES/71/292.¹⁸

3.8 Mauritius has openly acknowledged that the present advisory proceedings were sought precisely because the bilateral negotiations aimed at settling its dispute with the United Kingdom have, in its view, failed.¹⁹ The Aide Mémoire circulated by Mauritius in the General Assembly explicitly refers to the desired outcome of "enabling Mauritius to exercise its full sovereignty over the Chagos Archipelago".²⁰ Mauritius has also previously sought to bring the dispute concerning sovereignty within the jurisdiction of the Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, but the latter found itself without

¹⁷ A/71/PV.88 (22 June 2017), p. 11.

¹⁸ *Id.*, at pp. 15-16.

¹⁹ See, for example, *id.*, at p. 7.

²⁰ Republic of Mauritius, Aide Mémoire attached to Draft Resolution, Item 87 of the 71st Session of the UN General Assembly, Request for an Advisory Opinion on the Question of the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, May 2017, p. 2, para. 2.

jurisdiction to decide this issue.²¹ In these circumstances, it seems difficult to deny that it is the dispute between the two States that is being placed before the Court in the present proceedings. Indeed, several other States, in their explanation of vote in the General Assembly, also noted that the request for an advisory opinion was in essence designed to circumvent the Court's lack of contentious jurisdiction over a purely bilateral matter.²²

3.9 In addition, while the questions put to the Court in resolution A/RES/71/292 seem to be formulated in an attempt to locate them within a broader frame of reference, essentially any legal question could lend itself to such broader construction and presentation. It is therefore the duty of the Court, "if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction ... [to] ascertain what are the legal questions really in issue in questions formulated in a request".²³ In so doing, the subject-matter of the General Assembly's request may

²¹ *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award dated 18 March 2015, paras. 213-221.

²² See, for example, A/71/PV.88 (22 June 2017), p. 13 (the United States of America observing that the resolution "seeks to place before the International Court of Justice a bilateral territorial dispute ... While Mauritius is attempting to frame this as an issue of decolonization relevant to the international community, at its heart it is a bilateral territorial dispute, and the United Kingdom has not consented to the jurisdiction of the International Court of Justice"); p. 16 (Chile "tak[ing] note of the 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, which includes matters that may be dealt with bilaterally in compliance with the rules of international law"); p. 17 (France stating that "[a] sovereignty dispute between States, which is the case here, should be resolved in accordance with the principle of the concerned States' consent to court adjudication. We must all be attentive to respecting a principle that the International Court of Justice has considered to be fundamental"); p. 18 (Australia stating that "the vote raised a more specific question, namely, whether it is appropriate to request the International Court of Justice to render an advisory opinion on very specific issues that directly concern the rights and interests of two nations, Mauritius and the United Kingdom", and Germany expressing the view that "the dispute between Mauritius and the United Kingdom is bilateral in character" and noting that "one party to the dispute has expressly not agreed to involve the International Court of Justice in this matter, which is in conformity with the Court's Statute"); p. 20 (Canada expressing its view that "it is a fundamental principle and key to the effectiveness of the Court's work that the settlement of contentious cases between States through the International Court of Justice requires the consent of both parties. Seeking the referral of a contentious case between States through the General Assembly's power to request an advisory opinion circumvents that fundamental principle").

²³ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 73, at p. 88, para. 35. See also *Admissibility of hearings of petitioners by the Committee on South West Africa, Advisory Opinion of June 1st, 1956: I.C.J. Reports 1956*, p. 2, at p. 37 (Separate Opinion of Sir Hersch Lauterpacht, in which he observed that "the General Assembly, although actually desirous of an answer of the Court bearing upon a specific situation, cast its request in an apparently general form unrelated to that situation. This being so, a bare affirmative answer does not seem to me to meet the exigencies of the case. It is a matter of common experience that a mere affirmation or a mere denial of a question does not necessarily result in a close approximation to truth. The previous practice of the Court supplies authority for the proposition that the Court enjoys considerable latitude in construing the question put to it or in formulating its answer in such a manner as to make its advisory function effective and useful").

again be easily identified as the bilateral dispute existing between the United Kingdom and Mauritius, not least because any inquiry into whether “the process of decolonization of Mauritius [was] lawfully completed” or into the legal consequences arising from “the continued administration by the United Kingdom ... of the Chagos Archipelago” would almost inevitably require an assessment of the competing claims of the United Kingdom and Mauritius with respect to sovereign title over the territory.

3.10 Given the above, an additional argument may be in order. While the Court has stated in the past that “the motives of individual States which sponsor, or vote in favor of, a resolution requesting an advisory opinion are not relevant to the Court’s exercise of its discretion whether or not to respond”,²⁴ this approach should not be applied in an overly formalistic manner, allowing for an abuse of process manifestly designed to overcome the lack of consent of an interested State to the Court’s contentious jurisdiction. Otherwise, there is a risk that the Court’s advisory jurisdiction will come to be seen as an alternative, non-binding dispute settlement mechanism in a manner that undermines the Court as a judicial organ, its Statute, and the principled distinction between the Court’s functions in advisory and contentious cases.

3.11 As explained below, the preceding arguments acquire even greater force where the question placed before the Court goes to the heart of the dispute and/or bears upon a dispute concerning territorial sovereignty.

(i) The principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent commands particular respect where the question placed before the Court goes to the heart of the dispute

3.12 The Court has recognized that the scope of the dispute may well be “important in appreciating, from the point of view of the Court’s discretion, the real significance” of lack of consent.²⁵ As noted above, following in the footsteps of its predecessor, the Court has indeed observed that where the “question put to it [is] directly related to the

²⁴ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 417, para. 33 (recalling the Court’s similar reference, in the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, “to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution”).

²⁵ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 27, para. 42.

main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties”, judicial propriety would require that the request for an advisory opinion be refused.²⁶

3.13 Thus, even if the Court has in the past shown willingness to give advisory opinions concerning questions that were connected to a pending bilateral dispute, it has consistently maintained the position that questions that are at the heart of such disputes must not be the subject of advisory proceedings where an interested State has expressed a lack of consent for such adjudication.²⁷

3.14 For example, in the *Wall* case, the Court noted that the subject-matter of the case “is part of a greater whole”, and that “the question that the General Assembly has chosen to ask of the Court is confined” to only “one aspect of the Israeli-Palestinian conflict”.²⁸ Judge Higgins further clarified, in her Separate Opinion, that the Court “wisely and correctly, avoid[ed] what we may term “permanent status” issues”.²⁹ And Judge Owada noted, in his Separate Opinion, that “the critical criterion for judicial propriety in the final analysis should lie in the court seeing to it that giving a reply in the form of an advisory opinion on the subject-matter of the request should not be tantamount to adjudicating on the very subject-matter of the underlying concrete bilateral dispute that currently undoubtedly exists”.³⁰ While Israel took issue with the Opinion and reasoning of the Court in that case, it notes, nonetheless, that the Court was constrained to point out that addressing the question before it was not, in its view, the equivalent of deciding a bilateral dispute, nor did it go to the heart of that dispute, and thus affirmed the principle that were it to have that effect, the Court should have declined the request for an advisory opinion.

²⁶ *Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950*, p. 65, at p. 72.

²⁷ See also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 236, para. 15: “The purpose of the advisory function is not to settle – at least directly – disputes between States”.

²⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 160, para. 54.

²⁹ *Id.*, at p. 211, para. 17.

³⁰ *Id.*, at p. 265, para. 13.

3.15 In the present case, given the scope and terms of the request, it is difficult to see how the Court could avoid consideration of the issue of sovereignty over the Chagos Archipelago in replying to the questions contained in resolution A/RES/71/292. Accordingly, it could hardly be said, as was the case in *Interpretation of Peace Treaties*, that the present request for an opinion “in no way touches the merits” of the dispute between the United Kingdom and Mauritius.³¹ Indeed, the request does not simply “relate to a legal question actually pending between States”.³² It “concerns directly the main point of controversy”³³ between them – a point of controversy, it may be emphasized, that is not merely theoretical but that has in practice been the very subject of bilateral negotiations between these States. In terms previously employed by the Court, the settlement of the issue placed before the Court in the present case will doubtless “affect the rights of [the United Kingdom] today”, and its legal position may well be “compromised by the answer that the Court may give to the question put to it”.³⁴

3.16 In other words, replying to the questions posed by the General Assembly would not address matters that are merely peripheral to the controversy; it “would be substantially equivalent to deciding the dispute between the parties”.³⁵ It is also worth emphasizing that in such circumstances the Court has given controlling weight in its jurisprudence to the fundamental principle of consent in bilateral disputes even if the dispute in question has also been the subject of debate or action in the political organs of the UN. Indeed, the jurisprudence of the Court overwhelmingly indicates that the principle that its advisory jurisdiction should not be used to draw the Court into what is essentially a dispute between two or more parties is of primary concern when considering the propriety of providing an advisory opinion, notwithstanding debates and resolutions in the United Nations that have also addressed the dispute.

(ii) The principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent commands particular respect where the

³¹ *Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950*, p. 65, at p. 72.

³² *Id.*, at p. 71.

³³ *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, pp. 28-29 (referring to the question put to the Court by the request).

³⁴ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at p. 21, para. 42 (also citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, I.C.J. Reports 1950*, p. 72).

³⁵ *Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950*, p. 65, at p. 72.

question placed before the Court bears upon disputes concerning territorial sovereignty

3.17 The fundamental principle of consent to jurisdiction also commands particular respect when the question placed before the Court bears upon disputes concerning conflicting territorial claims. Disputes between States with respect to sovereignty and territorial claims are – invariably and by their very nature – matters of particularly acute sensitivity, and often concern the highest considerations of national and security interests. The principle of consent to jurisdiction, therefore, is of particular importance to States in the context of territorial sovereignty disputes that are, accordingly, addressed conventionally, if not exclusively, through consensual mechanisms, most usually negotiations or agreed contentious adjudication.

3.18 This critical observation appears to have been accepted by the Court in the *Western Sahara* case. There, the Court did not deny Spain’s argument that “the consent of a State to adjudication of a dispute concerning the attribution of territorial sovereignty is always necessary”, but in that case found that “the questions in the request do not however relate to a territorial dispute, in the proper sense of the term, between the interested States”.³⁶

3.19 The present case is fundamentally different, as the Court’s careful clarification in *Western Sahara* makes readily clear. There, the Court specified that the request for the opinion did not call for adjudication upon existing territorial rights or sovereignty over territory (and was thus permissible) given that the questions put to the Court “do not put Spain’s present position as the administering Power of the territory in issue before the Court ... Nor is in issue before the Court the validity of the titles which led to Spain’s becoming the administering Power of the territory”.³⁷ In the circumstances of the present case, however, such assurances apparently could not be guaranteed so far as the United Kingdom’s current position with regard to the Chagos Archipelago is concerned.

3.20 Again, the occupation of political organs of the United Nations with any

³⁶ *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12, at pp. 27-28, para. 43.

³⁷ *Id.*

bilateral disputes over territory does not detract from or alter their fundamental nature as such and the special caution warranted by it. Especially where the subject matter of a dispute placed before the Court by means of a request for an advisory opinion relates to territorial sovereignty, the lack of consent of an interested State indeed constitutes a ground for declining to give the opinion requested. The present case is one where this principle should clearly apply and provides a cogent reason for the Court to decline to answer the request.

B. The advisory opinion procedure is ill-equipped for the determination of complex and disputed issues of fact that is required in the present case

3.21 The Court has recognized that a request for an advisory opinion may well be refused in the absence of “sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character”.³⁸ It has also observed that “the question whether the evidence available to it is sufficient to give an advisory opinion must be decided in each particular instance”.³⁹

3.22 The questions put to the Court in the present case would doubtless require extensive and complex factual determinations regarding the issues that are in dispute, not least those relating to the agreements signed between the United Kingdom and Mauritius and the situation of persons of Chagossian origin. While the threshold of “sufficient information” has generally been set rather low,⁴⁰ Israel continues to believe that advisory proceedings are ill-suited for resolving differences regarding such information.⁴¹ Even where ample information is provided by the parties or by the United Nations Secretary-General, the procedural framework of advisory proceedings

³⁸ *Id.*, at pp. 28-29, para. 46; see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 161, para. 56 (citing previous case-law as well).

³⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 161, para. 56.

⁴⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136 (see also pp. 240-245 (Declaration of Judge Buergenthal)).

⁴¹ See also SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005*, Volume II 956 (4th ed., 2006): “... unless there is agreement on the facts as the point of departure for the determination of the law applicable to those facts, non-contentious and non-adversarial procedures are not likely to be appropriate machineries for the establishment of facts”.

remains such that resolving disputed points of fact with respect to that information is inherently riddled with difficulty. Thus, as the Permanent Court of International Justice explained, “under ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are”.⁴²

3.23 Indeed, the advisory opinion procedure was designed essentially to respond to a *legal* question, and it lacks the requisite adversarial mechanisms, such as witness and expert testimony or opportunities for repeated rounds of arguments and counter-arguments, available in contentious proceedings to enable the Court to make well-substantiated findings with respect to complex and disputed factual issues.

3.24 This is yet another compelling reason to decline the present request for an advisory opinion.

IV. Conclusion

4.1 In exercising its advisory jurisdiction, the Court must be careful to maintain its integrity as a judicial institution. As the Court itself has held as long ago as 1950,

“[t]here are certain limits ... to the Court’s duty to reply to a Request for an Opinion. It is not merely an “organ of the United Nations”, it is essentially the “principal judicial organ” of the Organization (Art. 92 of the Charter and Art. I of the Statute)”.⁴³

4.2 In the circumstance of the present case, as Israel has sought to make clear, giving the requested opinion would gravely compromise the judicial integrity of the Court. The present case is, indeed, precisely the type of case in which the Court, which has to date never exercised its discretionary power to refuse a request, should do so.⁴⁴ This would serve to prevent erosion of the fundamental distinction, enshrined

⁴² *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 28.

⁴³ *Interpretation of Peace Treaties, Advisory Opinion: I.C.J. Reports 1950*, p. 65, at p. 71.

⁴⁴ See also Judge Bennouna’s remarks in the *Kosovo* case as to “put[ting] a stop to any “frivolous” requests which political organs might be tempted to submit to [the Court] in future”: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at pp. 500-501, paras. 3, 5 (Dissenting Opinion).

in the Court's Statute, between contentious and advisory jurisdiction; would faithfully apply the Court's own jurisprudence; and would safeguard the principles consistently recognized by the Court with regard to its judicial character.

4.3 For all the foregoing reasons, Israel respectfully submits that the Court should exercise its discretion under Article 65, paragraph 1, of the Statute, and decline to give the advisory opinion requested in the present case.



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