

Recent case-law of the ICJ and its significance for International Law

OC - (ILA-14139) - ICJ'S CHAGOS ADVISORY OPINION IN CONTEXT: COMMENDATORE'S RETURN, OR WORLD COURT TO OPINE OR TO ADVISE?

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Abstract

In connection with the arbitral award on dispute between Mauritius and the United Kingdom on Chagos Marine Protected Area, and upon demand by the UN General Assembly on a relevant topic and question, the ICJ recently handed down an advisory opinion on the legal consequences of separation of Chagos Archipelago from Mauritius in 1965. Being an "advisory opinion", this does not only signify, at least in legal-technical terms, that the question put before World Court could not and have not been resolved qua the legal dispute between the mentioned states by a binding judicial ruling, but also connotes, in a broader sense, that fundamentals underlying the creation and operation of advisory proceedings seem still worth questioning. Given the fact that, at least since the advent of international organizations through the end of 19th century, international questions have generally, if not always, included disputant states along with so-called "non-state actors", and international community is much more aware of the problems posed by multiplication of means to settle the same or by less frequent applications to international courts and tribunals, it is also worth noting that these currents have been coupled with "forcing diplomatic solution", "combining diplomacy with force", "responsibility to protect" and so on in international practice while in some parts of international community, even referring a dispute to an international court is perceived as a "hostile" act. Bearing these and analogous currents in mind, in this paper, I argue, in a naïve way and in a totally Kantian or Mozartian fashion, that contrary to the mentioned perceptions, international adjudication, World Court and advisory proceedings, at least in all their formality, are even much more strongly needed today, especially with regard to complex international problems posed by questions involving often-conflicting notions of self-determination, use of force, human rights, international organization, environmental protection, cultural heritage, intellectual property, protection of foreign investment, indigenous rights or state responsibility, since we, young academics, are aware that we do not enjoy the privilege of conceiving such problems in their totality based on "we know it when we see it". In this, I sense that from these perspectives, in contrast to inter-state judicial proceedings, advisory powers of World Court as demonstrated by Chagos Opinion, are not only questionable from multiple perspectives but also, somewhat paradoxically, essential for the proper functioning of World Court as designed and in line with its supposed status, culminating in the indeterminacy between "to opine" or "to advise" international community. To substantiate this argument, and delving into substantial and procedural aspects of World Court's advisory proceedings in general including its predecessor, this paper purports to contextualize Chagos Opinion from the perspectives of trios of "subject-property-contract" or "sources-procedure-substance" embedded in public international law, and "status-design-functioning" of international adjudication in general and World Court *qua* the organ of the international law in particular.

Palavras-chave : Chagos Advisory Opinion, international adjudication, ICJ advisory proceedings