The Metamorphosis of Soft Law in Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean

Jack McNally

[2024] *UNSWLRS* 9
(2021) 28 *Australian International Law Journal* 195

UNSW Law & Justice
UNSW Sydney NSW 2052 Australia

E: LAW-Research@unsw.edu.au
W: http://www.law.unsw.edu.au/research/faculty-publications
AustLII: http://www.austlii.edu.au/au/journals/UNSWLRS/
SSRN: http://www.ssrn.com/link/UNSW-LEG.html

For citation purposes, please refer to the version published in
(2021) 28 *Australian International Law Journal* 195

The Metamorphosis of Soft Law in *Mauritius/Maldives*

JACK MCNALLY*

The first stage of the maritime boundary delimitation dispute between Mauritius and Maldives in the Indian Ocean was settled by a special chamber of the International Tribunal for the Law of the Sea in January 2021. In its judgment on preliminary objections, the Special Chamber rejected each of the Maldives' objections, which largely focussed on the question of whether Mauritius was the 'costal state' for the purposes of the UN Convention on the Law of the Sea due to its ongoing sovereignty dispute over the Chagos Archipelago with the United Kingdom. This judgment paved the way for a substantive maritime delimitation exercise. In this article, I provide context to the Special Chamber's judgment and step through its reasoning. I then provide some commentary on the practical effect of the judgment. First, I argue that the victory experienced by Mauritius may have been a hollow one given that the United Kingdom continues to exercise de facto control over the Archipelago. Second, I discuss how international courts and tribunals may 'daisy chain' pieces of soft law—in this case, the ICJ advisory opinion and UNGA Resolution 73/295—to treat otherwise disputed matters as established facts, thereby 'providing a potential "blue print" by which soft law may metamorphose into "hard law"'. Third, I consider how the approach of Mauritius may be adopted in small State litigation strategy going forward.

Published as:

Jack McNally, 'The Metamorphosis of Soft Law in Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean' (2021) 28 *Australian International Law Journal* 195.

In January 2021, a Special Chamber of the International Tribunal for the Law of the Sea ('ITLOS'), constituted by seven ITLOS judges and two judges *ad hoc*,[1] delivered its judgment on preliminary objections in *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* ('*Mauritius/Maldives*').[2] On paper, the proceedings concern the delimitation of the exclusive economic zone ('EEZ') and continental shelf between the two States in and around the Chagos Archipelago.[3] However, when given context, the proceedings take on a wider character, forming one part of a broader sovereignty dispute between the United Kingdom ('UK'), which is not a State party to the dispute, and Mauritius. The core of that sovereignty dispute concerns the UK's detachment of the Chagos Archipelago from its then–Mauritian colony in 1965 to form the British Indian Ocean Territory ('BIOT'), as part of what Mauritius claims was a forced deal to which it was required to consent to gain its independence.[4] Expelling the residents of the Archipelago, the Chagossians, from their homes, the UK leased Chagos' main island, Diego Garcia, to the United States to house its 'key strategic outpost in the Indian Ocean'.[5] Since that time, both the Chagossians and Mauritius have jointly sought to reclaim the Archipelago to restore Mauritian

* BA, LLB (Hons I) (UNSW). Research Fellow, Faculty of Law and Justice, UNSW Sydney. I thank Professor Natalie Klein and Annabel Burnett for generous and insightful comments on an earlier draft. My thanks also to the two anonymous reviewers. Any remaining errors or omissions are, of course, my own.

[1] President Paik, along with Judges Jesus, Pawlak, Yanai, Bouguetaia, Heidar, and Chadha. The Maldives selected Bernard H Oxman of the United States as their judge *ad hoc*. Mauritius selected Nico J Schrijver of the Netherlands.

[2] *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) (Preliminary Objections)* (Special Chamber, International Tribunal for the Law of the Sea, Case No 28, 28 January 2021) ('*Mauritius/Maldives*').

[3] 'Notification', *Mauritius/Maldives* (n 2) [27].

[4] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95, 110 [44] ('*Chagos Advisory Opinion*').

[5] Blake Herzinger, 'The Power of Example: America's Presence in Diego Garcia', *The Interpreter* (online, 15 February 2021) <https://www.lowyinstitute.org/the-interpreter/power-example-american-presence-diego-garcia>.

sovereignty and provide Chagossians with their right to return,[6] while the UK has continued to maintain actual possession, as well as its claim to sovereignty.[7] In recent years, the sovereignty dispute has been fought not only through bilateral negotiation and diplomatic *démarches*, but through the court of public opinion and a series of international actions, both political and legal, of which *Mauritius/Maldives* forms the latest episode.

Rejecting all of the Maldives' preliminary objections, the practical effect of the Special Chamber's judgment is that the dispute will proceed to the merits phase, which will result in the delimitation of the contested maritime zones between the two States. More than just a mere procedural ruling, the Special Chamber's assertion of jurisdiction over the dispute is arguably a landmark judgment in UNCLOS dispute resolution and in international law more broadly. Engaging in a process of reasoning that involved the linkage and subsequent metamorphosis of various non-binding pieces of 'soft law' to create binding legal effect, the Special Chamber recognised Mauritian sovereignty over the Chagos Archipelago notwithstanding the UK's competing claim. Accordingly, the judgment does not merely open the door to the merits phase, but rather is a highly consequential decision in and of itself.

This note proceeds as follows. Part I supplies a procedural history of the events leading to the institution of proceedings in *Mauritius/Maldives*. Part II recounts and

[6] Patrick Wintour, 'UN Court Rejects UK Claim to Chagos Islands in Favour of Mauritius', *The Guardian* (online, 29 January 2021) <https://www.theguardian.com/world/2021/jan/28/un-court-rejects-uk-claim-to-chagos-islands-in-favour-of-mauritius>.
[7] See discussion in 'Written Preliminary Objections of the Republic of Maldives', *Mauritius/Maldives* (n 2) [25]–[27] ('Maldives Preliminary Objections').

analyses the Special Chamber's reasoning. Before concluding, Part III provides commentary on the practical effect of the judgment, as well as its wider precedential impact in relation to new interpretive norms and small State litigation strategy. It also touches on the relevance of the judgment for the Chagossians, who, despite being most affected, often go unmentioned in both legal analyses and international decision-making.[8]

I PROCEDURAL HISTORY

One may consider the judgment of the Special Chamber as the culmination of a series of international actions brought by Mauritius in varied international fora from which the Special Chamber drew greatly to settle questions of fact and law, forming a unified procedural history. Taken together, this procedural history forms an intricate body of consolidatory and consequential case law. To understand the Special Chamber's judgment and its effect, one must understand the international actions that both preceded and that are inextricably connected to it, of which there are three.

First, the *Chagos Marine Protected Area* arbitration,[9] wherein a Tribunal constituted pursuant to Annex VII of the *United Nations Convention on the Law of the Sea* ('UNCLOS')[10] found that the establishment of a Marine Protected Area

[8] Thomas Burri and Jamie Trinidad, 'Introductory Note to Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean, Preliminary Objections (ITLOS)' (2021) *International Legal Materials* 1, 2–3.
[9] *Chagos Marine Protected Area (Mauritius v United Kingdom) (Award)* (2015) 31 RIAA 359 ('*MPA Award*').
[10] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 10 December 1982) ('*UNCLOS*').

('MPA') by the UK in the waters around the Chagos Archipelago was illegal. The Tribunal declined to resolve the question of sovereignty over the Archipelago, finding that the dispute was subsumed by a larger sovereignty dispute over land territory that the Tribunal did not have the jurisdiction under UNCLOS to decide upon. Nonetheless, the Tribunal found that the Lancaster House Undertakings—the independence-era agreement that provided Mauritius with a reversionary interest in the Chagos Archipelago, compensation, and fishing, mineral and oil rights—subjected the Archipelago to a 'special regime', in which Mauritius had a material interest.[11] By unilaterally declaring the MPA and failing to consult Mauritius in the process, the UK was found to have breached its obligations of good faith and due regard to Mauritius under both UNCLOS and general international law. The MPA was therefore invalid.

Second, the ICJ's advisory opinion in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* ('*Chagos Advisory Opinion*').[12] The ICJ relevantly found that the Chagos Archipelago was an 'integral part' of Mauritius at the time of its detachment,[13] and that its detachment by the UK breached Mauritius' right to self-determination.[14] Accordingly, it held that the decolonisation of Mauritius had not been lawfully completed and that the UK's ongoing administration of the Archipelago constituted an 'unlawful act of a continuing character'.[15] Consistent with its general practice for advisory opinions,

[11] *MPA Award* (n 9) 484–6 [294]–[295].
[12] *Chagos Advisory Opinion* (n 4).
[13] Ibid 137 [170].
[14] Ibid 137 [174].
[15] Ibid 138–9 [177].

the Court left it to the General Assembly to prescribe the 'modalities necessary for ensuring the completion of the decolonization of Mauritius'.[16]

Third, the UN General Assembly acted to prescribe said modalities through its Resolution 73/295,[17] wherein it welcomed and affirmed the *Chagos Advisory Opinion* and, by vote of an overwhelming majority of member States,[18] demanded that the UK withdraw from the Archipelago within six months.[19] Further, the Resolution called upon bodies of the UN and other international organisations to support Mauritius' decolonisation.[20]

II *MAURITIUS/MALDIVES*

In December 2019, the Maldives filed preliminary objections with the Special Chamber. The purpose of lodging preliminary objections is to 'avoid not merely a decision on, but even any discussion of the merits'[21] of the case by challenging the admissibility of claims or the jurisdiction of the international court or tribunal in question. The Maldives lodged five preliminary objections. First, that the substance of the dispute would involve settling the rights and interests of the UK, an indispensable third party pursuant to the *Monetary Gold* principle,[22] over which the Special Chamber lacked consent to exercise jurisdiction.[23] Second, that even if the

[16] Ibid 139 [179].
[17] GA Res 73/295, UN Doc A/RES/73/295 (24 May 2019) ('Resolution 73/295').
[18] 116 States voted in favour of the Resolution and 6 against (Australia, Hungary, Israel, the Maldives, the UK, and the US), with 56 abstentions.
[19] Resolution 73/295 (n 17) [3].
[20] Ibid [6]–[7].
[21] *Case concerning the Barcelona Traction, Light and Power Co, Limited (Belgium v Spain) (New Application: 1962) (Preliminary Objections Judgment)* [1964] ICJ Rep 6, 44
[22] *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom and United States) (Judgment)* [1954] ICJ Rep 19.
[23] Maldives Preliminary Objections (n 7), [49]–[58].

UK was not an indispensable third party, sovereignty over the Chagos Archipelago was in dispute and the Special Chamber did not have the jurisdiction under UNCLOS to resolve a sovereignty dispute concerning land territory.[24] Third, that the parties had not engaged in the necessary negotiations required under UNCLOS to activate the dispute resolution mechanisms of the Convention.[25] Fourth, that a 'dispute' did not exist between the two States as they did not have 'positively opposed' maritime claims at the time at which the proceedings were instituted.[26] Last, that Mauritius committed an abuse of process by instituting the proceedings, rendering its claims inadmissible.[27] Ultimately the Special Chamber rejected all of the Maldives' preliminary objections and asserted its jurisdiction over Mauritius' claims in their entirety, with only judge *ad hoc* Oxman dissenting.[28]

In this Part, each preliminary objection is discussed in turn, except for the first two preliminary objections, which, following the approach of the Special Chamber,[29] are considered in tandem as 'the predicate for the second preliminary objection subsumes the predicate for the first'.[30]

A The Sovereignty Dispute

The question of sovereignty over the Chagos Archipelago was the crucial element of the first two preliminary objections.[31] The Maldives argued that if the Special

[24] Ibid [59]–[62].
[25] Ibid [63]–[72].
[26] Ibid [73]–[94].
[27] Ibid [95]–[106].
[28] *Mauritius/Maldives* (n 2) (Judge *ad hoc* Oxman). Judge *ad hoc* Oxman would have accepted the second and third preliminary objections, but rejected the first, fourth and fifth: at [98]–[100].
[29] Ibid [81]–[251].
[30] Ibid [26] (Judge *ad hoc* Oxman).
[31] Ibid [98], [243].

Chamber found that the sovereignty of the Archipelago was still in doubt, it would be required to decline to exercise its jurisdiction to hear the merits of the dispute as Article 288 limits the jurisdiction of UNCLOS courts and tribunals to disputes 'concerning the interpretation or application' of the Convention.[32] While there is debate as to whether disputes involving questions of sovereignty over land fall within the scope of Article 288,[33] in this case the parties conceded the point[34] and the Special Chamber did not consider it necessary to enter the debate *proprio motu*. Further, in such circumstances the UK would necessarily be an indispensable third party due to its competing claim to sovereignty.[35] Accordingly, the question that the Special Chamber had to grapple with in relation to both preliminary objections was whether the procedural history of the dispute resolved the question of sovereignty such that the Special Chamber could treat it as pre-established fact, overcoming its jurisdictional limitations. In determining this question, the Special Chamber considered each element of the procedural history in turn.

First, in relation to the *Marine Protected Area* arbitration, the Maldives argued that the award of the Tribunal had *res judicata* effect on the question of whether a sovereignty dispute existed and whether such a dispute could be settled by a tribunal exercising jurisdiction under UNCLOS.[36] The Special Chamber found that the award could not have *res judicata* effect as the *Marine Protected Area* tribunal was

[32] *UNCLOS* (n 10) art 288(1).
[33] See generally Natalie Klein, 'Land and Sea: Resolving Contested Land and Disappearing Land Disputes under the UN Convention on the Law of the Sea' in Chiara Giorgetti and Natalie Klein (eds), *Resolving Conflicts in the Law: Essays in Honour of Lea Brilmayer* (Brill, 2019) 249, 257–79.
[34] *Mauritius/Maldives* (n 2) [110]–[111].
[35] Ibid [99].
[36] 'Written Observations of the Republic of Mauritius on the Preliminary Objections Raised by the Republic of Maldives', *Mauritius/Maldives* (n 2) [78] ('Mauritius Written Observations').

not competent to decide upon such a question.[37] The Special Chamber did, however, note that the Tribunal's findings in relation to the binding nature of the Lancaster House Undertakings could weigh in favour of the recognition of Mauritian sovereignty.[38]

Second, the Special Chamber devoted the largest portion of its judgment to evaluating the effects of the *Chagos Advisory Opinion*, a point over which the parties held 'diametrically opposed views'.[39] The Maldives was of the view that the *Chagos Advisory Opinion* was a non-binding opinion from which legal consequences could not be drawn,[40] such that it '[d]id not, and could not, resolve the bilateral sovereignty dispute between Mauritius and the United Kingdom'.[41] On the other hand, Mauritius argued that the words of the *Chagos Advisory Opinion* 'admit of only a single interpretation… Mauritius is sovereign over all of its territory, including the Chagos Archipelago'.[42] The Special Chamber therefore had to decide what legal effect should be given to the *Chagos Advisory Opinion*. The Special Chamber held that while advisory opinions are not necessarily binding, the determination that the UK was engaged in an 'unlawful act of a continuing character, entailing its international responsibility… [has] unmistakable implications for the United Kingdom's claim to sovereignty over the Chagos Archipelago'[43] as 'an advisory opinion entails an authoritative statement of international law on the question with which it deals'.[44] Accordingly, the Special

[37] *Mauritius/Maldives* (n 2) [138].
[38] Ibid [139].
[39] Ibid [167].
[40] 'Written Observations of the Republic of Maldives in Reply to the Written Observations of the Republic of Mauritius', *Mauritius/Maldives* (n 2) [49], [61] ('Maldives Reply').
[41] Maldives Preliminary Objections (n 7) [14]; Maldives Reply (n 40) [27], [45].
[42] Mauritius Written Observations (n 36) [3.15].
[43] *Mauritius/Maldives* (n 2) [173], [168].
[44] Ibid [202].

Chamber found that the Court's findings of fact and law had effect,[45] even if located within an advisory opinion, such that 'Mauritius' sovereignty over the Chagos Archipelago can be inferred from the ICJ's determinations'.[46]

Last, the Special Chamber turned to UN General Assembly Resolution 73/295. It noted that resolutions of the General Assembly are 'not binding, but only recommendatory in character'.[47] It was this view that the Maldives adopted, arguing that Resolution 73/295 'is a purely political statement'.[48] Instead, Mauritius highlighted that Resolution 73/295 implements the *Chagos Advisory Opinion* and therefore should be given legal effect.[49] The Special Chamber considered that the General Assembly had been 'entrusted to take necessary steps toward the completion of the decolonization of Mauritius' by the *Chagos Advisory Opinion* and,[50] accordingly, determined to give weight to the General Assembly's affirmation that 'the Chagos Archipelago forms an integral part of the territory of Mauritius' in considering the question of sovereignty.[51]

Threading the procedural history together, the Special Chamber found that the effect of the *Marine Protected Area* arbitration, *Chagos Advisory Opinion* and Resolution 73/295 was that, when read concurrently, they demonstrated that 'the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago cannot be considered anything more than "a mere assertion"'.[52] For

[45] Ibid [205]–[206].
[46] Ibid [246].
[47] Ibid [224], citing *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Second Phase) (Judgment)* [1966] ICJ Rep 6, 50–51 [98].
[48] Ibid [217]; Maldives Reply (n 40) [7(c)].
[49] Ibid [220]–[223]; Mauritius Written Observations (n 36) [2.32]–[2.35].
[50] Ibid [227].
[51] Ibid [228].
[52] Ibid [243].

the Special Chamber, it was critical that an advisory opinion had been issued on the topic and then reinforced by a resolution of the General Assembly. It was this mutually reinforcing and complementary series of actions that allowed it to distinguish past cases, such as the *Coastal State Rights* case, where the Annex VII tribunal declined to exercise jurisdiction on the question of disputed sovereignty over Crimea notwithstanding a favourable General Assembly resolution.[53] To this end, the Special Chamber found that the fact that the *Marine Protected Area* arbitration established a 'special regime' in the Archipelago,[54] and that the ICJ and General Assembly had pronounced that the UK's administration was an unlawful act of a continuing character meant that there was no dispute as to what State has sovereignty over the Archipelago.[55] This finding allowed the Special Chamber to overcome any jurisdictional limitations and, therefore, to recognise Mauritius as the coastal State.[56] Given that the Special Chamber had determined that the sovereignty dispute had been settled, the *Monetary Gold* objection necessarily failed. Accordingly, the Special Chamber rejected the first two preliminary objections.

B The Obligation to Negotiate

UNCLOS requires that delimitations of maritime boundaries 'be effected by agreement'.[57] The Maldives argued that such a requirement create a precondition to the referral of disputes to the UNCLOS compulsory third-party dispute resolution system;[58] one that Mauritius could not have met as, due to the existence of a

[53] *Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russian Federation) (Award on Preliminary Objections)* (UNCLOS Arbitral Tribunal, 21 February 2020).
[54] *Mauritius/Maldives* (n 2) [246].
[55] Ibid [245].
[56] Ibid [250]–[251].
[57] *UNCLOS* (n 10) arts 74(1), 83(1).
[58] Maldives Preliminary Objections (n 7) [65]–[66]; Maldives Reply (n 40) [124].

sovereignty dispute, any attempted negotiation between Mauritius and the Maldives 'would not be meaningful'.[59] The question was not whether Mauritius had attempted to engage in good faith negotiations, which it had by the Maldives' own concession,[60] but rather whether Mauritius had the competence to do so. This objection was effectively a repeat of the sovereignty argument, albeit with a different frame. It was therefore rejected by the Special Chamber, which found that Mauritius had done everything within its power to attempt to effect agreement by negotiation,[61] and was therefore not only entitled, but obligated, to resort to UNCLOS dispute settlement procedures.[62]

C The Existence of a 'Dispute'

In relation to its fourth preliminary objection, the Maldives argued that, even if the sovereignty dispute had been resolved, there was no dispute between the parties as they did not have 'positively opposed claims regarding the delimitation of the EEZ or continental shelf' at the time at which the proceedings were initiated.[63] The Special Chamber found that the evidence put on by Mauritius clearly demonstrated that the 'the claim of the Maldives is positively opposed by Mauritius'[64] and rejected the preliminary objection.[65]

---

[59] Maldives Preliminary Objections (n 7) [71]; Maldives Reply (n 40) [127].
[60] Maldives Preliminary Objections (n 7) [71].
[61] *Mauritius/Maldives* (n 2) [291].
[62] Ibid [292]–[293].
[63] Maldives Preliminary Objections (n 7) [75].
[64] *Mauritius/Maldives* (n 2) [332].
[65] Ibid [336].

D Abuse of Process

In its fifth and final preliminary objection, the Maldives claimed that Mauritius effectively sought to use ITLOS proceedings as a back door to get around its failure to establish sovereignty in the *Marine Protected Area* arbitration and, in the process, drew the Maldives into a bilateral sovereignty dispute with the UK.[66] Rejecting this argument on the basis that the sovereignty dispute had been resolved,[67] Mauritius similarly argued that the Maldives, by acting in open defiance of the *Chagos Advisory Opinion* and Resolution 73/295, was engaged in an abuse of process by filing its preliminary objections.[68] The Special Chamber summarily rejected this preliminary objection, finding that Mauritius' claims were cognisable.[69] It did not consider it necessary to evaluate Mauritius' counter-claim on this point.

III COMMENTARY

The Preliminary Objections judgment in *Mauritius/Maldives* is a landmark decision of ITLOS, containing many valuable insights ripe for analysis. In this Part, I focus on two. First, the practical effect of the judgment on the dispute as between the Maldives and Mauritius and, by extension, between Mauritius and the UK. Second, I turn to the broader interpretive insights arising from the judgment in relation to the blurring of the legal effect of 'soft law' instruments, questioning what potential impacts this phenomenon may have on small State litigation strategy.

---

[66] Maldives Preliminary Objections (n 7) [104]–[106].
[67] Mauritius Written Observations (n 36) [3.70].
[68] Ibid [3.80]; *Mauritius/Maldives* (n 2) [342]–[344].
[69] *Mauritius/Maldives* (n 2) [348]–[350].

A A Hollow Victory?

Even though the Special Chamber found that the *Monetary Gold* objection could be set aside and that the question of sovereignty had been determined, the dispute invariably occurred in the UK's shadow and has implications for the UK's legal interests over the Chagos Archipelago. The Special Chamber's recognition of Mauritian sovereignty over the Archipelago means that ITLOS can now proceed to delimit the maritime boundary between Mauritius and the Maldives in the merits phase of the proceedings; a decision that is both binding as between the parties,[70] as well as opposable *erga omnes*.[71] However, one must interrogate whether, in reality, such a finding would of any great consequence in light of the UK's *de facto* control of the Archipelago and its ongoing assertion of sovereignty following the Special Chamber's judgment.[72] Mauritius could, for instance, following the delimitation of its EEZ and continental shelf by ITLOS in the merits phase of the proceeding, begin to issue oil and gas exploration licenses and assign fishing rights within those maritime zones consistent with its rights as the coastal State under UNCLOS.[73] However, given that the UK has greater military might than Mauritius, it is likely to be able to 'exclude physically fishing vessels or oil and gas companies from the maritime area in question even in violation of international law'.[74] Accordingly, even if ITLOS delimits Mauritius' maritime zones in the Indian

[70] *UNCLOS* (n 10) art 296.
[71] Claude Blumann, *La frontière: Colloque de Poitiers* (Société française pour le droit international, 1980) 12, cited in Geoffrey Marston, 'The Stability of Land and Sea Boundary Delimitations in International Law' in Gerald H Blake (ed) *Maritime Boundaries* (Routledge, 1994) vol 5, 144, 149.
[72] Wintour (n 6).
[73] *UNCLOS* (n 10) arts 56, 77.
[74] Klein (n 33) 271 (discussing a hypothetical example).

Ocean such that it gains an entitlement to exercise the rights of the coastal State under UNCLOS, the UK's *de facto* control of the Archipelago is likely to render any judgment nugatory and deprive Mauritius of any marketable title. Such a hollow victory is likely to be of little comfort to Chagossians, who seek nothing more than the right to return to their home, notwithstanding any interest that may be had in declaratory relief.

One must therefore consider what practical benefit accrues to Mauritius and the Chagossians as a result of the Special Chamber's judgment—and any future judgment on the merits—beyond the mere vindication of a legal right. The better view may be that, rather than providing Mauritius with the ability to exercise both *de jure* and *de facto* sovereignty, the judgment imbues Mauritius' cause with the legitimacy of an authoritative ruling of an international tribunal, which it can then use to wage its case in the court of public opinion. Such a campaign may not only exert direct pressure on the UK to change its approach but may also act to convince the UK's allies to abandon their support for the British position, which 'could prove crucial in influencing British policy over Chagos'.[75] This approach may be complemented by action in other international fora. For instance, in August 2021 the Congress of the Universal Postal Union voted to prohibit the use of BIOT stamps[76] and Mauritius has announced that it intends to challenge the UK's membership of the Indian Ocean Tuna Commission.[77] However, it remains to be seen whether continued diplomatic and public pressure will generate any significant

[75] Burri and Trinidad (n 8) 2.
[76] Universal Postal Union, 'UPU Adopts UN Resolution on Chagos Archipelago' (Press Release, 27 August 2021).
[77] Owen Bowcott and Julian Borger, 'UK Suffers Crushing Defeat in UN Vote on Chagos Islands', *The Guardian* (online, 23 May 2019) <https://www.theguardian.com/world/2019/may/22/uk-suffers-crushing-defeat-un-vote-chagos-islands>.

change. As Klein notes, '[t]he national interest (or pride) associated with title to territory may be too strong for a State to give up possession, or its claim in the face of an adverse ruling'.[78]

B The Metamorphosis of Soft Law

UN General Assembly resolutions and advisory opinions have long been recognised as 'soft law'.[79] That is to say that while they are not necessarily devoid of legal effect, they are not a 'formal' or 'binding' source of law.[80] However, this position may now be becoming more nuanced, with the Special Chamber's judgment providing a potential 'blueprint' by which soft law may metamorphose into 'hard law'. By 'daisy chaining' pieces of soft law such as Resolution 73/295 and the *Chagos Advisory Opinion*, the Special Chamber has given legal effect to otherwise non-binding instruments. Such an approach may signal a movement toward a 'blurred usage of advisory jurisdiction as a mechanism to actually rule, and not just opine, on legal matters', which is reminiscent of the approach of the former Permanent Court of International Justice in its advisory jurisdiction.[81] Accordingly, the Special Chamber's judgment may force States to rethink the value and consequence of advisory opinions and resolutions of the General Assembly.

At least one commentator has argued that the precedential value of this interpretive approach may be limited, stating that the Special Chamber's judgment may

---

[78] Klein (n 33) 271.
[79] Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2(1) *Journal of Legal Analysis* 171, 207–10, 216–21; Daniel Thürer, 'Soft Law' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, at March 2009).
[80] Ibid. But see Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99(3) *American Journal of International Law* 581 (arguing that '[t]here is no such thing as "soft law"').
[81] Joege Contesse, 'The Rule of Advice in International Human Rights Law' (2021) 115(3) *American Journal of International Law* 368, 374, 408.

represent 'a one-off; a bit of legal trickery or magic that allows the Special Chamber to ignore jurisdictional obstacles'.[82] However, such a narrow view is difficult to reconcile with the territorial jurisdiction decision of the International Criminal Court ('ICC') in *Situation in the State of Palestine*.[83] In that decision, considering a similar procedural history involving resolutions of the UN General Assembly and the *Wall* advisory opinion—which clarified that the Palestinian people have the right to territorial integrity and self-determination[84]—the ICC's Pre-Trial Chamber I ruled it was not barred by the *Monetary Gold* principle in exercising authority over Palestine in the absence of Israel's consent.[85] To this end, it may be the case that a new interpretive norm is crystalising; one that assigns weight to soft law instruments that are mutually-reinforcing and consolidatory in nature, at least in the context of disputes involving questions of self-determination.

The extent to which this practice represents a new interpretive norm may be debated, particularly given that the interplay of Article 293 of UNCLOS, which allows UNCLOS courts and tribunals to apply 'other rules of international law not incompatible with [UNCLOS]', and Article 38(1)(d) of the *Charter of the International Court of Justice*, which allows recourse to subsidiary documents as a

---

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

[83] *Situation in the State of Palestine (Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/18, 5 February 2021). Analogies have been drawn to the finding of the Special Chamber. See Volker Roeben and Sava Jankovic, 'Unpacking Sovereignty and Self-Determination in ITLOS and the ICC: A Bundle of Rights?', *EJIL: Talk!* (Blog Post, 4 March 2021). <https://www.ejiltalk.org/unpacking-sovereignty-and-self-determination-in-itlos-and-the-icc-a-bundle-of-rights/>.

[84] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

[85] *Situation in the State of Palestine* (n 84) [58]–[60].

source of international law. To this end, it may simply be the case that the Special Chamber is operating within the established bounds of extant international law. In any case, regardless of the way in which one characterises the approach, it is clear that the Special Chamber has acted boldly and not demurred notwithstanding the objections of a powerful State and the inevitable and foreseeable controversy its judgment was likely to cause.

The Special Chamber's approach may provide small States and States that have traditionally lacked power in the international system with a viable method to use the advisory jurisdiction of the ICJ and General Assembly resolutions as a vector for creating enforceable legal rights on subjects for which there is little appetite to generate 'hard law' instruments. To this end, Paparinskis has noted that the Special Chamber's judgment presents 'a how-to guide for sophisticated actors to fill in authoritative determinations of discrete points before approaching tribunals with limited jurisdiction'.[86] For its part, Mauritius appears to have expertly and methodically brought its claims in a strategic way so as to create this legal outcome, in line with its 'stated policy of "recourse to judicial or arbitral bodies"' to vindicate its rights.[87] Such a strategy could be replicated by other States in relation to issues of self-determination and/or territorial integrity. Ukraine, for example, may rely on *Mauritius/Maldives* to aid it in creating enforceable legal rights out of the otherwise non-binding General Assembly Resolution 68/262 and other 'soft law' decisions of international bodies with respect to Crimea.[88]

[86] Martins Paparinskis, 'Long Live *Monetary Gold* * Terms and Conditions Apply' (2021) 115 *AJIL Unbound* 154, 158.
[87] Maldives Preliminary Objections (n 7) [12].
[88] GA Res 68/262, UN Doc A/RES/68/262 (1 April 2014).

However, the potential impact of *Mauritius/Maldives* extends beyond just questions of self-determination. For instance, Vanuatu has announced that it will seek an advisory opinion on 'the rights of present and future generations to be protected from climate change'.[89] If the ICJ were to issue a favourable advisory opinion following a request from the General Assembly, which was then followed by a resolution of the General Assembly implementing the modalities arising therefrom, a Small Island Developing State could approach a tribunal of limited jurisdiction, such as ITLOS, to create enforceable legal rights citing *Mauritus/Maldives* as precedent. It remains to be seen whether this approach is limited to a particular class of soft law instruments, such that the precedential impact of *Mauritius/Maldives* is limited to cases concerning self-determination and decolonisation, or whether it will be of wider effect. In any case, it appears that this approach was an outcome that was both predicted and feared by many highly developed States who, during the debate over whether to seek an advisory opinion over the separation of the Chagos Archipelago from Mauritius and in their ensuing submissions to the ICJ, expressed concern that the *Chagos Advisory Opinion* would create a 'dangerous precedent'.[90] Given the class of the States likely to benefit from such a litigation strategy and those who objected to it, one may ask, 'dangerous for whom?'.

[89] Bernadette Carreon, 'Vanuatu to Seek International Court Opinion on Climate Change Rights', *The Guardian* (online , 26 September 2021) <https://www.theguardian.com/world/2021/sep/26/vanuatu-to-seek-international-court-opinion-on-climate-change-rights>.

[90] 'Written Statement of the United Kingdom', *Chagos Advisory Opinion* (n 4) [1.15]; 'Written Comments of the Republic of Mauritius' *Chagos Advisory Opinion* (n 4) [1.5]–[1.6] (noting that the only States that objected to the admissibility of the Advisory Opinion were Australia, Chile, France, Israel, the UK and the US).

IV CONCLUSION

ITLOS now moves to the merits phase of the dispute. The merits phase will see argument as how the maritime border between the two States ought to be delimited, and any judgment arising therefrom will, for the purposes of the Convention, authoritatively establish the maritime boundaries between the two States. However, two qualifications may be made as to the effect of any such delimitation exercise. First, the practical effect of a judgment on the merits for Mauritius and the Chagossians is likely to be of little tangible benefit given the UK's *de facto* control of the Archipelago. While there is certainly an interest in the declaratory relief arising from any maritime boundary delimitation, such that it legitimises and formalises Mauritius' claim to the broader international community, any risk of non-compliance is likely to dampen the effect of any such relief. Regardless, and perhaps emboldened by the Special Chamber's judgment, Mauritius appears content to continue its campaign to gain both *de facto* and *de jure* sovereignty over the Chagos Archipelago. Second, arguably greater consequence arises from the Special Chamber's assertion of jurisdiction over the dispute, rather than any judgment on the merits. By 'daisy-chaining' pieces of soft law together, the Special Chamber has given States a valuable template by which they can seek to overcome jurisdictional and procedural barriers in international litigation. The extent to which this approach represents a new interpretive norm, its utility for States, in particular small States and other States that have lacked power in the international system, and the scope of its effect should remain a point of interest for extended scholarly analysis going forward.