STATEMENT DECISIONS

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I.

In legal systems where decision authority and enforcement power are separated, the functions of decision making and decision implementation are distinct, yet the likelihood of the latter is typically not without relevance to the processes of the former.[1] Decisionmakers care about whether their edicts will be enforced, regardless of whether they are legislative or judicial bodies, as they care – and need to care – about whether their work has – and is seen to have – real consequence and meaning. While in sophisticated domestic systems, decisionmakers can in the normal course count on implementation, and hence they can make decisions largely without concern about whether their decrees will become nullities, in the international system, with no centralized enforcement mechanism, decisionmakers must be especially attuned to the possibility that their pronouncements will go unheeded, lest their acts lack import and therefore their role within the system be undermined and ignored. Accordingly, as they consider cases, international tribunals will generally take into account the risk that the respondent state (or, with advisory opinions, the states and international organizations whose duties are implicated) will not comply with an order or judgment (or heed an opinion) that requires some action or inaction, and so they adapt their decisions accordingly, sometimes declining jurisdiction, sometimes declaring a matter inadmissible, sometimes attuning their analysis of the merits, sometimes adjusting the remedies they award, and sometimes combining some or all of these techniques as they fashion a decision.[2]

There are rare cases, however, in which the tribunal, paradoxically, appears to come to a decision without regard to the likelihood of its implementation – or even knowing that implementation is highly unlikely. These are "statement decisions" – decisions that assert what the law is – that make a statement regarding an important legal principle – independent of any enforcement considerations. The International Court of Justice's Chagos Advisory Opinion,[3] the story of which Philippe Sands tells

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[1] For a discussion of the themes in this paragraph, see W. Michael Reisman & Mahnoush H. Arsanjani, *Legal Decisions and Their Implementation in International Law*, *in* THE INTERNATIONAL LEGAL ORDER: CURRENT NEEDS AND POSSIBLE RESPONSES – ESSAYS IN HONOUR OF DJAMCHID MOMTAZ 149 (James Crawford, Abdul Koroma, Said Mahmoudi, & Alain Pellet eds., 2017).

[2] *See, e.g.*, International Court of Justice, Judgment, Oil Platforms (Iran v. U.S.) (Nov. 6, 2003), *at* https://www.icj-cij.org/sites/default/files/case-related/90/090-20031106-JUD-01-00-EN.pdf (concluding that the military actions taken by the United States were not measures necessary to protect its essential security interests but at the same time dismissing the claim of Iran against the United States under the Treaty of Amity).

[3] International Court of Justice, Advisory Opinion, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Feb. 25, 2019), *at* https://www.icj-

in his book *The Last Colony*,[4] provides an excellent example. Remarkably, the Court issued its opinion seemingly without concern for whether the primary object of that opinion – the United Kingdom – would abide by its unequivocal and unflinching directive. Indeed, it is likely that the ICJ went ahead knowing full well that the United Kingdom would ignore its legal conclusions and findings. "[T]he real-world consequences of a ruling . . . can take time to work their magic," Sands writes.[5] Delays in compliance, though, typically incur reputational costs. Why did the Court choose to accept those costs?

By examining the ICJ's opinion on Chagos, as well as its decisions in a few other cases, we can explore under what circumstances statement decisions arise and the reasons for their (infrequent) use by international tribunals.

II.

Of the three international cases pertaining to Chagos recounted in *The Last Colony*, the advisory opinion of the International Court of Justice is the only one that deals directly with the issue of Mauritius's sovereignty over the Chagos Archipelago. While the two other decisions are both interesting and consequential in their own ways – in the case brought by Mauritius against the United Kingdom, the Annex VII arbitral tribunal found that the undertakings made by the United Kingdom to Mauritius in 1965 were binding and in consequence certain obligations of the Law of the Sea Convention were breached by the Marine Protected Area that was established by the United Kingdom in 2010,[6] and in the case brought by Mauritius against Maldives, the ITLOS special chamber decided that it had jurisdiction to delimit the maritime boundary between the two countries on the assumption that Chagos belongs to Mauritius[7] – neither one takes on itself the central question. The first tribunal decided it did not have jurisdiction over the issue of sovereignty, and the second deferred to – and consequently applied – the ICJ's legal conclusions.[8] Both decisions are good examples of judicial avoidance, and neither risked noncompliance.

Only the advisory opinion issued a clear statement concerning the fundamental principle of international law at stake in the dispute between Mauritius and the United Kingdom. The Court's conclusions regarding the law of decolonization, and particularly the law pertaining to territorial integrity during that process, were plainly stated:

> States have consistently emphasized that respect for the territorial integrity of a non-self- governing territory is a key element of the exercise of the right

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cij.org/public/files/case-related/169/169-20190225-01-00-EN.pdf [hereinafter Chagos Advisory Opinion].

[4] PHILIPPE SANDS, THE LAST COLONY: A TALE OF EXILE, JUSTICE, AND BRITAIN'S COLONY LEGACY (Weidenfeld & Nicolson 2022).

[5] *Id.* at 98.

[6] In the Matter of the Chagos Marine Protected Area Arbitration, the tribunal constituted under Annex VII of the UN Convention on the Law of the Sea, Award (Mar. 18, 2015), *at* https://files.pca-cpa.org/pcadocs/MU-UK%2020150318%20Award.pdf [hereinafter PCA Award].

[7] International Tribunal for the Law of the Sea, In its Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives), Judgment (Jan. 28, 2021), *at* https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/C28_Judgment_prelimobj_28.01.2021_orig.pdf [hereinafter ITLOS Judgment].

[8] PCA Award, *supra* note 6, para. 547(1); ITLOS Judgment, *supra* note 7, para. 205 ("The Special Chamber considers that [the ICJ's] determinations do have legal effect.").

> to self- determination under international law. The Court considers that the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power. It follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination.[9]

The Court goes on to find, on the facts, that the "agree[ment] in principle [by the Council of Ministers of the Colony of Mauritius] to the detachment of the Chagos Archipelago . . . was not based on the free and genuine expression of the will of the people concerned."[10] In its operative clause, the Court was of the opinion "that, having regard to international law, the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago" and consequently "that the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible."[11]

III.

While the Chagos Advisory Opinion did not create binding obligations on the United Kingdom as such (since it was not a contentious case), the ICJ's statement was also not mere dicta.[12] But regardless of how we might view the legal consequences of the opinion, the Court clearly characterized the actions of the United Kingdom as a violation of international law and clearly indicated that that state and other UN member states had an obligation to take actions to remedy that violation and "to complete the decolonization of Mauritius."[13] Consequently, the absence of a formal legal obligation to comply with the advisory opinion should not have reduced the ICJ's concern regarding the likelihood of the United Kingdom's noncompliance. The ICJ stated the law and found, on the facts, a violation, and statements of law and conclusions therefrom need to be adhered to if a tribunal's decisions are to be considered more than just wishes and abstractions that are of no consequence. A tribunal that is dependent on parties opting in to its jurisdiction which issues decisions that are ignored can quickly become a tribunal that hears no cases.

But evidently the ICJ was not concerned. At no point would a realistic observer have expected the United Kingdom to leave the Chagos Archipelago because an ICJ ruling that so required. Indeed, noncompliance was entirely to be expected if the United Kingdom was found by the Court to be in violation of international law – and the actions and statements of the United Kingdom subsequent to the advisory opinion (referring to it as nonbinding) did not disappoint in this regard.[14] Why did the ICJ, which otherwise should have cared deeply about the implementation of its ruling, apparently not worry about compliance with this decision? Why was it apparently happy to make a statement decision?

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[9] Chagos Advisory Opinion, *supra* 3, para. 160.
[10] *Id.*, para. 172.
[11] *Id.*, para. 183(3), (4).
[12] This is different from judicial dicta. For a discussion, see, for example, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 NYU L. REV. 1249 (2006).
[13] Chagos Advisory Opinion, *supra* 3, para. 183(5).
[14] *See, e.g.*, UN Doc. A/73/PV.83, at 9-11 (May 22, 2019) (statement of the representative of the United Kingdom); *see also* SANDS, *supra* note 4, at 136.

IV.

This was not the first time the ICJ issued a statement decision. Two others are familiar: the Nicaragua case[15] and the Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.[16] In both instances, the Court knew, or should have known, that its decisions would not be implemented by the United States and Israel, respectively. Yet, it went ahead nonetheless with broad statements regarding important principles of international law and clear conclusions that the states concerned violated the law. As with Chagos, to no one's surprise, noncompliance followed.

V.

The Chagos Advisory Opinion might tempt some to conclude that international courts generally act – or should act – without regard to whether their rulings will be followed. That, though, would be an incomplete reading of the ICJ's ruling. Tribunals care about implementation – that is, whether those they call upon to act will actually comply – because they and their litigants want their cases to have real effects. But tribunals also care about how their decisions will be evaluated by audiences beyond the particular states whose actions are at issue – that is, they care about their international reception. Courts are dependent in various ways on the good opinion of states and others who have nothing directly at stake in a particular case. Reception and implementation are separate considerations that are balanced by tribunals, and sometimes, if the two are not aligned, reception is prioritized over implementation. In those rare circumstances, statement decisions result.

As with the Nicaragua judgment and the Wall Advisory Opinion, the International Court of Justice in its Chagos Opinion traded implementation for reception. That's not a comment upon the correctness of these decisions as a matter of law. It is instead a candid understanding of the choices made and the strategies undertaken by an international institution – the ICJ – that, like any other, needs to be sensitive to its position in the international public order if it wishes to maintain its pride of place within it. In the Nicaragua case and Wall opinion, it would seem that the Court made the correct assessment of its audience and the benefits of playing to it even at the cost of having its decisions ignored by the states to which those decisions were primarily directed. It's likely that the Court made the right choice in Chagos as well from this institutionalist perspective. But we shouldn't confuse organizational self-preservation with effectiveness.

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[15] International Court of Justice, Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Judgment (Merits) (Nicar. v. U.S.) (June 27, 1986), *at* https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf.

[16] International Court of Justice, Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (July 9, 2004), *at* https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf.