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China and Discourse Power in International Law: Modes of Engagement with the International Court of Justice

Dr Mauro Barelli

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Abstract

This article examines China's engagement with the International Court of Justice as a manifestation of its pursuit of discourse power and influence in international legal affairs. It analyses the strategies and motivations behind its participation in a series of advisory proceedings and considers how China could build on this practice to experiment with bolder forms of intervention in the context of the Court's contentious jurisdiction. Situated in the broader context of China's evolving geopolitical aspirations, the discussions developed in this article contribute to shed light on China's role in shaping international legal discourse and, in turn, promoting its own interpretations and perceptions of international law.

1. Introduction

Over the past few decades, China has accumulated a significant amount of hard power that has allowed it to take an increasingly assertive role in international affairs.[1] Hard power alone, however, cannot ensure a State's steady advancement on the global stage. Today, it is generally acknowledged that to maintain or enhance its standing in the world, a country 'must find new, complementary ways of establishing and exerting power.'[2] One such way is to deploy soft power as a tool of foreign policy. Contrary to hard power, which relies on coercion to effect change, soft power refers to a State's ability to influence others' behaviour through attraction and

[1] See, for example, European Parliament Recommendation to the Council and the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy concerning EU-China Relations, 2023/2127(INI), 13 December 2023

[2] 'Persuasion and Power in the Modern World', Select Committee on Soft Power and the UK's Influence, House of Lords, 11 March 2014, p. 8

persuasion.[3] While it is not difficult to identify the resources, e.g., culture, values and policies, on which soft power rests, its fluidity makes it particularly hard to measure and define it.[4] The important point to emphasise is that soft power is a supplement to, and not a substitute for, hard power. In other words, it is the combined effect of hard and soft power that can enhance a State's ability to achieve desired outcomes and, in turn, enable it to protect its interests more effectively.

Cognizant of these benefits, China has been using a variety of channels to project its soft power globally, including public diplomacy, the use of external communication and the promotion of the Chinese language and culture.[5] In addition to all that, China has more recently begun to invest in a particular form, or variant, of soft power, namely discourse power in international law.[6] The latter can be broadly described as the ability of a State to influence legal narratives at the global level. The significance of this form of power should not be underestimated. It can in fact be instrumental in the pursuit of key foreign policy objectives such as overcoming external legal challenges and legitimising a State's conduct.

While States can use several methods to exercise discourse power in international law, two contemporary and intertwined trends make international adjudication a particularly interesting avenue to examine from a Chinese perspective. The first trend is the process of judicialization of international relations that has led to the creation of a 'plethora' of international and regional adjudicative bodies.[7] This, in turn, has facilitated the rise of strategic litigation as a State tactic to advance political goals.[8] The second trend is China's gradual abandonment of its traditional policy of rejection of international adjudication in favour of a more flexible cost analysis-

[3] J. Nye, Get Smart: Combining Hard and Soft Power, (2009) 88:4 *Foreign Affairs*, pp. 160-163
[4] J. Nye, Public Diplomacy and Soft Power, (2008) 616 *The Annals of the American Academy of Political and Social Science*, pp. 94–109
[5] M. Repnikova, *Chinese Soft Power* (CUP, 2022)
[6] For a broader discussion of China's quest for discourse power in international law, see W. Muller, The Power of Discourse: Doctrinal Implications of China's Normative Aspirations, (2018) 31 *Hague Yearbook of International Law/Annuaire de La Haye de Droit International*, pp. 43-78
[7] C. Romano, Litigating International Law Disputes: Where To?, in N. Klein (ed.), *Litigating International Law Disputes: Weighing the Options* (CUP, 2014)
[8] M. Ramsden, Strategic Litigation before the International Court of Justice: Evaluating Impact in the Campaign for Rohingya Rights, (2022) 33:2 *European Journal of International Law*, pp. 441–472

approach that is (slowly) pushing the boundaries of its comfort zone in this critical area of international relations.[9]

Among other things, these two parallel developments have influenced the way in which China relates to the most important judicial body operating at the global level, that is, the International Court of Justice (ICJ). States tend to keep at a safe distance from the ICJ because, by virtue of a potentially unlimited jurisdiction, the latter has the capacity to adjudicate on sensitive matters involving very high stakes. At the same time, the pronouncements of such an authoritative body can have important 'downstream effects' that extend beyond the limited context of a specific dispute.[10] In this sense, the ICJ represents a platform where States not only directly defend their national interests through the medium of international law but also seek to influence the meaning and interpretation of international rules in accordance with their own preferences and priorities.

Against this background, this article will examine China's modes of engagement with the ICJ in the context of Beijing's ambition to contribute more prominently to international legal discourse. After this introduction, section 2 will briefly contextualise China's quest for discourse power in international legal affairs. Following on from that, Section 3 will introduce international adjudication as an avenue to exercise discourse power in international law. Section 4 will then highlight China's attitudes towards the International Court of Justice as the main judicial body operating at the international level. Building on that, Section 5 will analyse the motivations and key aspects of China's intervention in three recent advisory opinions of the ICJ. Before the concluding remarks, Section 6 will discuss China's potential future strategies of engagement with the Court.

[9] H. Moynihan, 'China's Evolving Approach to International Dispute Settlement', 2007, at www.chathamhouse.org/publicationchinas-evolving-approach-international-dispute-settlement, and Y. Hao and I. de la Rasilla, China and International Adjudication—Picking Up Steam?, (2021) 12:4 *Journal of International Dispute Settlement*, pp. 637–668

[10] T. Ginsburg, International Judicial Law-Making, *Illinois Law and Economics Working Paper* No. LE05-006, p. 6

2. China, Discourse Power and International Law

Since it is usually powerful Sates that have the resources and ambition to exercise discourse power, it is not surprising that China has showed a growing interest in strategically engaging with international law. While Beijing began to flirt with the concept of soft power almost two decades ago,[11] the objective of 'strengthening international discourse power' was formally proclaimed at the 2011 sixth plenum of the 17th Central Committee of the Chinese Communist Party (CCP).[12] Under the presidency of Xi Jinping, calls for enhancing discourse power not only intensified but also acquired a normative dimension.[13] For example, at the fourth plenum of the 18th Central Committee of the CCP, held in 2014, China pledged to 'vigorously participate in the formulation of international norms', 'strengthen [its] discourse power and influence in international legal affairs' and 'use legal methods to safeguard [its] sovereignty, security and development interests.'[14] At the basis of this new trajectory lies the realisation that engaging more actively with the processes of interpretation, application and creation of international law not only allows a country to better defend itself from external challenges but also enables it to leave its imprint on the present and future of the international legal system. Thus, China has begun to build its own narratives of international law, using the latter as an instrument to enhance its relevance and influence as a global actor.[15]

Signs of this new ambition have been noticeable across a range of areas. For example, in 2015 the International Law Advisory Committee of the Ministry of Foreign Affairs was established with the task of assisting the foreign minister with

[11] P. Lee, The Rise of China and its Contest for Discursive Power, (2016) 1 *Global Media and China*, pp. 102-120

[12] Central Committee of the Chinese Communist Party Decision Concerning Deepening Cultural Structural Reform, at https://digichina.stanford.edu/work/central-committee-of-the-chinese-communist-party-decision-concerning-deepening-cultural-structural-reform/

[13] C. Sørensen, Constraints on the Soft Power Efforts of Authoritarian States: The Case of the 2015 Military Parade in Beijing, (2017) 46:2 *Journal of Current Chinese Affairs*, pp. 111–134; CHECK S. Ho, Infrastructure and Chinese Power, (2020) 96: 6 *International Affairs*, pp. 1461–1485; Wu Xinbo, 'China in Search of a Liberal Partnership International Order', (2018) 94:5 *International Affairs*, pp. 995–1018

[14] T. Heath, Fourth Plenum: Implications for China's Approach to International Law and Politics, (2014) Volume XIV, Issue 22 China Brief; A. Jacobs and C. Buckley, China Moves to Reinforce Rule of Law, With Caveats, 3 October 2014, New York Times; Carl Minzner, After the Fourth Plenum: What Direction for Law in China?, (2014) Volume XIV, Issue 22 China Brief; Jacques deLisle, The Rule of Law with Xi-Era Characteristics: Law for Economic Reform, Anti-corruption, and Illiberal Politics, (2015) 20 *Asia Policy*, pp. 23-29

[15] Zhipeng He and Lu Sun, *A Chinese Theory of International Law* (Spinger, 2020) p. 23

legal opinions, reports and policy recommendations on major diplomatic issues.[16] Two years later, the Martial Law Institute was set up to provide legal support for China's military operations.[17] In 2023, China upgraded the status of international law studies in the national education system, with important implications both in terms of funding and prestige. The declared objective of this measure was to produce, by 2035, 'a contingent of prominent home-grown international law scholars' who 'will fill the critical shortage of experts in this field.'[18]

These types of initiatives contribute to enhance China's legal diplomacy and potential to generate influential international legal scholarship, leading, in turn, to a more sophisticated engagement with international law. Yet, they are not in themselves constitutive of discourse power; rather, as we shall see, they are propaedeutic to it. Accordingly, the next section will focus on more direct ways in which China could effectively use discourse power in international law, paying special attention to the domain of international adjudication.

3. China and International Adjudication

As an economic giant with global political stature, China has no shortage of opportunities to use discourse power on the international stage. For example, its permanent seat at the UN Security Council allows it to regularly engage in defining, debating, interpreting and re-interpreting fundamental rules and principles of international law.[19] To fully appreciate the importance of these activities one must first acknowledge that international law does more than regulating relations between States. As the indispensable language of foreign policy and international affairs,[20] it also performs a parallel function, namely that of legitimising, or de-legitimising,

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[16] 'The International Law Advisory Committee of the Ministry of Foreign Affairs Holds its Third Plenary Meeting', at https://www.fmprc.gov.cn/web/wjb_673085/zzjg_673183/tyfls_674667/xwlb_674669/201601/t20160106_7670475.shtml

[17] C. Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (OUP, 2019) p. 293

[18] S. Zhuang, China Raises Status of International Law Studies in Push for Home-grown Global Expertise, *South China Morning Post,* 28 February 2023

[19] I. Johnstone, Discursive Power in the UN Security Council, (2005) 2 *Journal of International Law and International Relations*, pp. 73-94

[20] I. Hurd, The Empire of International Legalism (2018) 32:3 *Ethics & International Affairs, pp.* 265-278

behaviour.[21] This is so because the *perceived* legality of a particular conduct confers on it a high degree of legitimacy. For this reason, States routinely justify their actions by reference to international law, including when doing so requires appealing to implausible legal exceptions or advancing unconvincing legal interpretations.

China also has the capacity to influence both the design and objectives of international governance structures. For example, it is not a coincidence that Beijing's 'bureaucratic footprint' within UN agencies has recently become both wider and deeper.[22] Similarly, China has been pivotal to the establishment of international institutions such as the Asian Infrastructure Investment Bank and the Shanghai Cooperation Organisation that reflect its ambition to lead in the important spheres of international finance and security. [23] Operating under the principle that 'international rules should reflect the concerns of all countries in a balanced manner',[24] China has also adopted a more entrepreneurial stance in international law-making. Its efforts to shape the normative discourse on the Responsibility to Protect[25] and promote the concept of cyber-sovereignty as an alternative to the Western model of cyber regulation[26] are two pertinent examples of its ambition to behave not just as a norm shaper but also as a norm maker on important global issues.[27]

Without any doubt, those just discussed above represent more established methods of exercising discourse power in international law. Yet, they do not exhaust the repertoire of actions that a State like China could take in order to advance its interests through international law. In particular, in light of the ongoing process of

[21] K. Rapp, Justifying Force: International Law, Foreign Policy Decision-making, and the Use of Force, (2022) 28:2 *European Journal of International Relations*, pp. 337-360

[22] C. Fung and S. Lam, Why the Increase in Chinese Staff at the United Nations Matters, *International Affairs Blog,* 2 August 2021, at https://medium.com/international-affairs-blog/why-the-increase-in-chinese-staff-at-the-united-nations-matters-e0c30fdfcc46

[23] Z. Peng and S. Tok, The AIIB and China's Normative Power in International Financial Governance Structure, (2016) 1 *Chinese Political Science Review,* pp. 736–753

[24] Remarks by Ambassador Zhang Jun at the UN Security Council Open Debate on the Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security, 12 January 2023, at http://un.china-mission.gov.cn/eng/hyyfy/202301/t20230113_11006774.htm

[25] M. Barelli, Preventing and Responding to Atrocity Crimes: China, Sovereignty and the Responsibility to Protect, (2018) 23:2 *Journal of Conflict and Security Law*, pp. 173–201

[26] C. Fung, China's Use of Rhetorical Adaptation in Development of a Global Cyber Order: a Case Study of the Norm of the Protection of the Public Core of the Internet, (2022) 7:3 *Journal of Cyber Policy*, pp. 256-274

[27] S. Sceats, Guest Post: China As a Shaper of International Law? *Opinio Juris*, 17 March 2015

judicialization of international relations, participation in international adjudication represents today an important mechanism for strategic engagement with international law. This is especially true considering the potential 'rule-creating functions' of judicial decisions.[28] Evidently, international courts are tasked with applying, rather than making, international law; yet the dividing lines between these two acts tend to blur when, confronted with the indeterminacy of the international legal system, courts need to develop, adapt, or expand the meaning of the law.[29]

The fact that international courts have the capacity to affect the way in which international law is interpreted and, ultimately, applied provides an incentive for powerful States to participate in what has been described as a 'symbolic struggle' to assert control over the meaning of international legal rules that takes place before judicial institutions.[30] This participation offers two sets of advantages. Firstly, and most obviously, by bolstering or undermining the authority of specific interpretations of international law, a State appearing before a tribunal will be able to defend its legal position and, in turn, its national interests. Secondly, looking beyond the specific outcome of a case and taking into account the law-making function of judicial decisions, a State will also have a chance to control the potential effects of a ruling on the future of international law.[31] In this respect, it is worth noting that high-ranking Chinese officials have themselves acknowledged the strategic importance of the ICJ's pronouncements in shaping 'the long-term development of international law.'[32]

For these reasons, authors like Eder have called on China to 'engage more' with international adjudication as part of a larger plan to 'make full use' of international law in protecting both its short and long-term interests.[33] Crucially, similar calls have also come from within Chinese legal academic circles. For example, Song Jie has

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[28] T. Ginsburg, International Judicial Law-Making, *Illinois Law and Economics Working Paper* No. LE05-006, p. 6
[29] R. Jennings, Judicial Function and the Rule of Law in International Relations, in *Collected Writings of Sir Robert Jennings*, Vol I (Springer 1998) p. 486
[30] T. Soave, The Social Field of International Adjudication: Structures and Practices of a Conflictive Professional Universe (2023) 22 *Leiden Journal of International Law*, pp. 1–27, p. 22
[31] V. Lowe, The Function of Litigation in International Society, (2012) 61:1 *International & Comparative Law Quarterly,* pp. 209-222
[32] Ma Xinmin, director general of the Chinese foreign ministry's department of treaty and law, United Nations General Assembly, Seventy-eight Session, 20th Meeting (PM), 26 October 2023, GA/12547, at https://press.un.org/en/2023/ga12547.doc.htm
[33] T. Eder, *China and International Adjudication: Caution, Identity Shifts, and the Ambition to Lead* (Nomos, 2021) pp. 520-521

pointed to the need for China to increase both the extent and quality of its participation in international adjudication to better align with, and take advantage of, the recent trend towards the legalization of international dispute settlement.[34] On his part, Sienho Yee has argued that, in order to safeguard its economic and political achievements, China must become a 'leader country on international law', increasingly capable of and confident in appearing before international tribunals.[35]

The art of legal persuasion that is needed to successfully engage with international tribunals, however, is not something that can be improvised; it requires, instead, sophisticated understanding of the relevant law, on the ground experience and familiarity with the relevant institutional setting. In this sense, the initiatives mentioned in the previous section aimed at promoting the study of international law and its integration into foreign policy decision-making are important first steps on which to build further. Yet, as its experience with the WTO has shown, the best investment that China could make going forward is in the process of direct learning. It is, in fact, the latter that has allowed China to transform, in a span of less than ten years, from a shy to a confident participant capable of navigating and benefitting from the WTO dispute resolution system.[36] China's recent experience in the South China Sea arbitration, unilaterally initiated by the Philippines in connection with the UN Convention on the Law of the Sea (UNCLOS), further illuminates the importance of this point. China's decision not to take part in the UNCLOS proceedings was primarily aimed at delegitimising the arbitral tribunal, which, in its view, lacked the jurisdiction to deal with a disguised sovereignty dispute. Yet, it is telling that China did not skip participation altogether.[37] Rather, it chose to engage with the judicial process laterally, releasing official statements and communications

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[34] Song Jie, Evaluating the Effectiveness of China's Participation in International Legal Matters: Lessons from China's Practice in the International Law Commission and the International Court of Justice, (2017) 15:2 *China: An International Journal*, pp. 144-165 and Song Jie, 'China's Lawsuit-Averse Culture and International Dispute Settlement Mechanism', (2020) at https://mp.weixin.qq.com/s/M5gjLcpqt0a0YD8kO6HU1Q accessed on 29 March 2024

[35] Qi Yuefeng, 'China Should be More Actively Involved in the International Rule of Law Process - Dialogue with Yi Xianhe, *Oriental Outlook Weekly*, 28 January 2016, at https://www.sienhoyee.org/cn.htm accessed on 29 March 2024

[36] Y. Guohua, China in the WTO Dispute Settlement: A Memoir, (2015) 49:1 *Journal of World Trade*, p. 3; See also, H. Gao, How China Took on the United States and Europe at the WTO, in G. Shaffer (ed.) *Emerging Powers and the World Trading System: The Past and Future of International Economic Law*, (CUP 2021)

[37] It was reported that The Politburo Standing Committee was split as to whether take part in the proceedings, with a 5 to 4 victory for non-participation. S. Shirk, *Overreach: How China Derailed Its Peaceful Rise* (OUP, 2022) p. 224.

which the tribunal ultimately considered equivalent to preliminary objections.[38] In an important sense, this form of 'non-participating participation'[39] can be seen as an attempt by China to gradually develop its understanding and familiarity with the UNCLOS dispute settlement mechanism ahead of an expected increase in its use.[40]

If China's encounter with the WTO and UNCLOS dispute resolution systems has showed the importance of gaining discourse power in international litigation, the tribunals operating within these two specialised systems can only deal with a limited set of disputes, namely those related to, respectively, international trade law and the law of the sea. There is only one international court where States could turn for virtually any dispute concerning international law, namely the ICJ. The prestige of this institution is reflected in the provisions of the UN Charter that describe it as the 'principal judicial organ' of the UN and instruct States that international legal disputes should be, as a general rule, referred to it.[41] The ICJ's potentially unlimited jurisdiction and unmatched judicial authority makes it an ideal platform for international discourse power. Yet, precisely because of those qualities, the ICJ can also deal with disputes that involve very high stakes. This has profound consequences considering that, as Coleman put it, 'the more vital the outcome of a dispute, the less prepared States are to devolve control of its resolution to an independent body'.[42] As a result, States are particularly wary of appearing before the Court as either claimants or respondents. That said, appearing before the ICJ as a party to a contentious case is not the only form of engagement with this body. In particular, the Statute of the ICJ allows States to intervene as non-parties in contentious proceedings as well as to submit written statements and make oral observations during advisory proceedings. As will be discussed in the next sections, the advantage of these indirect forms of participation is that they offer States a

[38] Procedural Order No. 4, PCA Case Nº 2013-19, Permanent Court of Arbitration, 21 April 2015, p. 5.

[39] For a discussion, see, W. Muller, Multiple Book Review Essay, (2018) 8:1 *Asian Journal of International Law*, pp. 296-299.

[40] Anne Hsiu-An Hsiao, China and the South China Sea Lawfare, (2016) 52:2 *Issues & Studies: A Social Science Quarterly on China, Taiwan, and East Asian Affairs*, pp. 1-42

[41] Article 92 and Article 36(3), Charter of the United Nations, 24 October 1945, 1 UNTS XVI

[42] A. Coleman, The International Court of Justice and Highly Political Matters, (2003) 29:4 *Melbourne Journal of International Law,* pp. 29-75, p. 32.

concrete opportunity to influence the relevant judicial processes without having to pay the potentially high costs of direct litigation.

4. China and the International Court of Justice

As a newcomer to the international stage, the People's Republic of China was imbued with a broad sense of mistrust towards the international legal system. Further fuelled by its prolonged exclusion from the United Nations, this mistrust derived largely from China's traumatic encounter, in the 19th century, with foreign powers and international law that left the country in a semi-colonial status as a result of military aggressions and a series of unequal treaties imposed upon it.[43] This scepticism towards international law and organizations also affected China's attitudes towards international adjudication, which was not regarded as a reliable method for solving inter-States disputes.[44] While a clear preference for diplomatic methods continue to characterise the Chinese approach to dispute settlement,[45] recent studies have highlighted how China has gradually moved from 'outright rejection' to 'selective acceptance' of international adjudication mechanisms. Accordingly, China's current engagement with international adjudication can be described as being 'asymmetrical' in the sense that Beijing has developed different approaches towards different adjudicative bodies on the basis of strategic and ideological rationales.[46]

Despite this general progress, China's traditional uneasiness about third-party adjudication has remained particularly acute with regard to the ICJ. This does not mean that China maintains a principled position against this institution. On the contrary, given its commitment to multilateralism and the importance of the ICJ for

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[43] J. d'Aspremont and B. Zhang, China and International Law: Two Tales of an Encounter (2021) 34:4 *Leiden Journal of International Law,* pp. 899-914

[44] For an account, see, J. Ku, China and the Future of International Adjudication, (2012) 27 *Maryland Journal of International Law*, pp. 154-173

[45] Ma Xinmin, China's Mechanism and Practice of Treaty Dispute Settlement (2012) 11 *Chinese Journal of International Law,* pp. 387-392, at p. 392

[46] Y. Hao and I. de la Rasilla, China and International Adjudication—Picking Up Steam?, (2021) 12:4 *Journal of International Dispute Settlement*, Volume 12, pp. 637–668

the maintenance of a truly international legal order, China regularly praises it for its contribution towards 'upholding the purposes and principles of the UN Charter and the promotion of the international rule of law.'[47] Yet, this rhetorical support has not developed into substantive engagement.

It is worth highlighting that there is nothing unique about China's reluctance to engage with the ICJ. In accordance with a fundamental precept of international adjudication, the Court only has jurisdiction over a State with its consent and, as a matter of fact, the majority of States have either not given such a consent in advance of a dispute or have done so in a very limited way in order to safeguard their sovereignty and national interests. Nowhere is this clearer than in respect of optional clause declarations. These are unilateral acts that, in accordance with the Statute of the ICJ, allow States to voluntarily accept as compulsory the jurisdiction of the Court. At the time of this writing, only 74 States have deposited such declarations. Crucially, most of these declarations are replete with far-reaching reservations that significantly limit the ability of the Court to carry out its judicial function with respect to the declarant State. The picture is even starker in relation to the great powers, which, by their very nature, have a predilection for diplomatic, as opposed to judicial, methods of solving inter-State disputes. Russia has never accepted the compulsory jurisdiction of the Court. France terminated its optional clause declaration in 1974, after the ICJ indicated provisional measures in a case concerning French nuclear tests conducted in the South Pacific.[48] The US made a U-turn in 1985 following the Court's finding that it had jurisdiction to entertain a case concerning the legality of American military activities in Nicaragua.[49] It follows that today the UK is the only permanent member of the Security Council to have accepted the obligatory jurisdiction of the Court. Yet, its optional clause declaration includes far-reaching

[47] For example, Statement by Xu Hong at the 73rd Session of the United Nations General Assembly on Agenda Item 76 Report of the International Court of Justice, 25 October 2018, at https://www.fmprc.gov.cn/ce/ceun/eng/chinaandun/legalaffairs/sixthcommittee1/t1618967.htm; and Statement by Liu Yang at the 74th Session of the UN General Assembly on Agenda Item 83 The Rule of Law at the National and International Levels, 11 October 2019, at https://www.un.org/en/ga/sixth/74/pdfs/statements/rule_of_law/china_e.pdf

[48] Letter of 10 January 1974, 20 *Annuaire Français de Droit International* (1974), pp. 1052-4.

[49] United States: Department of State Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction, 24 *ILM* (1985), p. 1742.

conditions and limitations that effectively shield the UK from judicial scrutiny, signalling a *de-facto* exit from the system of compulsory jurisdiction of the Court. [50]

In line with the tendency described above, China has taken several measures to limit its exposure to the ICJ. After being admitted to the UN, it promptly disowned the optional clause declaration that had been previously made, in 1946, by the Republic of China without contemplating the prospect of re-joining the optional clause system since that time.[51] China has also regularly opted out of compromissory clauses included in treaties to which it is a party.[52] These are clauses that grant the ICJ jurisdiction with regard to disputes concerning the interpretation and application of the treaties in question. For example, China made a reservation to Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination which establishes that any dispute between two States Parties with respect to the interpretation or application of that convention shall be referred to the ICJ. Similarly, it opted out of Article IX of the Genocide Convention whereby disputes between the contracting parties relating to the interpretation, application or fulfilment of that convention shall be submitted to the ICJ.

As a natural consequence of this reluctant posture, China has never initiated a contentious case before the ICJ, while in 2014 the Marshall Islands became the first, and so far, only State that sought, unsuccessfully, to bring a claim against it.[53] Similarly, China has never intervened as a non-party in bilateral disputes before the Court. While these records signal a high level of disengagement with the contentious jurisdiction of the ICJ, they overlook an important element, namely that China's attitudes towards the advisory function of the Court have followed a different trajectory. As will be further discussed below, this is significant for three main reasons. First, reflecting its ambition to contribute to international legal discourse,

[50] M. Barelli, A Heartfelt Commitment to the International Rule of Law? The United Kingdom and the International Court of Justice, (2023) 70 *Netherlands International Law Review*, pp. 143–170.
[51] Report of the International Court of Justice (August 1972–July 1973), 28 GAOR. 28th Session, Supp No 5 (A/9005) p. 1.
[52] Ma Xinmin, China's Mechanism and Practice of Treaty Dispute Settlement (2012) 11 *Chinese Journal of International Law* (2012) pp. 387-392, at p. 391
[53] China was, however, the subject of an order indicating measures of interim protection issued by the Permanent Court of Justice as part of a case (later discontinued) brought by Belgium in 1927. For the background, see C. Tang, China-Europe, in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) pp. 706–11, at p. 701.

China has begun to engage regularly with the most important judicial body operating at the international level. Second, China has chosen to do so via more indirect forms of participation that do not require it to act as a party to a case. Third, this limited practice may well evolve and harden into bolder forms of participation linked with the contentious jurisdiction of the Court.

5. China's Intervention in the Advisory Proceedings of the ICJ

In addition to deciding legal disputes submitted to it by States, the ICJ is also entrusted to give opinions on legal questions at the request of duly authorized UN organs such as, for example, the General Assembly.[54] Despite not being able to request them, States can use advisory opinions as a vehicle to wield discourse power in international law. This is so because the Statute of the ICJ allows States concerned by a question posed to the Court to present both written and oral statements before it.[55] In this way, States are provided with the opportunity to influence the Court's interpretation of the rules of international law that sit at the heart of an opinion.

Of course, advisory opinions are not legally binding. Yet, to say that is not tantamount to saying that they do not carry legal weight. Aimed to 'guide the United Nations in respect of its own action',[56] they are in fact a key instrument used by the ICJ to promote compliance with international law both within the UN and among the international community. In the words of former ICJ President Hisashi Owada, advisory opinions 'serve as an authoritative declaration of the law in fields where the law has not been entirely free from ambiguity or has at least been subject to some controversy'.[57] Another former President of the Court, Abdulqawi Yusuf, similarly described them as 'authoritative pronouncements' that 'provide legal clarity […] on

[54] Article 96, United Nations, *Charter of the United Nations*, 1 UNTS XVI, 24 October 1945
[55] Article 66, United Nations, *Statute of the International Court of Justice*, 18 April 1946
[56] Reservations to the Convention on Genocide, Advisory Opinion, ICJ Reports 19-51, p. 1, at p. 19. See, also, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p. 16, para. 32; Western Sahara, Advisory Opinion, ICJ Reports 1975, p. 12, para. 72
[57] Speech by H. E. Judge Hisashi Owada to the Legal Advisers of the United Nations Member States, 25 October 2011, at https://www.icj-cij.org/public/files/press-releases/9/16739.pdf.

specific principles and rules of international law'.[58] In other words, advisory opinions not only represent definitive statements of the law that concur to direct State behaviour on the international stage but also affect the evolving interpretation of contemporary international law. This provides an important incentive for States to integrate their concerns into the pronouncements of the Court, especially when the subject of an opinion is considered to be of strategic importance.

This indirect form of involvement in the activities of the ICJ has two additional advantages for a State like China. First, there is a correlation between a State's participation in advisory proceedings and its perceived commitment to, and respect of, the judicial function of the ICJ.[59] This correlation acquires even more value when advisory opinions concern fundamental questions of international law that affect the international community as whole. Under those circumstances, participating in the activities of the ICJ would contribute to reinforce the image of China as a great power intent to engage responsibly with global issues and challenges.[60] Second, given that advisory opinions are not aimed at solving inter-State disputes but, rather, at providing an authoritative answer to general questions of international law, interventions in advisory proceedings do not collide with China's characteristic commitment to non-interference in the internal affairs of other States.

Against this background, in 2009 China participated, for the very first time, in the advisory proceedings of the ICJ concerning the legality of the declaration of independence of Kosovo.[61] About a decade later, and despite their more challenging nature, China intervened in two other advisory proceedings concerning, respectively, the legal consequences of the separation of the Chagos Islands from Mauritius and

[58] Speech by H. E. Mr. Abdulqawi A. Yusuf, on the occasion of the seventy-fourth session of the United Nations General Assembly, 30 October 2019, at https://www.icj-cij.org/sites/default/files/press-releases/0/000-20191030-STA-01-00-EN.pdf.

[59] M. Wood, European Perspectives on Inter-State Litigation, in N. Klein (ed), *Litigating International Law Disputes: Weighing the Balance* (CUP 2014) p. 145

[60] See, for example, Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on 27 February 2019, at <https://govt.chinadaily.com.cn/s/201902/27/WS5cc7f203498e079e6801f647/foreign-ministry-spokesperson-lu-kangs-regular-press-conference-on-february-27-2019.html>

[61] The Republic of China had submitted written statements to the ICJ in its first two advisory proceedings: Condition of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, [1948] ICJ Rep 57, and Reparation for injuries suffered in the service of the Nations, Advisory Opinion, [1949] ICJ Rep 174

the legality of Israel's occupation of Palestinian territory.[62] The next two sections will analyse China's involvement in these advisory opinions highlighting its motivations to intervene and assessing its impact on the respective outcomes.

5.1. The Background of the Three Opinions

In 2010, the ICJ rendered an opinion on the legality of the declaration of independence from Serbia issued by the Assembly of Kosovo in 2008.[63] The core question that lay at the centre of this opinion, and that, as we shall see, the Court chose not to address directly, was whether the right to self-determination confers on certain peoples a legal entitlement to independence via unilateral secession. Kosovo's attempt to break from Serbia divided the international community. By the time the opinion was issued, almost 70 States had recognized Kosovo as an independent State.[64] Yet, many others, including China, Russia, India and EU countries such as Greece and Spain had not. State participation in this opinion was remarkable. Thirty-six States filed written statements, while twenty-eight subsequently participated in the oral phase of the proceedings.[65] Given the highly politicized moment and the existence of secessionist movements within its own borders, China broke with the past by intervening, for the very first time, in the Court's judicial activities. Presenting both a written and an oral statement, China participated in the proceedings with the objectives of demarcating the legal boundaries of the right to self-determination and accentuating the supremacy of the principles of sovereignty and territorial integrity in the international legal order.

In 2018, China continued on the path of engagement with the ICJ taking part in the advisory opinion concerning the legal consequences of the 1965 separation of the Chagos archipelago from Mauritius. Located in the Indian Ocean, the Chagos

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[62] As reported on 12 April 2024, China has also filed a written statement – not yet available on the website of the Court - in connection with the forthcoming Climate Change Opinion. ICJ, Press Release No. 2024/31, 12 April 2024

[63] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ, 2 July 2010

[64] See https://www.beinkosovo.com/countries-that-have-recognized-kosovo-as-an-independent-state/

[65] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p. 403, paras. 6-14

islands form part of British overseas territory. Between 1814 and 1965, the UK administered these islands as a dependency of the colony of Mauritius. Before granting independence to the latter, the UK separated the archipelago from the territory of the colony in order to retain its possession and lease its major atoll, Diego Garcia, to the US for military purposes. Considering the British conduct to be in violation of the laws regulating the process of decolonisation, Mauritius sought in various ways to regain control of what it considers unjustly lost territory. Among other things, Mauritius explored the possibility of referring the dispute to the ICJ but, as was explained in section 4 above, the latter can only entertain a dispute with the consent of both parties. As the UK did not consent to such adjudication, the ICJ was prevented from resolving this dispute through its contentious jurisdiction. This opinion, like the Kosovo one, sparked significant interest in the international community: thirty-one States submitted a written statement and twenty-two States subsequently participated in the oral proceedings.[66] On this occasion, China opted only to submit a written statement without later appearing before the Court. Remarkably, the length of its statement paralleled that of countries with a more established international law tradition such as Russia and France. China intervened in this opinion to both champion the cause of decolonisation and caution against the possible erosion of the principle of consent in international adjudication – two objectives that, as we shall see, were not easily reconcilable in the context of that opinion.

At the time of writing, the third advisory proceedings in which China has intervened remain ongoing. The advisory opinion in question concerns the legal consequences of Israel's occupation of the Palestinian territory and was triggered by a request advanced by the General Assembly on 30 December 2022.[67] A considerable number of States took part in the proceedings: fifty-three States filed a

[66] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019, p. 95, paras. 9-23

[67] Eighty-seven States voted in favour of the resolution, including China. Twenty-six States voted against, including the United States, United Kingdom, Germany, Australia and Canada. There were 53 abstentions and 27 States chose not to cast a vote, UN Doc. A/RES/77/24730 December 2022, at https://digitallibrary.un.org/record/3999158?ln=en

written statement and fifty States subsequently participated in the oral proceedings.[68] The aim of China's intervention, which consisted of a written and an oral statement, was twofold: first, to support the Palestinian people's struggle for self-determination and, second, to clarify why the ICJ was entitled to render this opinion in the absence of Israel's consent. It is noteworthy that in 2004 the ICJ had issued a similar opinion on the legal consequences arising from Israel's construction of a wall in the occupied Palestinian territory.[69] At that time, alone among the permanent members of the Security Council, China did not take part in the proceedings despite the striking similarities between the focus and circumstances of the two opinions. While facilitated by Beijing's growing diplomatic involvement in the region,[70] this change in approach is revealing of an important shift towards a more determined and systematic participation in the judicial functions of the Court.

5.2 China's Interventions and Discourse Power: Strategies and Motivations

China's position on each of the three advisory opinions in question was diametrically opposed to that of the United States and other powerful Western countries. In the Kosovo opinion, where the US, the UK and France acted as Kosovo's main allies, China supported Serbia's counter-secession strategies.[71] In the Chagos opinion, China endorsed Mauritius's demands for decolonisation against the vested interests of the UK and the US. In the Occupation opinion, Beijing's strong accusations of Israel did not find an echo in Western capitals. Strategically, China's interventions in these opinions were aimed at protecting two core national interests:

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[68] Public sitting held on Monday 19 February 2024, at 10 a.m., at the Peace Palace, on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for advisory opinion submitted by the General Assembly of the United Nations) CR2024/4, VERBATIM RECORD, p. 52

[69] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C.J. Reports 2004, p. 136.

[70] See, for example, Position Paper of the People's Republic of China on Resolving the Palestinian-Israeli Conflict, 30 November 2023, at https://www.mfa.gov.cn/eng/wjbxw/202311/t20231129_11189405.html#:~:text=President%20Xi%20Jinping%20stated%20China's,the%20expansion%20of%20the%20conflict; and 'Carrying Forward the Spirit of China-Arab Friendship and Jointly Building a China-Arab Community with a Shared Future in the New Era, Statement by Xi Jinping, First China-Arab States Summit, Riyadh, 9 December 2022, at https://english.news.cn/20221210/9c4e2500c7da4a6b84f11b57bfb64ef9/c.html

[71] For a discussion, see, J. Ker-Lindsay, Explaining Serbia's Decision to go to the ICJ, in M. Milanovic and M. Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015)

first, the inviolability of the principle of territorial integrity; and, second, a State's prerogative to determine its preferred method of dispute resolution as a manifestation of its sovereignty.

A. Self-determination and Territorial Integrity

The right to self-determination featured prominently in each of the three advisory proceedings discussed in this article. The Kosovo opinion concerned the applicability of the right to self-determination to peoples aspiring to secede from an existing State; the Chagos opinion focused on the content and scope of the right to self-determination applicable to the process of decolonization; finally, in the Occupation opinion the Court was asked to consider the legal consequences arising from the violation of the right to self-determination of a people under occupation.

The significance of the right to self-determination derives from the fact that this right poses a potential challenge to one of the constitutive elements of State sovereignty, namely territorial integrity. More specifically, the external dimension of self-determination relates to the right of peoples to determine their own political status, including – under certain circumstances - through the creation of a new State. Not surprisingly, all States are, to various degrees, preoccupied by the potential implications of the right to self-determination. It is, however, those States that are directly confronted with internal threats to their territorial integrity that are particularly wary of the risks associated with expansive interpretations of this right.

As one of those States, China participated in the advisory proceedings concerning Kosovo's attempt to secede from Serbia with a clear strategy and purpose. In its pleadings, China highlighted that 'respect for [the] territorial integrity of a sovereign State is one of the fundamental principles of contemporary international law.'[72] Noting that this paramount principle is reflected in key international law documents

[72] Written Statement of the People's Republic of China, 16 April 2009, p. 2, available at https://www.icj-cij.org/case/141/written-proceedings; and Oral Statement, 7 December 2009, para. 15 available at https://www.icj-cij.org/case/141/oral-proceedings

such as the UN Charter and the 1970 UN Declaration on Friendly Relations,[73] China argued that the right of peoples to self-determination cannot be construed as authorising, in any manner, the disintegration of existing States and that, accordingly, its application under international law is confined solely to situations of colonial rule and foreign occupation.[74]

The fact that these are precisely the two scenarios at play in the Chagos and Occupation opinions explains why China felt sufficiently comfortable to intervene in those proceedings in support of the self-determination claims of Mauritius and Palestine. In the Chagos opinion, after referring to its own experience of 'aggression and oppression under imperialism and colonialism',[75] China affirmed that peoples under colonial domination are legally entitled to independence as part of their right to self-determination. To justify its position, China referenced key international law instruments such as the 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples,[76] which strongly condemns colonialism and emphasizes that all peoples have the right to self-determination, and the already mentioned 1970 UN Declaration on Friendly Relations, which affirms that every State has the duty to promote the realization of the right to self-determination of peoples in order 'to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned.'[77] Likewise, in the Occupation opinion China stated that, as a people under foreign occupation, the Palestinian people are legally entitled to self-determination,[78] a conclusion, China emphasised, that has been reached also by authoritative bodies such the UN General Assembly and the

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[73] UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, A/RES/2625(XXV), 24 October 1970

[74] Written Statement of the People's Republic of China, 16 April 2009, p. 3 and Oral Statement, 7 December 2009, para. 21

[75] Furthermore, the Constitution of the People's Republic of China affirms that 'China consistently opposes imperialism, hegemonism and colonialism, works to strengthen unity with the people of other countries, supports the oppressed nations and the developing countries in their just struggle to win and preserve national independence and develop their national economies, and strives to safeguard world peace and promote the cause of human progress'. Written Statement of the People's Republic of China, 1 March 2018, para. 12 available at available at https://www.icj-cij.org/case/169/written-proceedings

[76] UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, A/RES/1514(XV), 14 December 1960

[77] Supra note 73

[78] Written Statement of the People's Republic of China, 25 July 2023, para. 37, available at https://www.icj-cij.org/index.php/case/186/written-proceedings

International Court of Justice.[79] In particular, China submitted that Israel's prolonged occupation has prevented the Palestinian people from exercising in full their right to self-determination, including their right to establish an independent State.[80]

The Kosovo opinion presented a different set of challenges. As Kosovo is neither colonized nor occupied, the conventional notion of self-determination discussed above would not entitle its people to break away from Serbia and form a new State. As the ICJ noted, the international law of self-determination has developed 'in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.'[81] Yet, a number of States that intervened in the proceedings referred to a variant of the right to self-determination that may exceptionally legitimise unilateral secession when this is the only available remedy to the systematic oppression of a distinct group within a State. These views find some support in the pronouncements of judicial and quasi-judicial bodies both at the national and international level that have referred, if implicitly, to the existence of a right to remedial secession. For example, the Supreme Court of Canada famously held that the right to self-determination can generate a right to unilateral secession in situations where a people is oppressed or denied meaningful political representation.[82] The fact that this right has some traction in the international legal community is also confirmed by the fact that a number of judges of the Court referred to it in their individual opinions.[83]

Unqualified support for a right to remedial secession, however, is lacking among great powers. This is due not only to fears of potential internal repercussions but also to concerns about the political complexity of having to deal with secessionist movements in geopolitically inconvenient scenarios. For these reasons, countries such as the US, the UK and France refrained from endorsing a right to secession for

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[79] Ibid., para. 43
[80] Ibid., para. 45
[81] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ, 2 July 2010, para. 79
[82] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217
[83] Separate Opinions, Judge Yusuf (para. 11) and Judge Cancado Trindade (paras. 178-181)

the Kosovar people, presenting, instead, Kosovo as a *sui generis* case in an attempt to simultaneously support its factual independence and discourage others from pursuing a similar course of action.[84] China had different priorities. Its main concern was to prevent any explicit or implicit validation of secessionist claims through self-determination rhetoric. Accordingly, China employed strong and unequivocal language to discredit the existence of a right to remedial secession in international law.[85] It is also telling that the same strong language against remedial secession was used in the Occupation opinion, even though the circumstances of the latter did not require China to take a position on that specific question.[86]

China's argument against a right to remedial secession is not without merit, given that the normative foundations of this right, typically associated with the 'safeguard' clause inserted in the UN Declaration on Friendly Relations, are not well defined. Read *a contrario*, this clause seems to suggest that a government that systematically oppresses a group within its territory is not entitled to invoke the principle of territorial integrity.[87] As a consequence, the group in question could, if it wished, claim a right to secede from that State. However, doubts exist as to the correctness of this interpretation. For example, some authors have highlighted that the drafting history of this provision does not suggest that States intended to confer a right to remedial secession on distinct groups living within their territories.[88] Equally, State practice does not provide sufficient evidence of support for such a progressive interpretation of that clause. In fact, not only do States hold different views on the

[84] M. Milanovic, Arguing the Kosovo Case, in M. Milanovic and M. Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP 2015)
[85] Oral Statement, 7 December 2009, para. 23
[86] Written Statement, 25 July 2023, para. 38
[87] 'Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.' Supra note 73
[88] See, for example, T. Jaber, A Case for Kosovo? Self-determination and Secession in the 21st Century", (2011) 15 *The International Journal of Human Rights*, pp. 936-937; J. Summers, The Right of Self-Determination and Nationalism in International Law, (2005) 12 *International Journal on Minority and Group Rights*, pp. 335-336.

legal foundations of this right but also tend to succumb to *Realpolitik* when dealing, inconsistently, with remedial secession claims.[89]

The fact that China articulated its position on the question of remedial secession in the Kosovo opinion was not inconsequential. One of the reasons why the ICJ expediently declined to comment on the actual scope of the right to self-determination, including whether it includes a right to secession, is that 'radically different views' on this question were expressed by States during the proceedings.[90] In this sense, China's legal arguments contributed to the formulation of the advisory ruling in a manner that broadly aligned with its interests. On the other hand, China's argument against the legality of declarations of independence was less persuasive. China opined that, since they infringe the principles of State sovereignty and territorial integrity, attempted acts of unilateral secession cannot be deemed to be in accordance with international law because the latter recognizes and protects those very principles as central pillars of the international legal system.[91] Yet, upholding the *Lotus* principle according to which anything not expressly prohibited by international law is permitted,[92] the Court took a different view and found that the declaration of independence of Kosovo was not illegal.

B. The Centrality of the Principle of Consent in International Adjudication

The only obligation that the UN Charter imposes upon States involved in a dispute is that they solve it peacefully.[93] It follows that no State is 'obliged to allow its disputes to be submitted to judicial settlement without its consent.'[94] The centrality of this tenet in international adjudication is a natural consequence of the

[89] See, for example, C. Borgen, The Language and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia, (2009) 10 *Chicago Journal of International Law*, pp. 1-33; R. Falk, The Kosovo Advisory Opinion: Conflict Resolution and Precedent", (2011) 105 *American Journal of International Law*, pp. 50-59.
[90] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ, 2 July 2010, para. 82
[91] Oral Statement, 7 December 2009, para. 17
[92] S.S. 'Lotus', France v. Turkey, Judgment No 9, PCIJ Series A No 10, ICGJ 248 (PCIJ 1927)
[93] Article 33, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[94] Western Sahara, Advisory Opinion, ICJ Reports 1975, pp. 24-25, paras. 32-33; Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, ICJ Reports 1950, p. 71.

principle of State sovereignty and can have potential ramifications for the advisory function of the ICJ. In particular, a problem may exist when a request for an advisory opinion overlaps with a dispute between two States and at least one of them does not consent to the involvement of the Court. [95]

This issue did not arise in the Kosovo opinion because the only State directly affected by the dispute, that is, Serbia, was actually the one which campaigned for the intervention of the ICJ in the hope that it would delegitimise the Kosovar declaration of independence. Things were different in the Chagos and Occupation opinions. According to Israel, the General Assembly's request for an advisory opinion sought to 'perversely circumvent' the lack of Israel's consent to the Court's involvement, making 'a dead letter' of the most fundamental principle of international adjudication.[96] Similarly, the UK argued that the question of the Chagos archipelago should have remained a bilateral matter between the UK and Mauritius, adding that the request for an advisory opinion was nothing but an attempt by Mauritius to bypass the absence of British consent to judicial settlement.[97]

The British and Israeli objections put China in a difficult position. As discussed above, for political and strategic reasons China wanted to offer its support to the causes of Palestine and Mauritius. At the same time, Beijing had good reasons to sympathise with the concerns voiced by the UK and Israel. Only a few years before, in fact, the Philippines had invoked the compulsory dispute settlement of UNCLOS to drag China before an arbitral tribunal in relation to a territorial dispute in the South China Sea. China responded to what it described as a 'wanton abuse' of the UNCLOS procedures by, firstly, questioning the jurisdiction of the tribunal to entertain the case and, subsequently, refusing to comply with the unfavourable verdict.[98] There is no doubt that this experience strengthened China's condemnation

[95] *Status of the Eastern Carelia*, Advisory Opinion, ICJ Reports 1950, p. 72.
[96] Statement of the State of Israel pursuant to the Court's Order of 3 February 2023 Relating to the Advisory Proceedings Initiated by UN General Assembly Resolution 72/247, 24 July 2024, p. 4
[97] Statement by Ambassador Matthew Rycroft, Permanent Representative to the United Nations, at the General Assembly Meeting to Discuss 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, 22 June 2017
[98] 'The South China Sea arbitration violated the principle of state consent and the arbitral tribunal exercised its jurisdiction ultra vires and rendered an award in disregard of law." Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference, 12 July 2021, at http://gr.china-embassy.gov.cn/eng/fyrth/202107/t20210712_8974967.htm

of strategies aimed at bypassing the lack of a State's consent to judicial settlement. Under the circumstances, it was the ICJ's own jurisprudence that offered China a way out of this difficult situation.

Recognizing the importance of safeguarding the principle of consent in international adjudication, the ICJ has affirmed that 'the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character'.[99] However, the Court has also clarified that this would not prevent it from giving an opinion on a question related to an inter-States dispute as long as the latter also has a multilateral dimension which falls within the sphere of competence of the requesting organ.[100] In fact, the 2004 opinion on the legal consequences arising from Israel's construction of a wall in the occupied Palestinian territory is one of the pronouncements that contributed to develop this logic. In that instance, the ICJ rendered the opinion in the absence of Israeli consent for two main reasons: first, because the opinion was requested 'on a question which [was] of particularly acute concern to the United Nations'; and, secondly, because it was 'located in a much broader frame of reference than a bilateral dispute'.[101] This reasoning allowed China to confidently engage with the Court in the Occupation opinion without running the risk of undermining the principle of consent. As China put it:

> 'The question of Palestine has always been an important part of the work of the UN since its founding. For more than 70 years, the UN has approached the question of Palestine as a matter of international peace and security … Moreover, … UN General Assembly resolutions have reaffirmed the permanent responsibility of the United Nations with regard to the question of Palestine until the question is resolved in all its aspects in accordance with international law and relevant resolutions.' [102]

In other words, by emphasising the special responsibility of the United Nations towards the question of Palestine, China portrayed the latter as a unique case that

[99] *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 12, at p. 25, para. 33
[100] *Western Sahara*, p. 26, paras. 38 and 39
[101] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 50
[102] Written Statement of the People's Republic of China, 25 July 2023, para. 13

can hardly set a precedent or be emulated by others. The circumstances of the Chagos opinion, however, were significantly less straightforward.

The first indication of China's more hesitant approach came from its voting behaviour at the General Assembly. While China voted in favour of the resolution seeking a judicial pronouncement on the question of Israel's occupation, it abstained on the resolution requesting an advisory opinion on the Chagos archipelago.[103] In the explanation of vote, China expressed its 'firm support for the decolonization process and its understanding of the position of Mauritius'; yet, it also called upon the two countries 'to continue to carry out bilateral negotiations and consultations' in order to find a political solution to their disagreement.[104] During the advisory proceedings, China continued to display some degree of ambivalence, inviting the States concerned 'to act in good faith, and seek appropriate solution to [the] relevant issues through negotiation or any other peaceful means agreed to by both parties.'[105]

China had good reasons to be cautious. The subject-matter of the opinion was an ongoing bilateral dispute between two member States of the United Nations and one of them, i.e., the UK, had not consented to submitting it for judicial settlement. In fact, the UK had gone to great lengths to prevent Mauritius from bringing the dispute before the ICJ, unscrupulously amending a clause of its declaration of acceptance of the jurisdiction of the Court which could have allowed Mauritius to initiate proceedings against it.[106] The challenge to the principle of consent in international adjudication was, therefore, significantly more acute than it was in the Occupation opinion, calling for a more nuanced approach.

Despite its concerns with the strategies employed by Mauritius, China did not argue, like other States did, that there were compelling reasons for the Court to decline to give the opinion. Instead, recognizing that the views of those States were not without merit, China encouraged the ICJ to approach the question of consent

[103] The resolution was passed with 94 votes in favour, 15 against and 65 abstentions. General Assembly 71st Session, 88th Plenary Meeting, UN Doc. A/71/PV.88, 22 June 2017
[104] Ibid.
[105] Written Statement, 1 March 2018, para. 19
[106] M. Barelli, A Heartfelt Commitment to the International Rule of Law, supra note 50.

in a cautious manner.[107] In particular, China affirmed that if the Court were to provide an opinion - something which China did not expressly encourage the Court to do - it should clearly articulate a set of reasons that, under the specific circumstances, would allow it to make a pronouncement in the absence of British consent. In this regard, the Chinese written statement referred to a number of General Assembly resolutions which dealt with the question of Mauritius and the status of the Chagos archipelago as well as a 2010 resolution that reminded that 'it is incumbent on the United Nations to continue to play an active role in the process of decolonization'.[108] In other words, China seized on the historic and ongoing decolonization efforts of the United Nations to highlight that an important dimension of the bilateral dispute between the UK and Mauritius fell within the scope of activity of the organisation.

Through this strategy, China achieved two goals. First, by not urging the Court to decline to give the opinion, it avoided openly assisting the UK's attempt to evade judicial scrutiny to the detriment of a fellow member of the Global South; second, by asking the Court to tread carefully on the overlap between the legal question before it and the territorial dispute between Mauritius and the UK, it defended the continued relevance of the principle of consent in international adjudication trying to mitigate the risk of setting a dangerous precedent in the use of advisory opinions.

The way in which the Court ultimately approached the question of consent was largely aligned with the Chinese position. In keeping with its jurisprudence, the ICJ carefully explained why, on this occasion, the rendering of the opinion would not amount to a circumvention of the principle of consent. In particular, the Court did not deny the existence of a dispute between the UK and Mauritius, but attached greater significance to two facts: first, the fact that its opinion was sought on a matter, i.e. decolonization, which was of particular concern to the United Nations; and, second, the fact that the purpose of its advice was not to resolve a territorial

[107] Written Statement, 1 March 2018, para. 14
[108] General Assembly Resolutions 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 16 December 1967; and General Assembly Resolution 65/118 of 10 December 2010

dispute between two States but, rather, to guide the General Assembly 'in the discharge of its functions relating to the decolonization of Mauritius.'[109]

In dealing with the actual merits of the opinion, instead, the Court did not show the degree of restraint that China had wished for. In an attempt to demarcate the boundary between giving the opinion and resolving the bilateral dispute related to it, China had invited the Court to limit itself to 'providing legal guidance to assist the General Assembly in fulfilling' its functions. As suggested by Sienho Yee, one way of achieving this delicate balance could have been to determine the applicable law without setting out in detail how that law would apply to the specific circumstances of the case.[110] In a similar way, Germany had asked the Court to limit its opinion 'to those aspects of the request that are of relevance for the General Assembly in order for it to exercise its competences on issues of decolonization,' refraining, in particular, from elaborating on the legal consequences and remedies deriving from of its findings.[111] Instead, the ICJ did more than simply clarify the relevant legal framework. After establishing that the process of decolonization of Mauritius was not lawfully completed at the time of independence, it deliberated that, first, the UK administration of the archipelago was unlawful and, second, the islands should be returned to Mauritius.

It would be wrong to describe China's approach to this opinion as that of a fence-sitter. China could have simply abstained from participating in these proceedings given the difficult position in which it found itself. The fact that it chose to intervene despite having to reconcile two conflicting objectives as part of its legal strategy is, therefore, indicative of a growing commitment to both develop a sphere of political and economic influence in the developing world and play a more active role in international legal discourse. It is also worth noting that China eventually made its

[109] Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ Reports 2019, p. 95, para. 86

[110] Sienho Yee, Notes on the International Court of Justice (Part 7) - The Upcoming *Separation of the Chagos Archipelago* Advisory Opinion: Between the Court's Participation in the UN's Work on Decolonization and the Consent Principle in International Dispute Settlement, (2017) 16:4 *Chinese Journal of International Law*, pp. 623–642

[111] Written Statement of Germany, 15 January 2018, paras. 146 and 147 available at https://www.icj-cij.org/case/169/written-proceedings

position on this matter more explicit. In May 2019, the General Assembly adopted a resolution which welcomed the Court's opinion and demanded that the UK withdraw its colonial administration from the Chagos archipelago within a six-month deadline.[112] By voting in favour of that resolution, China endorsed the Court's decision to issue the opinion, acknowledging its legitimacy and calling on the UK to fully comply with it.[113]

6. Intervention in Contentious Cases: A Possible Way Forward?

Having discussed China's engagement with the advisory activities of the ICJ, the final section of the article will consider whether conditions could be ripe for China to experiment with intervention in the context of the Courts' contentious jurisdiction. Historically, there have only been a few attempts to intervene in contentious proceedings, with the majority of them being rejected by the ICJ.[114] Nevertheless, recent developments have ignited a new interest in this form of incidental participation, making this discussion particularly timely.

At the outset, it should be noted that a State willing to intervene as a non-party in a contentious case can do so via either Article 62 or Article 63 of the Court's Statute.[115] Setting a higher threshold for participation, Article 62 permits a State to intervene if 'it has an interest of a legal nature which may be affected by the decision'. As explained by the ICJ, this requires more than a mere interest 'in the general legal

[112] Advisory Opinion of the International Court of Justice on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, General Assembly Resolution 73/295, UN Doc. A/RES/73/295, 24 May 2019

[113] 'General Assembly Welcomes International Court of Justice Opinion on Chagos Archipelago, Adopts Text Calling for Mauritius' Complete Decolonization', 22 May 2019, at https://press.un.org/en/2019/ga12146.doc.htm. See, also, a 2021 statement of the Foreign Ministry Spokesperson calling on the UK 'to implement the 2019 International Court of Justice advisory opinion on the Chagos Archipelago as soon as possible and return Chagos to Mauritius at an early date to complete the decolonization of Mauritius'. Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference, 15 December 2021 at https://www.fmprc.gov.cn/nanhai/eng/fyrbt_1/202112/t20211215_10470159.htm#:~:text=the%20troops%20accountable.,If%20the%20UK%20truly%20cares%20about%20human%20rights%2C%20it%20should,complete%20the%20decolonization%20of%20Mauritius

[114] B. Bonafe, The Collective Dimension of Bilateral Litigation: The Ukraine v Russia case Before the ICJ, *Questions of International Law*, 30 November 2022

[115] See, G. Barrie, Third-Party State Intervention in Disputes before the International Court of Justice: A Reassessment of Articles 62 and 63 of the ICJ Statute (2020) 53:1 *Comparative and International Law Journal of Southern Africa* pp. 152-171; T. Gill, Third Party Intervention in Contentious Proceedings at the International Court within the Context of Litigation Strategy (1991) 85 *Proceedings of the ASIL Annual Meeting*, pp. 41-43; and S. Forlati, The International Court of Justice: An Arbitral Tribunal or a Judicial Body? (2014 Springer) pp. 183-205

rules and principles likely to be applied by the decision'.[116] The interest invoked by the intervening State must in fact be the 'object of a real and concrete claim of that State, based on law, as opposed to a claim of a purely political, economic or strategic nature.'[117] In a less stringent manner, Article 63 provides that a State that is a party to a convention, the construction of which is at the centre of a dispute, has a right to intervene in the relevant proceedings. In other words, a State intervening under Article 63 does not have to claim a specific legal interest in the case at hand, since the purpose of the intervention would be to present to the Court its observations on the construction of the convention in question.[118]

China has never sought to intervene under either Article 62 or Article 63 of the Statute. By virtue of their less-confrontational nature, however, interventions under Article 63 could represent a natural progression of its earlier participation in the Court's advisory opinions. This is especially so given the recent surge in Article 63-interventions. In the past few years, a considerable number of States have intervened in a series of cases concerning the Genocide Convention brought by The Gambia, Ukraine and South Africa.[119] The participation of third-party States has been particularly striking in Ukraine v. Russia, where a total of thirty-three States filed a declaration of intervention.[120] Given States' traditional reluctance to intervene in contentious proceedings, and considering the unique features of the three cases mentioned above, it is difficult to say whether, and, if so, to what extent, a new trend towards a regular use of Article 63 will effectively emerge. It is also worth noting that the Court has recently shown some signs of unease with the strategy and effects of 'mass intervention'. In March 2024, the ICJ amended the rules governing its

[116] Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, ICJ Reports 1990, p. 92, at para. 76

[117] Territorial and Maritime Dispute (Nicaragua v. Colombia), Application for Permission to Intervene, Judgment, ICJ Reports 2011, p. 434 at para 37.

[118] Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, ICJ Reports 2013, p. 3, at para. 7

[119] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), proceedings instituted on 11 November 2019; Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), proceedings instituted on 26 February 2022; and Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), proceedings instituted on 29 December 2023

[120] ICJ Press Release No. 2023/27, 9 June 2023

practices and procedures with a view to alleviating the burden of interventions on its resources.[121] First, it introduced a tighter timeline for the submission of such requests; and, secondly, to prevent large numbers of States from presenting the same legal arguments in the course of the same proceedings, it granted itself the power to decide whether an intervening State will be allowed to make an oral submission.

It remains to be seen whether these limitations will have a chilling effect on States' willingness to participate. That said, should the practice of intervening – at least via written submissions – continue to consolidate, China would be in a good position to begin experimenting with it. This, of course, does not mean that China, a 'litigation-averse'[122] country committed to non-interference in other States' internal affairs, would enthusiastically embroil itself in other countries' disputes. This is even more so considering the political sensitivity of many of the cases that land on the docket of the ICJ. In this sense, any State contemplating intervention needs to navigate complex legal, political and diplomatic issues. Yet, under certain circumstances, it would not be unconceivable for China to intervene as a non-party in contentious proceedings in order to cultivate discourse power, advance its interests and familiarize further with the ICJ.

In bringing third-party intervention at the ICJ to the fore, the recent cases mentioned above have also highlighted a number of factors that may contribute to determine a case's suitability for Chinese intervention, including the number of States involved and the positions they take, the political repercussions of standing shoulder to shoulder with a particular State and the potential effects of participation on the proceedings in question. First, a large number of interventions is more likely to prompt action through emulation. In particular, the participation of other permanent members of the Security Council could be a strong motivating factor for China. On the other hand, the level of political exposure associated with being the only major power to advance a certain legal argument could weight against

[121] ICJ Press Release No. 2024/18, 28 February 2024. For a discussion, see J. McIntyre, The ICJ Changes the Rules for Intervention, *EJILTalk!*, 11 March 2024

[122] C. Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (OUP, 2019) p. 267

intervention. Secondly, an intervening State is not only addressing complex legal nuances before the Court; it is also taking sides in a dispute. In this sense, 'who support whom' carries considerable political significance. For example, supporting a State whose conduct has provoked a chorus of international condemnation could lead to reputational damage and diplomatic isolation. In such situations, intervening on the basis of political ties or shared views on certain issues of international law would not necessarily align with the national interest. Thirdly, the nature of the proceedings in which intervention is sought must also be considered. China has no desire to expand the scope of the Court's judicial activity, especially by encouraging progressive forms of litigation that risk unsettling the ICJ's traditional model of dispute settlement.[123] For example, applications that creatively seek to bypass the lack of consent of the respondent State to the jurisdiction of the Court[124] as well as lawsuits that aim to vindicate 'public interests' as opposed to the interests of a directly injured State are not seen with favor by China.[125] This can have important implications on its intervention strategies since the perceived illegitimacy of a proceeding tends to discourage participation for the risk of legitimising the process and validating the tactics that lay behind it.

A final point worth noting relates to China's experience with the WTO. In 2001, in order to further integrate into, and benefit from, the world economy, China joined the WTO accepting, among other things, its compulsory and binding dispute settlement system. Over time, China acquired greater confidence in operating within that system, increasing both the quantity and quality of its engagement. As a result, China has thus far participated in 267 WTO disputes, including as complainant in 23 cases and as respondent in 49 cases. Remarkably, China has intervened as third party in as many as 195 cases.[126] This striking record has been driven by two main

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[123] Zhang Hua, 中国当代国际秩序观的法理基础 (The Legal Foundations of China's Contemporary View of the International Legal Order) 40: 6 (2023) *Studies in Law and Business*, pp. 45-60, p. 58.
[124] M. Milanovic, ICJ Delivers Preliminary Objections Judgment in the Ukraine v. Russia Genocide Case, Ukraine Loses on the Most Important Aspects, EJIL:Talk! 2 February 2024
[125] Liao Xuexia, Obligations to the International Society as a Whole and the Jurisdiction of the International Court of Justice, 6 (2020) *International Law Research*, pp.
[126] Statistics available at https://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm

objectives. First, as a major trading partner, China has a systemic interest in the disputes arising within the organisation and, for that reason, seeks to ensure that its voice is heard at the table to the greatest extent possible. Secondly, intervening as third party has provided China with an opportunity to learn and gain familiarity with the WTO dispute settlement system, paving the way for more direct forms of engagement with it. More generally, the experience with the WTO has been crucial for advancing China's capacity-building in dispute settlement and has already informed the country's practice in other areas such as that of investor-state arbitration.[127] Similarly, then, China could build on its WTO experience to develop a greater sense of confidence in its interaction with the ICJ's dispute resolution mechanism, ultimately strengthening its position as an 'international law power' on the global stage.

7. Conclusions

Sovereignty concerns and political sensitivities more often than not prevent States from utilising the ICJ to settle their disputes. That said, a policy of complete disengagement with the Court can be detrimental for a major power which seeks to maintain or enhance its standing in the world. As the primary judicial body of the United Nations, the ICJ plays an important role in interpreting and developing international law, which, in turn, serves as a legitimising framework for States' actions. In this sense, the ICJ provides great powers with an avenue to influence global perceptions and interpretations of international law in ways that better align with their interests and values.

Against this background, this article has analysed how China, driven by the ambition to enhance its discourse power in international law, has begun to interact systematically with the judicial activities of the Court. Three key themes have emerged from this examination. Firstly, China has thus far favored engaging with

[127] I. de la Rasilla and Y. Hao, China and International Dispute Settlement by Adjudicative and Other Means, in I. de la Rasilla and C. Cai (eds) *The Cambridge Handbook of China and International Law* (CUP, 2024)

the ICJ in its advisory capacity. This is not surprising given that advisory proceedings offer States a concrete opportunity to influence judicial pronouncements without having to pay the potentially high costs of direct litigation. Furthermore, participating in the advisory opinions of the ICJ is not only compatible with Beijing's characteristic commitment to non-interference in the internal affairs of other States but also enhances the image of China as a country that contributes responsibly to address global legal issues. Secondly, the way in which China positioned itself on the political and legal issues at the heart of the opinions examined in this article shows a growing confidence in challenging the views of States that have traditionally dominated international legal discourse. Politically, China saw the proceedings on Kosovo, the Chagos islands and Israel's occupation of Palestinian territory as an opportunity to take a stance on important global issues while strengthening its influence in the respective regions. Legally, it intervened in those opinions to protect core national interests such as the inviolability of the principle of territorial integrity and the prerogative of a sovereign State to determine its preferred method of dispute resolution. Thirdly, while thus far confined to the advisory jurisdiction of the ICJ, China's practice may well evolve and harden into bolder forms of participation connected with the contentious jurisdiction of the Court. In particular, by allowing a State to partake in the process of legal interpretation of a convention at the centre of a contentious case without having to become a party to it, interventions under Article 63 of the ICJ Statute represent an attractive method for shaping global interpretations of international law. In this sense, should a clear trend towards the use of third-party intervention emerge, China would be in a good position to experiment with it, building also on its previous experience with the WTO dispute settlement mechanism.

Inevitably, the nature and extent of China's participation in the judicial activities of the ICJ will be determined in each case by a combination of factors driven by national interests. This new trajectory is also not without its pitfalls, especially for a country which strenuously defends the consent-based nature of international

adjudication amidst concerns of judicial overreach. Nonetheless, active engagement with the ICJ represents a significant addition to China's repertoire of strategies to exert greater influence over the formulation and development of international law. As such, the way in which China will approach the opportunities and challenges that come with an increased involvement with the Court warrants continued scholarly attention.