Lawmaking Through Advisory Opinions?

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A. Preliminary Remarks

International courts and tribunals are firstly and particularly conceived to settle legal disputes between States and/or other organs or individuals admitted as parties according to the statute of the respective court by means of a binding decision. An advisory function is not inherent in the function of a judicial body, but has to be transferred expressly upon a court or tribunal in the constituent instrument. For non-standing judicial bodies, i.e., arbitral tribunals, an advisory function is rather unusual, but not altogether ruled out: The parties to a *compromis* may empower the tribunal to give an advisory opinion.[1]

As settlement of disputes (and the clarification of legal questions generally) are functions that preferably should be exercised by courts or tribunals, the question of transferring advisory power to international judicial organs became relevant in the context of the creation of the first international standing court, the Permanent Court of International Justice (PCIJ).[2] There was, however, a fundamental debate about whether

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1 *Cf.* Hugh Thirlway, *Advisory Opinions*, in: MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (MPEPIL), margin number 4 (Rüdiger Wolfrum ed., 2006); *cf. infra* section C.III.

2 There had been other bodies with advisory functions, such as the International Bureau of the U.P.U., Art. 15 of the 1874 Convention; the International South American Postal Bureau, Art. 2 of the 1911 Montevideo Convention; the International Commission for Air Navigation, Art. 34 of the 1919 Aerial Navi-

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international courts should at all exercise non-judicial functions, in particular with regard to potential parties, namely states, of contentious cases, because states could be inclined to favor advice instead of submitting to binding contentious jurisdiction.[3] This concern explains why advisory power has been conceived for the PCIJ – followed by the majority of other courts entitled to give advisory opinions – in order to avoid as far as possible conflicts with the contentious power of the court. Thus, the power to request advisory opinions lies with organs that cannot be parties in contentious cases[4] because the advisory function should not substitute the contentious jurisdiction.

In order to appreciate the impact of non-binding advisory opinions for the development or "making" of international law and the "power" of the court or tribunal flowing from that function, it seems appropriate to give an initial but brief overview of the judicial organs empowered to issue advisory opinions and the extent of such power (B). Secondly, some examples of advisory opinions that have clearly contributed to the development of international law will be given (C); the central issue concerning the legal effect of advisory opinions will be examined in part (D), which will then be followed by some concluding remarks (E).

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gation Convention. These and other bodies were bodies concerned with rather technical questions and will not be treated in the present context. *But cf.* Jochen A. Frowein & Karin Oellers-Frahm, *Art. 65*, in: THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE – A COMMENTARY, 1403, margin number 1 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006), which is limited to international courts or tribunals.

[3] *Cf. Informal Inter-Allied Committee on the Future of the PCIJ*, 39 AJIL 1-42, para. 65 (1945) (Supplement); *see also* the critics of Judge John Bassett Moore, in: Publications of the PCIJ, Series D, No. 2, Annex 58A, 383, who stated that "to impose upon a court of justice the duty of giving advice, which those requesting it were wholly at liberty to reject, would reduce the court to a position inferior to that of a tribunal of conciliation".

[4] *Cf. infra* section B; an exception is constituted by the IACtHR, *infra* section B.III.

B. Judicial Bodies Entitled to Deliver Advisory Opinions

I. Permanent Court of International Justice/International Court of Justice

The power to deliver advisory opinions was first laid down in Art. 14(3) of the Covenant of the League of Nations with regard to the PCIJ. The explicit idea underlying Art. 14(3) of the Covenant was the creation of an additional means for peaceful dispute settlement – besides judicial settlement – focusing primarily on interstate controversies and only in a subsidiary way on abstract legal questions ("any dispute or question," not even "legal" question, Art. 14 (3)).[5] According to the idea that an advisory function should be complementary to the contentious power without substituting it, the power to request advisory opinions was only given to organs that could not be a party in a contentious case. This principle has been followed for most of the judicial bodies entitled to give advisory opinions. In the case of the PCIJ, the organs empowered to request an opinion were the Council and the Assembly.

The drafters of the ICJ Statute maintained the advisory function of the PCIJ, albeit in a more restrictive measure insofar as Art. 96 (1) of the UN Charter only provides for advisory opinions to be given "on any legal question," thus omitting the reference to "disputes" as included in Art. 14(3) of the Covenant. This does not exclude opinions on "disputes" between states, but the Court decided that the advisory function may not be used to circumvent the lack of acceptance of the Court's jurisdiction by states, the main danger related to the advisory function.[6]

Under the UN Charter the number of bodies entitled to request an advisory opinion has been increased. However, the General Assembly and the Security Council remain the sole bodies capable of requesting an opinion "on any legal question," while the specialized organizations of the UN, which may be authorized by the General Assembly to request

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[5] Hermann Mosler & Karin Oellers-Frahm, *Art. 96*, in: THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, 1181, margin number 3 (Bruno Simma ed., 2002); Manley O. Hudson, *Les Avis Consultatifs de la Cour Permanente de Justice Internationale*, 8 RECUEIL DES COURS 207 (1925/II).

[6] *Applicability of Article IV, Section 22, of the Convention on the Privileges and Immunities of the United Nations,* Advisory Opinion, ICJ Reports 1989, 177, 189, referring to earlier dicta.

advisory opinions according to Art. 96(2) UN Charter, can do so only with regard to "legal questions arising within the scope of their activities."

Art. 65 of the Statute provides the Court with discretionary power to give or to decline to give an opinion. However, the Court has limited its discretional power to instances of "compelling reasons," because it has to be mindful of its responsibilities as the principal judicial organ of the United Nations. No request for an advisory opinion has ever been refused for discretionary reasons.[7]

The advisory activity of the PCIJ was rather significant; it delivered twenty-seven advisory opinions between 1922 and 1940. Concerning the ICJ, a clear decrease of its advisory function has occurred; between 1945 and 2010 only twenty-six advisory opinions were issued – two of which took place during the last ten years. However, it is not the number, but rather the type of opinions requested which is important here. While all advisory requests brought to the PCIJ were initiated by the Council of the League of Nations and focused on "disputes,"[8] the majority of advisory requests to the ICJ came from the General Assembly and only rarely concerned "interstate disputes," but rather current legal questions that were at stake also in contentious disputes or Security Council Resolutions.[9]

II. European Court on Human Rights

The European Court of Human Rights was not initially empowered to deliver advisory opinions because the Convention did not contain a provision to that effect. Such an entitlement was only introduced in

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[7] The only request dismissed was the one of the WHO concerning the legality of the use by a state of nuclear weapons; the dismissal was based on the lack of jurisdiction, ICJ Reports 1996-I, 66, 73 (para.14).

[8] Michla Pomerance, *The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future*, in: THE INTERNATIONAL COURT OF JUSTICE – ITS FUTURE ROLE AFTER FIFTY YEARS, 271, 291 (Alexander Sam Muller, David Raic & Johanna M. Thuranszky eds, 1997).

[9] Julie Calidonio Schmid, *Advisory Opinions on Human Rights: Moving Beyond a Pyrrhic Victory*, 16 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 415, 421 (2006).

1970 by Protocol No. 2 to the Convention, by which the Committee of Ministers of the Council of Europe was empowered to request advisory opinions on legal questions concerning the interpretation of the Convention and its Protocols. As, however, advisory opinions "shall not deal with any question relating to the content or scope of the rights and freedoms defined in Section I of the Convention and the Protocols thereto," the scope of the advisory function is extremely limited. Therefore, it is not surprising that only three opinions have been requested to date; the first one, dating from 2 June 2004, concerned the question whether the Human Rights Commission (established in 1995 by the Commonwealth of Independent States following the break-up of the Soviet Union) could be regarded as "another procedure of international investigation or settlement" within the meaning of Art. 35(2b) of the Convention. This request was dismissed because it would have only been relevant in a particular case concerning the question whether the *same* matter had already been submitted to another procedure of international investigation or settlement; it thus did not fall under the advisory competence of the Court.[10] The second advisory opinion concerned the election of judges to the ECHR and led to a unanimous decision finding that a list of candidates not including the underrepresented gender, i.e., women, was not compatible with Art. 22 of the Convention. Also, the third advisory opinion concerned questions regarding the election of judges; it was delivered on 22 January 2010.[11]

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[10] *Cf.* HUMAN RIGHTS LAW JOURNAL 326 (2004); *see also*, EUROPÄISCHE MENSCHENRECHTSKONVENTION, EMRK-KOMMENTAR 612 (Jochen A. Frowein & Wolfgang Peukert eds, 2009).

[11] Advisory Opinion on certain legal questions concerning the list of candidates submitted with a view to the election of judges to the European Court of Human Rights, 12 February 2008 and Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights, 22 January 2010.

III. Inter-American Court of Human Rights

The situation in the Inter-American Court of Human Rights[12] differs considerably from that of its European counterpart. According to Art. 64 of the Convention, any member state of the Organization of American States (OAS) may consult the Court not only regarding the interpretation of the Convention, but also with respect to the interpretation of other treaties concerning the protection of human rights in the American States and regarding the compatibility of domestic law with the aforesaid international instruments. Furthermore, the organs of the OAS may request advisory opinions "within their respective spheres of competence." States initiating an advisory procedure need not even be parties to the ACHR or have accepted the contentious jurisdiction of the Court. This very broad competence implies the possibility of overlap between a contentious and an advisory procedure. However, the Court has the discretion whether or not to give an opinion that will lead it (and has in fact led it) to decline a request that interferes with a contentious case. Although the advisory competence is thus greater than in other judicial bodies, the number of advisory opinions is rather limited as compared to contentious cases: Until 2010 the Court had issued twenty-one opinions and about 210 judgments (March 2010).[13]

IV. The African Court on Human and Peoples' Rights

The power of the African Court (established in 2004) to give advisory opinions principally follows that of the IACtHR: It may give an opinion at the request of "a member state of the OAU, the OAU, its organs, or any African organization recognized by the OAU upon any legal

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[12] Gerald L. Neuman, *Inter-American Court of Human Rights (IACtHR)*, in: MPEPIL, *passim* (Rüdiger Wolfrum ed., 2007); *see also* SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 99-122 (1997); Juliane Kokott, *Das Interamerikanische System zum Schutze der Menschenrechte*, in: 92 BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT 166 (Armin von Bogdandy & Rüdiger Wolfrum eds, 1986); Karin Oellers-Frahm, *Der Interamerikanische Gerichtshof für Menschenrechte*, in: MENSCHENRECHTE, BILANZ UND PERSPEKTIVEN, 385-430 (Jana Hasse, Erwin Müller & Patricia Schneider eds, 2002).

[13] *Cf*. homepage of the Court: http://www.corteidh.or.cr/casos.cfm.

matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission."[14] This provision is similar to that of the IACtHR in that is gives the Court an advisory power comprising the entire set of human rights instruments in order to concentrate implementation and control of human rights issues in the Court. Until today (March 2011), the African Court has only decided one contentious case, but has not yet received a request for an advisory opinion; however, the African Commission of Human Rights, which was created by the African Charter on Human and Peoples' Rights of 27 January 1981, was and remains entitled to "interpret all the provisions of the present Charter at the request of a state party, an institution of the OAU or an African organization recognized by the OAU" (Art. 45, para. 3 of the Charter). The only request for interpretation referred to Art. 45, para. 1 and para. 3; it concerned the compatibility of the UN Declaration on the Rights of Indigenous People with the African Convention. The opinion was delivered in 2007.[15]

V. The Law of the Sea Tribunal

The Law of the Sea Tribunal has only contentious jurisdiction, while the Sea-Bed Dispute Chamber also has the power to give advisory opinions on a request by the Assembly or the Council on legal questions arising within the scope of their activities (Art. 191 of the Convention). This power is comparable to the advisory function of the ICJ according to Art. 96(2) of the Charter with regard to opinions concerning questions arising within the scope of the activities of specialized organizations of the UN. The first request for an advisory opinion was brought before the Sea-Bed Chamber on 14 May 2010 and delivered on

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[14] Art. 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights of 9 June 1988; Anne Pieter van der Mei, *The Advisory Jurisdiction of the African Court on Human and Peoples' Rights*, 5 AFRICAN HUMAN RIGHTS LAW JOURNAL 27 (2005).

[15] Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous People, available at: http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf.

1 February 2011. It concerned the question of the Council on the legal responsibilities and obligations of states with respect to the sponsorship of activities in the area.

VI. The European Court of Justice

The Court of Justice of the European Union is not generally empowered to give advisory opinions. It may only give advisory opinions in the context of concluding treaties with one or more non-member states or with an international organization. According to Art. 218, para. 11, of the Treaty on the Functioning of the European Union (formerly Art. 300, para. 6, of the EC Treaty) the European Parliament, the Council, the Commission, or any member state may request an opinion on the compatibility of such an agreement (proposed to be entered into by the Union) with the Treaty. This competence, which has been used several times,[16] is rather comparable to the involvement of national constitutional courts with regard to the conclusion of international treaties aimed at preventing the declaration of unconstitutionality of a treaty after its coming into force. It is thus not of relevance to the present study.

VII. The Court of Justice of the Economic Community of West African States

The Economic Community of West African States, which was created in 1975, established a Community Court of Justice.[17] Art. 10 of the Protocol provides that "the Court may, at the request of the Authority, the Council, one or more member states or the Executive Secretary, and any other institution of the Community, express, in an advisory capac-

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[16] *Cf.* Christian Tomuschat, *Art. 300*, in: KOMMENTAR ZUM VERTRAG ÜBER DIE EUROPÄISCHE UNION UND ZUR GRÜNDUNG DER EUROPÄISCHEN GEMEINSCHAFT, 1602, margin number 89 *et seq.* (Hans von der Groeben & Jürgen Schwarze eds, 2004).

[17] Protocol on the Community Court of Justice of 6 July 1991, text in: KARIN OELLERS-FRAHM & ANDREAS ZIMMERMANN, 1 DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW, TEXTS AND MATERIALS 1020 *et seq.* (2001).

ity, a legal opinion on questions of the treaty." There is no information on any advisory opinion delivered by the Court.

VIII. Common Market for Eastern and Southern Africa (COMESA)

The Treaty instituting COMESA (5 November 1993)[18] provides, in Art. 32 concerning the competences of the Court, that "the Authority, the Council or a member state may request the Court to give an advisory opinion regarding questions of law arising from the provisions of this Treaty affecting the Common Market, and the member states shall in the case of every such request have the right to be represented and take part in the proceedings." There is no information on cases having been brought to the Court.

IX. The Judicial Board of the Arab Organization for the Petroleum Exporting Countries

The Arab Organization for the Petroleum Exporting Countries (OAPEC), created in 1968, provides in a Special Protocol of 9 May 1978 for a Judicial Board for the settlement of disputes.[19] According to Art. 25, the Board may give an advisory opinion on a legal question referred to it with the approval of the Council of Ministers. There is no information on any opinion having been given.

X. The Arbitration Commission on the Former Yugoslavia

The Arbitration Commission under the UN/EC Geneva Conference of 27 January–26 April 1993 (created in the context of the dissolution of the Former Yugoslavia) is comparable to an arbitral tribunal; it is not a standing court like the other organs considered above. The Commis-

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18 Text in: OELLERS-FRAHM & ZIMMERMANN (note 17), 1042 *et seq*.

19 Text in: KARIN OELLERS-FRAHM & ANDREAS ZIMMERMANN, 2 DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW, TEXTS AND MATERIALS 1469 *et seq*. (2001).

sion was empowered to settle disputes and give legal advice on any legal question submitted to it by the Co-Chairmen of the Steering Committee of the Conference.[20] In fact, only requests for advisory opinions (as opposed to contentious cases) were brought before the Commission (fifteen in total), which concerned questions arising from the dissolution of the Former Yugoslavia. The opinions delivered by the Commission did, in fact, govern the legal consequences connected with the dissolution of the Former Yugoslavia.

XI. Summary Conclusion

From the survey given above, it becomes clear as a first result that the advisory function is only given to a handful of judicial bodies,[21] few of which have had the possibility to exercise such a function. In fact, advisory opinions have until now only been requested from the PCIJ and the ICJ, the ECHR, the IACtHR, the Sea-Bed Dispute Chamber, the ECJ and the "Badinter" Commission (which is not a standing court). Secondly, it should be noted that the extent of such a function differs largely: Some judicial organs are only empowered to give advice to particular organs of the relevant organization on questions concerning their activities, as is the case with the ICJ regarding requests under Art. 96(2) of the Charter and the Sea-Bed Chamber under the Law of the Sea Convention. In addition, the advisory function of the ECJ is rather limited in nature, as it only concerns issues relating to the compatibility of agreements or treaties to be concluded with the EC Treaty. Such an advisory function is not of primary relevance in the present context because the issue of "lawmaking" through advisory opinions rather arises if advisory opinions are requested on legal questions of a general character, such as the existence or the precise meaning of legal rules.

With respect to these preconditions, there are only three organs relevant for the present study, that is the PCIJ/ICJ, the IACtHR, and the "Badinter" Commission, which raises the question whether general

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[20] Text in: OELLERS-FRAHM & ZIMMERMANN (note 19), 1779 *et seq*.

[21] There are more than 150 judicial bodies (*cf.* OELLERS-FRAHM & ZIMMERMANN, *supra* note 17) and only those presented above have advisory jurisdiction. It should, however, be added that some judicial organs concerning very special technical matters have not been listed above.

conclusions can and should at all be drawn from the sole practice of three bodies, one of which is not even a standing international judicial organ. This concern can, however, easily be set aside because these organs are the most important international judicial institutions: The PCIJ/ICJ, the "World Court," is the only "universal" international court with a more than 80-year-old practice, and it is the only one empowered to give advisory opinions on "any legal question." The IACtHR, although "only" a regional court with subject-matter-restricted competence, is the most active human rights court besides the ECtHR, which does not only contribute to the implementation of human rights obligations through its contentious jurisdiction, but also through its advisory function. As to the Badinter Commission, its role in this context is somehow special. However, it gave advice in an intricate legal and political situation which served as the guideline in the process of the dissolution of the Former Yugoslavia and will certainly be of relevance in future comparable situations. Thus, the impact of the advisory opinions of these bodies on international law is highly relevant in the context of "lawmaking" by international judicial organs.

C. Contribution of Advisory Opinions to the Development of International Law

The fact that advisory opinions shall and in fact do contribute to the development of international law has never been contested.[22] As *Lauterpacht* rightly stated already in 1934, "judicial law-making is a permanent feature of administration of justice in every society,"[23] a statement that is particularly true for the advisory function of a court. Such a con-

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[22] Hersch Lauterpacht, The Development of International Law by the International Court (1958); Frowein & Oellers-Frahm (note 2), margin number 45; Laurence Boisson de Chazournes, *Advisory Opinions and the Furtherance of the Common Interest of Mankind*, in: International Organization and International Dispute Settlement: Trends and Prospects, 105 (Laurence Boisson de Chazournes, Cesare P. R. Romano & Ruth Mackenzie eds, 2002); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Enforcement of a New International Judiciary*, 20 EJIL 73, 77 (2009).

[23] Hersch Lauterpacht, The development of International Law by the Permanent Court of International Justice 45 (1934).

tribution to this development may occur when the court finds that a particular rule is part of customary international law or when it identifies the meaning of a treaty provision. This aspect of "development" or "making" of law becomes particularly evident in cases of "dynamic" treaty interpretation, i.e., cases where "the parties' intent upon conclusion of the treaty was, or *may be presumed to have been* (emphasis added), to give the terms used – or some of them – a meaning or content capable of evolving, not one fixed one and for all, so as to make allowance for, among other things, developments in international law."[24]

A view on the advisory practice and its follow-up in international law can only confirm this statement. It is neither possible nor necessary in this context to give a comprehensive overview of the advisory practice and its part in the development of international law; however, reference should at least be made to some of the most important advisory opinions in order to give an impression of the subject matters at stake. Such a selective proceeding seems justified by the fact that, in the present context, the contribution of advisory opinions to the development of international law as such is not controversial; what is controversial is simply the issue whether this "contribution" should be qualified as "lawmaking," a question that under legal aspects requires a uniform answer independent of the particular case.

I. The International Court of Justice

With regard to the ICJ – for reasons of space and in order to concentrate on tribunals in function today, the PCIJ advisory jurisprudence will be left aside[25] – the *Genocide* opinion of 1951,[26] in which the Court

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[24] *Dispute Regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), 13 July 2009, para. 64 and *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), 20 April 2010, para. 203 *et seq*.

[25] For information on the advisory activity of the PCIJ, *see* MICHLA POMERANCE, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND U.N. ERAS (1973); DHARMA PRATAP, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT 235 *et seq*. (1972); *see also* LAUTERPACHT (note 22), particularly Chapter III on the advisory practice of the PCIJ, 155 *et seq*.

[26] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951, 15; *cf.* Eckart Klein, *Reparation for Inju-*

had to answer questions concerning the admissibility and effect of reservations to multilateral treaties in case of objection or lack of objection to such reservations by other state parties to the treaty, must first be broached. At that time, this question was not settled by a binding international rule of law. The Court therefore attempted to develop a new legal regime concerning reservations.[27] As the law of treaties was, at that time, under the consideration of the ILC, the guidelines elaborated by the Court had far reaching effects and were adopted by the ILC in Arts. 19 *et seq*. of the Convention. In the *Reparation for Injuries* opinion,[28] the Court ruled in favor of the capacity of an international organization to bring a claim against a state, a decision that was standard-setting on the issue of the international personality of an international organization; on the basis of this opinion the United Nations' claim for recovery of pecuniary reparation from Israel was successful. In the *Certain Expenses* opinion,[29] the Court had to decide on the budgetary powers of the General Assembly; it found that expenses authorized by the General Assembly in relation to two peacekeeping forces were expenses in the meaning of Art. 17(2) UNC and thus had to be borne by the member states. The significance of the three advisory opinions delivered in the context of the *South Africa* cases, in particular the *Namibia* opinion,[30] concerning the international responsibility of a state resulting from physical control, not from sovereignty, over a particular territory, is undisputed. In particular, the findings concerning the consequences for UN member states as well as non-member states flowing from the illegal presence of South Africa in Namibia had far reaching repercussions, although the South Africa Government maintained its original position and did not cooperate with the General Assembly in its efforts

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ries Suffered in the Service of the UN (Advisory Opinion), in: 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 174 (Rudolf Bernhardt ed., 2000).

[27] For more details, *see* LAUTERPACHT (note 22), 186 *et seq*.

[28] *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, 174; Klein (note 26), 174.

[29] ICJ Reports 1962, 151; Michael Bothe, *Certain Expenses of the United Nations (Advisory Opinion)*, in: 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 557 (Rudolf Bernhardt ed., 1981).

[30] ICJ Reports 1971, 16; Eckart Klein, *Namibia*, in: 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 485, 488 (Rudolf Bernhardt ed., 1997).

to "implement" the opinion. In the *Wall* opinion,[31] as in the *Namibia* opinion, the Court gave detailed explanations of the legal consequences for all states flowing from the illegal construction of the wall in the occupied Palestinian territory. Furthermore, the Court used the occasion to make its voice heard in the debate concerning the meaning of the term "armed attack," in Art. 51 of the Charter, taking a stance opposite to that of the Security Council. In contrast to the Council, the ICJ persisted in understanding armed attack as only referring to attacks committed by *states*, not including those of non-state actors. In difference to the lack of national reaction to the *Namibia* opinion, in the *Wall* opinion there was at least a decision of the Supreme Court of Israel following the findings of the Court.[32] Finally, the opinion on the *Use of Nuclear Weapons*[33] should also be mentioned, in which the law-developing approach played a particular role in order to prevent a *non liquet;* ultimately, however, the *non liquet* was favored by the majority. It is the only opinion delivered so far where the Court found that international law (as it then existed) was not able to provide an answer to the question,[34] a statement that underlines the difficulties a question can raise to a court when any decision on the substance would be seen as plain lawmaking on a very contentious issue.

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[31] ICJ Reports 2004, 3; Frowein & Oellers-Frahm (note 2), margin number 49 *et seq*.

[32] *Cf.* Israeli Supreme Court, decision of 15 September 2005 in the case *Mara'abe v.The Prime Minister of Israel,* HCJ 7957104, available at: http://elyon1.court.gov.il/eng/verdict/framesetSrch.html.

[33] ICJ Reports 1996, 226; Bharat H. Desai, *Non Liquet and the ICJ Advisory Opinion on the Legality of the Threat or Uses of Nuclear Weapons; Some Reflections*, 37 INDIAN JOURNAL OF INTERNATIONAL LAW 201 (1997).

[34] *Infra* section D.I., text to note 71.

II. The Inter-American Court on Human Rights

With regard to the IACtHR,[35] the opinions by which the Court defined the extent of its own competences laid down in Art. 64 of the Convention should first be mentioned. In the opinion on the interpretation of the term "other treaties" concerning the protection of human rights in the American States in Art. 64 of the Convention,[36] the Court arrived at a broad understanding of these terms. Although the term "other treaties" could have been understood as meaning only human rights instruments, the Court held that it included

> any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-member states of the inter-American system are or have the right to become parties thereto.[37]

This decision was confirmed in the *Consular Relations* opinion,[38] where the IACtHR held that Art. 36(1) of the Convention on Consular Relations conferred rights on the individual that qualified as human rights.[39] This opinion applied the general findings of the first advisory opinion concerning the term "other treaties" to a particular situation, namely

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35 For a summary overview over the advisory opinions, *see* Gerald L. Neumann, *Inter-American Court of Human Rights (IACtHR)*, in: MPEPIL, margin number 31-35 (Rüdiger Wolfrum ed., 2007); Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, in: LA CORTE INTERAMERICANA DE DERECHOS HUMANOS: ESTUDIOS Y DOCUMENTOS, 15 (Daniel Zovatto ed., 1999); Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STANFORD JOURNAL OF INTERNATIONAL LAW 241 (2001).

36 *"Other Treaties" Subject to the Advisory Jurisdiction of the Court,* Advisory Opinion OC-1/82 of 24 September 1982, Series A, No. 1.

37 *Id*., para. 52 of the Opinion.

38 *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law,* Advisory Opinion OC-16/99 of 1 October 1999, Series A, No. 16.

39 It is, however, interesting to note in this context that the ICJ in the *LaGrand* Case declined to take position on the character of Art. 36(1)(b) as a human right, ICJ Reports 2001, 494, para. 78.

the Convention on Consular Relations, which is neither a human rights treaty nor a regional treaty "concerning the protection of human rights in the American States"; however, the Court reiterated that it had jurisdiction to review any treaty provision concerning the protection of human rights in the American States because the relevant terms in Art. 64(1) of the Convention could not be deemed to impose geographic or regional limits.[40] As these opinions did not require any implementation on behalf of the states, they constitute an authoritative interpretation of the Convention and accordingly the guideline for the extent of the Court's advisory powers. This is of the utmost importance because it empowers the Court to control the implementation of any human rights provision by the parties to the American Convention on Human Rights. What was of general relevance at a substantial level were, in particular, the opinions on *Habeas Corpus in Emergency Situations*[41] and *Judicial Guarantees in States of Emergency*,[42] by which the Court stated which rights could not be derogated even in emergency situations. The opinion concerning the *Judicial Status and Human Rights of the Child*[43] has also to be mentioned, which together with several contentious cases on the right of the child, was of significant relevance in defining the rights of the child in a surrounding where such rights urgently needed definition and implementation. Finally, reference should be made with respect to the most recent and very far reaching opinion on the *Juridical Condition and Rights of the Undocumented Migrants,*[44] where the Court found that any migrant worker was entitled to non-discrimination and equality before the law, independently of his migratory status, because non-discrimination had to be qualified as a *jus cogens* norm.[45] As a consequence of this opinion, the U.S. Aliens Torts Claims Act (which provides standing to aliens that are victims of torts in violation of the law of nations) would be applicable to undocumented workers.

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[40] In this sense *cf*. already Opinion *"Other Treaties"* (note 36), para. 25.

[41] Advisory Opinion OC-8/87 of 30 January 1987, Series A, No. 8.

[42] Advisory Opinion OC-9/87 of 6 October 1987, Series A, No. 9.

[43] Advisory Opinion OC-17/2002 of 28 August 2002, Series A, No. 17.

[44] Advisory Opinion OC-18/03 of 18 September 2003, Series A, No. 18.

[45] *Cf*. for the significance of such finding Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Worker's Rights for the Hemisphere: A Comment on Advisory Opinion 18*, 28 NEW YORK UNIVERSITY REVIEW OF LAW AND SOCIAL CHANGE 547, 565 (2004).

This result was not in line with U.S. politics and led the U.S. Supreme Court to indicate that it would narrowly define the term "laws of nations."[46] This statement in fact implies that the United States admitted that the opinion would be of some effect for it although the United States has not ratified the Convention.

III. The Badinter Commission

Coming finally to the opinions of the Badinter Commission, it can be said that the whole issue concerning the consequences of the dissolution of a state and the conditions for the recognition of new states was not settled in international law and thus lent itself to contributing to the legal issues concerning the dissolution of states and relating to statehood and succession.[47] Regarding the particular situation at hand, namely the one in the Former Yugoslavia, the opinions on the legality of secession[48] and the issue of consent of the former sovereign,[49] as well as those opinions on issues of self-determination,[50] recognition of new states[51] and questions of minority rights and human rights in case of secession,[52] offered some guidance to solve these issues with regard to the particular situation in the Former Yugoslavia; however, they undoubt-

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46 Schmid (note 9), 415, 450.

47 Malgosia Fitzmaurice, *Badinter Commission (for the Former Yugoslavia)*, in: MPEPIL, margin number 38 (Rüdiger Wolfrum ed., 2005).

48 Opinion No. 1 of 29 November 1991, 31 INTERNATIONAL LEGAL MATERIALS (ILM) 1494. (1992) and Opinions No. 4, 5, 6 and 7, all of 11 January 1992, 31 ILM 1501 (1992); *cf.* for more details to: Matthew C. R. Craven, *The European Community Arbitration Commission on Yugoslavia*, 66 BALTIC YEARBOOK OF INTERNATIONAL LAW 323 (1996); Stefan Oeter, *Yugoslavia, Dissolution*, in: 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 1563, 1568 (Rudolf Bernhardt ed., 2000); Malgosia Fitzmaurice, *Badinter Commission (for the Former Yugoslavia)*, in: MPEPIL (Rüdiger Wolfrum ed., 2005); ANDREAS ZIMMERMANN, STAATENNACHFOLGE IN VÖLKERRECHTLICHE VERTRÄGE 303 *et seq.* (2000).

49 Opinion No. 8 of 4 July 1992, 31 ILM 1522 (1992).

50 Opinion No. 2 of 11 January 1992, 31 ILM 1497 (1992).

51 Opinion No. 10 of 4 July 1992, 31 ILM 1525 (1992).

52 Opinion No. 2 (note 50).

edly also constitute a contribution to the development of the respective questions of international law which will be of relevance in future cases; they already played a role in the advisory opinion of the ICJ concerning *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*. Several of the issues considered by the Badinter Commission were of particular relevance in that procedure and have been cited as precedents by numerous of the "participants" in the procedure.

This admittedly incomplete and abridged overview of the advisory practice of the relevant judicial bodies not only gives an impression of the international law issues at stake but also of their significance for the development of international law. However, the statement that advisory opinions "contribute to the development of international law," which is generally employed in the context of describing the impact of advisory opinions on international law,[53] does not answer the question what exactly is (legally speaking) the particular impact of advisory opinions and the quality of such contributions respectively. This question will be addressed in the following section.

D. The Legal Impact of Advisory Opinions

As the term *advisory opinion* implies, it only constitutes advice on a legal question[54] concerning either the existence of a legal rule or the exact meaning of such a rule. Consequently, the advisory function of a court or tribunal is used with regard to controversial, often evolving issues of international law: Where the meaning of a treaty provision or the state of international law is uncontroversial, no advisory opinion would be requested. Thus, advisory proceedings, far more than contentious cases, are aimed at clarifying or establishing basic doctrines of international law and they do indeed constitute contributions to the conceptual evo-

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53 *Cf*. in this sense already Edvard Hambro, *The Authority of the Advisory Opinions of the International Court of Justice*, 3 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 87 (1954).

54 Manley O. Hudson, *The Effect of Advisory Opinions of the World Court*, 42 AJIL 630 (1948).

lution of international law.[55] However, the clarification or identification of legal rules is situated at the boundary between simply stating the existing law, law-development, and law-making, which are not separated by a precise definition. Although the opinions are merely advisory, they are judicial pronouncement and not only legal advice in the ordinary sense.[56] The substance of the opinions is of the same high judicial quality as that of judgments,[57] underpinned by the fact that the advisory procedure is "guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable."[58] Furthermore, advisory opinions do at least constitute a "subsidiary source of law" according to Art. 38, para. 1(d) of the ICJ Statute. Nevertheless, "the character and binding force of these opinions have puzzled jurists since the very beginning of the existence of the Court"[59] because the legal meaning of that "binding force" remains unclear, although the contribution of advisory opinions to the development of international law was never contested. The different circumscriptions concerning the effect of advisory opinions, such as *contribution to the development* of international law, *law-making*, *statement of law erga omnes*,[60] and *judicial legislation*,[61] are not doctrinally determined legal terms, but rather terms in legal theory or political science;[62] they do not contain a clear qualification of what exactly constitutes the legal impact on the development of international law of advisory opinions.

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55 Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung*, 70 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 1, 11 (2010).

56 PRATAP (note 25), 230.

57 PRATAP (note 25), 227.

58 Art. 68 ICJ Statute; Art. 63 Rules of Court of the IACtHR; for details concerning the procedure *cf.* Hambro (note 53), 8.

59 Hambro (note 53), 8.

60 SHABTAI ROSENNE, 3 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005 1699 (2006).

61 LAUTERPACHT (note 23), ch. III entitled "Judicial Legislation", 45.

62 LAUTERPACHT (note 22), 155.

I. Lack of Binding Force

It is a basic truth that advisory opinions have no binding force, as there is no provision in the relevant treaties comparable to that concerning the binding effect of judgments. They do not create an obligation for the body requesting the opinion to give them effect,[63] and lesser still are the states likely to be legally bound by them. Even if the opinions are accepted by the requesting body – as generally is the case[64] – the states are not bound individually. Thus, for example, if the General Assembly requests an opinion from the ICJ, it usually adopts a resolution by which it accepts the advice given by the Court, but the positive vote expressed by the states supporting the resolution does not imply any obligation on these states individually. Advisory opinions are not even binding "in the negative sense": Action contrary to the law found to exist in an opinion does not constitute a violation of international law, although in fact there are nearly no cases in which states or organizations have acted contrary to the law laid down in an opinion; infamous exceptions being of course South Africa with regard to the *Namibia* opinion and Israel with regard to the *Wall* opinion.[65] On the other hand, action in conformity with the legal situation found to exist in an advisory opinion would have a justifying effect for state action in accordance with the opinions.[66]

Also, the formal position constantly taken by the courts themselves clearly denies not only any binding effect of the advisory opinions, but also any legislative impact.[67] The PCIJ/ICJ as well as the IACtHR constantly underline the non-binding and non-legislative character of their opinions. On this matter the ICJ has said the following: "The Court's

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[63] For an overview over the reception of advisory opinions, *see* PRATAP (note 25), 234 *et seq*.; Frowein & Oellers-Frahm (note 2), margin number 43 *et seq*.

[64] *Cf*. Frowein & Oellers-Frahm (note 2), margin number 44, with examples of resolutions adopted by the General Assembly concerning advisory opinions given on the request of the General Assembly; ROSENNE (note 60), 1755.

[65] PRATAP (note 25), 228.

[66] Frowein & Oellers-Frahm (note 2), 1417, margin number 53.

[67] This conclusion was drawn very early: LAUTERPACHT (note 23), 45 and confirmed with a view to the practice of the ICJ, in LAUTERPACHT (note 22), 156.

reply is only of an advisory character; as such it has no binding force."[68] This position was confirmed in the advisory opinions regarding the ILO Administrative Tribunal, the Statute of which provides for the binding character of certain opinions. In this context, the Court made it clear that "such effect of the Opinion goes beyond the scope attributed by the Charter and by the Statute of the Court to an Advisory Opinion."[69] In its advisory opinion concerning the powers of the Council of the League of Nations under the mandates system, the Court even stated that "… the opinion would not have binding force, and that the Mandatory could continue to turn a deaf ear to the Council's admonitions."[70] A particularly telling example where the ICJ explicitly reiterated that it did not consider itself as empowered to "make" law is the advisory opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*.[71] This opinion was largely criticized as constituting a *non liquet* in the decisive part 2E of the dispositive,[72] where the Court's findings were as follows:

> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in the extreme circumstances of self-defense, in which the very survival of a state would be at stake.

In fact this case would have been an occasion for the Court to "make" law, and the separate opinions reflect the discussion that took place within the Court on this issue. In particular, the question was raised whether a finding of *non liquet* was forbidden as a rule of international law, which is, in fact, controversial; but if that were the case, the question would have arisen whether such rule would also apply to advisory opinions, a question that would have to be answered in the negative: Advisory opinions are requested in order to hear the court's advice upon the existing state of law; when the court finds a gap in the law, it is

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[68] *Peace Treaties*, Advisory Opinion, ICJ Reports 1950, 71; also *Privileges and Immunities Convention*, Advisory Opinion 1989, ICJ Reports 1989, 189, para. 31.

[69] *ILOAT (UNESCO)*, Advisory Opinion, ICJ Reports 1956, 84.

[70] *South West Africa Cases*, Preliminary Objections, ICJ Reports 1962, 337.

[71] ICJ Reports 1996, 226.

[72] *See* Dissenting Opinion of Judge Schwebel, ICJ Reports 1996, 322 and Judge Higgins, *Id.*, 590.

not its task to fill the gap, as it only has the function of stating the law in existence at that moment in time.[73] In the last paragraph of his separate opinion, Judge Guillaume took a clear position on the role of the Court when he said: "I should like solemnly to reaffirm that it is not the role of the judge to take the place of the legislator. … The Court must limit itself to recording the state of the law without being able to substitute its assessment for the will of sovereign states."[74] Similar statements have been made by the IACtHR which qualified its advisory function as being designed "to enable OAS member states and OAS organs to obtain a judicial interpretation of a provision embodied in the Convention or other human rights treaties in the American States."[75] Furthermore, the Court stated in its first advisory opinion that in interpreting the Convention, it "will resort to traditional international law methods, relying both on general and supplementary rules of interpretation, which find expression in Art. 31 and 32 of the Vienna Convention on the Law of Treaties,"[76] thus indicating its intention to merely interpret and not to "make" law.

All these statements underline the fact that the advisory function is conceived, or at least presented, by the courts themselves as a means of merely giving guidance to the requesting organ in the particular circumstance on the basis of the *existing* law, and that the impact of the opinions depends on the reception and acceptance by the international community. Furthermore, it should be mentioned that there exists no obligation to answer a request brought before a court; it is within the court's discretion to give the requested opinion or not,[77] a fact that, on the one hand, reflects the difference between contentious jurisdiction

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[73] Robert Y. Jennings, *Advisory Opinions of the International Court of Justice*, in: 1 BOUTROS BOUTROS-GHALI AMICORUM DISCIPULORUMQUE LIBER, 531, 534 (1998); ROSENNE (note 60), 1753.

[74] ICJ Reports 1996, 293, para. 14.

[75] *Restriction to the Death Penalty /Arts 4.2 and 4.4 American Convention on Human Rights*, Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3, para. 22.

[76] *"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 of the Convention)*, Advisory Opinion OC-1/82 of 24 September 1982, Series A, No. 1, para. 33.

[77] This discretion is expressed in terms that the Court "may" give an advisory opinion, Art. 65 ICJ Statute and Art. 64 (2) American Convention on Human Rights.

and, on the other hand, the possibility that requests for advisory opinions may have significant political implications which may make it preferable not to answer the question. It should, however, be noted that neither the PCIJ/ICJ nor the IACtHR has ever dismissed a request for reasons of propriety,[78] because, except in very particular situations, declining a request for an advisory opinion would not be in line with the function of a judicial body and the task of merely clarifying legal questions.[79] The "sensibilities" of the states are thus very present in the courts' action that finds particular expression in the exhaustive reasoning of the opinion, because the absence of full reasons could raise the impression of law-making or even of arbitrariness.[80] In this context, the procedure is of utmost importance, because it is characterized by what may be called *amicus curiae input*. In advisory proceedings before the ICJ and the IACtHR, not only are all parties to the instrument informed of the request, but also organs and international organizations that may furnish information on the question at stake by written statements and/or oral argument (Art. 66 ICJ Statute and Art. 62 Rules of Procedure of the IACtHR). States and organizations, in particular NGOs, make great use of this possibility.[81] This input enables the

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[78] *See* in particular, the *Kosovo* Opinion of 2010, the *Wall* Opinion, ICJ Reports 2004, 3, 144 *et seq*. and the *Nuclear Weapons* Opinion, ICJ Reports 1996, 66, requested by the WHO which was dismissed for other reasons than those of propriety. The IACtHR only once refused to give an advisory opinion, however for the reason that the question presented "could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings", *Compatibility of Draft Legislation with Art. 8.2. of the American Convention on Human Rights*, Advisory Opinion OC-12/91 of 6 December 1991, Series A, No. 12; *see also* Frowein & Oellers-Frahm (note 2), margin number 37 *et seq*.; Pasqualucci (note 35), 274; Franklin Berman, *The Uses and Abuses of Advisory Opinions*, in: 2 LIBER AMICORUM JUDGE SHIGERU ODA (Nisuke Ando, Edward McWhinney & Rüdiger Wolfrum eds, 2002).

[79] Frowein & Oellers-Frahm (note 2), margin number 39.

[80] LAUTERPACHT (note 22), 39.

[81] In the ICJ *Wall* Opinion more than 40 statements by states and organizations were furnished; in the still pending opinion concerning the *Unilateral Declaration of Independence by Kosovo* the situation was similar; for more details, *cf.* the information on the homepage of the ICJ; *see also* Andreas Paulus, *Art. 66*, in: THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE – A

Court to decide the question on the basis of the information of all interested parties, which may be considered to be a means of legitimating the decision. This possibility of receiving broad information exists thus in a significantly larger measure in advisory opinions than in contentious cases where, on the one hand, the question at stake is defined by the application and the claims of the parties, and, on the other hand, the information brought before the Court only comes from the parties and is thus rather one-sided and partial but does, however, determine the Court's findings in so far as the Court cannot decide *ultra petita*. In this context, it should also be kept in mind that the advisory function of international courts depends on a request by an authorized organ so that the way the courts treat such requests will be reflected in the readiness of the organs to bring requests to the court. In this sense, the acceptability of an advisory opinion which results, on the one hand, from the reasoning of the decision and, on the other hand, from the support given to the decision by a convincing majority of the court,[82] is of utmost importance for the reception of the opinion and thus its impact on international law.

II. Authoritative Character

The fact that advisory opinions are not binding and lack the res judicata effect is, however, "not sufficient to deprive an advisory opinion of all the moral consequences which are inherent in the dignity of the organ delivering the opinion, or even of its legal consequences."[83] Advisory opinions have been characterized as "a quasi-judicial appraisal" and "some kind of judgment,"[84] and their "persuasive character and substantive authority"[85] as pronouncements of the most prominent inter-

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COMMENTARY (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds, 2006).

[82] Hambro (note 53), 20; LAUTERPACHT (note 22), 40, 41.

[83] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, Separate Opinion of Judge Azevedo, ICJ Reports 1950, 80.

[84] *Certain Expenses of the United Nations*, Advisory Opinion, Dissenting Opinion of Judge Koretsky, ICJ Reports 1962, 254.

[85] Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 29 BALTIC YEARBOOK OF INTERNATIONAL LAW 55 (1952).

national court have constantly been emphasized. Due to the "authoritative character" of advisory opinions, they have been considered as comparable to declaratory judgments,[86] and declaratory judgments have even been considered to be an indirect method of obtaining advisory opinions by states.[87] This idea is particularly attractive in cases where the interpretation of treaties is at stake, the only subject matter of the advisory function of the IACtHR, but also often the subject matter of advisory opinions of the ICJ. In fact, whether treaty interpretation is the subject matter in a contentious or advisory procedure will not make a great difference in practical terms: The interpretation given by the court will govern the future application of the treaty and, *de facto*, this will not be limited to the parties to the case.[88] This is the reason why, in contentious cases, each state party to a treaty, the construction of which is at stake, has a *right* to intervene,[89] and, in advisory opinions, it has the right to give comments.[90] In this sense treaty interpretation in contentious or advisory proceedings is nothing more than a statement of the law *erga omnes*, a finding that is also applicable to advisory opinions on legal questions not concerning treaty interpretation, since, in this case, the court also states what is – in its view – the law at large, namely the law *erga omnes*.[91] Although this conclusion does not answer the question to what "extent an advisory opinion enters into the general corpus of international law,"[92] it is of great importance because it produces a justifying effect in the sense that no state can be considered to act illegally if complying with the law found to exist in an advisory opinion.[93]

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86 Leland M. Goodrich, *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, 32 AJIL 156 (1938).

87 LAUTERPACHT (note 22), 250.

88 In this sense reference can be made to the ICJ which explicitly stated in the case *Avena and other Mexican Nationals (*Mexico v. United States*),* ICJ Reports 2004, 12, that its findings in the present case on the obligations of the United States under Art. 36 Vienna Convention on Consular Relations would also apply to other foreign nationals in similar situations, 151, paras 69-70.

89 Art. 63 ICJ Statute.

90 Art. 66 ICJ Statute, Art. 62 Rules of Procedure of the IACtHR.

91 ROSENNE (note 60), 1699.

92 *Id.*

93 Frowein & Oellers-Frahm (note 2), margin number 53.

Rather, the contrary is true: A state would have to justify its actions if acting contrary to an advisory opinion.

A further effect of advisory opinions concerning the court's rather than the international community's reaction lies in the fact that the court will rely on its findings in an advisory opinion as well as in contentious cases if the same legal issue is at stake in subsequent proceedings, be they advisory or contentious. Only in the presence of compelling reasons would the court depart from its earlier ruling, because advisory opinions, as judgments, are authoritative statements of law in equal degree.[94] From this perspective, advisory opinions constitute precedents:[95] They do not legally bind the court, however, for the sake of consistency and predictability of jurisprudence, the law stated to exist in an advisory opinion will be upheld unless compelling reasons require the court to decide otherwise.

III. The Law-Making Element

Having found that advisory opinions contribute to the development of international law, that they do have authoritative, even *erga omnes* character, and that they have generally been accepted by the requesting body, the question that still remains concerns their *law-making* character. This question calls for an initial definition of what the term *law-making* means.[96] If law-making is understood in the traditional sense, namely as a formal procedure of legislation or codification resulting in the definition of rights and obligations binding upon all legal subjects, the answer is a clear "no," because there is neither a legislative procedure nor any legal obligation flowing from the opinion, neither for the

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[94] LAUTERPACHT (note 22), 22; *see also* Art. 38(1)(d) ICJ Statute on decisions as a source of law where no distinction is made between judgments and advisory opinions.

[95] For the "lawmaking" effect of precedents, *see* Marc Jacob, *Precedents: Lawmaking Through International Adjudication*, in this issue; *see also* LAUTERPACHT (note 22), 18 *et seq*.; Shyam K. Kapoor, *Enforcement of Judgments and Compliance with Advisory Opinions of the International Court of Justice*, in: INTERNATIONAL COURT IN TRANSITION 301, 312 (Raama P. Dhokalia & B.C. Nirmal eds, 1995).

[96] Von Bogdandy & Venzke (note 55), 12.

body requesting the opinion nor for the states. In that sense, any law-making effect would rather derive from the reception of the opinion by the international community by a voluntary act that ultimately would only depend upon the intrinsic merit and general acceptability of the opinion. As Lauterpacht put it:

> [H]owever competent, however august, however final, and however authoritative a tribunal may be, it cannot, in the conditions in which its jurisdiction is in law, and in compliance with its decisions is in fact, essentially of a voluntary character, dispense with that powerful appeal to opinion which stems from the reasoned content of its pronouncements. [97]

This statement, which is still true today, means that advisory opinions are not a formal source of law, but that their persuasive authority can and does induce states or other organs to act in accordance with advisory opinions, thus contributing to the creation of customary law or – and that is a strong argument against the law-making effect comparable to a formal source – in the case that they do not accept the opinion, to act contrary to it thereby preventing the creation of customary law. Consequently, advisory opinions can, but do not necessarily, have a lawmaking effect in that they state what the court considers to be the law; this needs, however, confirmation by state practice. In this sense the law-making, or in the terms of Lauterpacht, the "judicial legislation" by court decisions including advisory opinions, is not – and ought not to be – comparable with legislative codification by statute;[98] it only is an "indirect, although significant contribution towards the development of the law of nations."[99] This finding is in line with the traditional concept that international lawmaking lies with states by concluding treaties or creating customary law – the decisive element for the creation of law being at the very end the consent of states "to be bound *as a matter of law.*"[100] In formal terms, this is confirmed by the fact that an advisory opinion could never successfully be invoked as a source of law before a court or tribunal or give rise to reprisals in a technical sense in

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[97] LAUTERPACHT (note 22), 41.

[98] LAUTERPACHT (note 22), 189.

[99] *Id*., 400.

[100] Michael Bothe, *Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?*, 11 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 65, 94 (1980).

case of non-implementation; only its development into customary law makes it generally applicable, and until then it is not more than a precedent and a subsidiary source of law in the sense of Art. 38(1)(d) of the ICJ Statute.

There is, however, an alternative concept of the term *lawmaking* that focuses more on the procedural aspect of creating law or changing the existing law rather than the outcome of such process, namely the creation of a legal rule. As advisory opinions contain an *erga omnes* judicial statement of what is – in the view of the court – the law at large, they have a direct impact on international law in so far as they cannot be ignored. If the existence of the relevant rule of law is controversial, the opinion of the court will in any case initiate a process of creating or confirming customary law according to the opinion by justifying any action in accordance with the opinion. In case of a general disregard of the rule found to exist in an advisory opinion, the developing law would deviate from the opinion. In this sense *law-making* could be understood as a process extending from the non-binding definition of a legal issue, which could be characterized as the authoritative statement of the *opinio juris,* to the final acceptation of the *opinio* by state practice. In this sense an advisory opinion would also be part of the *lawmaking* process. However, such an understanding is in fact not controversial and finds expression in the term *contribution to the development of international law*; judicial law-making in this sense is a permanent feature of the administration of justice in every society, but at the same time it is accepted that a system of law expressly sanctioning judicial legislation would be a contradiction in terms.[101]

In the context of the conceptual apparatus of this research project, advisory opinions are of particular relevance because their contribution to generating new normative expectations is not controversial. Under the modern definition of law-making, not to be understood as formal legislation, advisory opinions play a more significant role than judgments for the reason that they construe the meaning of a treaty provision or state the existence or contents of a rule of customary law at large, e.g., *erga omnes.*

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[101] LAUTERPACHT (note 22), 155.

E. Concluding Remarks

At a time when international courts and tribunals have gained increasing importance and are seized with current controversial issues of international law, the question whether their contribution to clarifying and developing the status of international law has already entered the domain of legislation is of general interest. As law-making in international law is a time-consuming affair, the involvement of courts and tribunals could in fact be helpful. However, international law, more than national law, depends on the consent of the subjects of the legal order, namely states which today still fulfill the role of legislator in international law and thus constitute the democratic and legitimizing basis of international law. Even if court decisions – and here the difference between advisory opinions and judgments in contentious cases is *de facto* rather irrelevant – may be progressive in defining the state of law or the concrete meaning of a treaty provision, these statements as such are not legislation; they need confirmation and acceptance by the international community in order to evolve into formal law if they do more than merely reflect the already existing legal situation; until then they only serve as precedents, as guidelines, or as authoritative pronouncements of considerable weight, but not more.

This conclusion, which may seem extremely positivistic and formalistic is, however, reassuring insofar as it reiterates that formal legislation simply does not belong to the power of courts or tribunals, neither in national nor in international law because legislation is a power which cannot be exercised by only some persons, however qualified and morally high-standing they may be; particularly in international law where means for coercive implementation of legal obligations are wanting, a democratic, i.e., large and consensual, basis is the primary guarantee for law-abiding conduct of states. In this sense, especially with a view to the limited means of coercive implementation, it may in the final analysis not even be decisive whether an advisory opinion or other court decision has created *formal* law: It is the authority and acceptability flowing from the significance of the organ and the reasonableness and persuasiveness of the decision which will govern the conduct of the states, irrespective of the formal character of the *law*.[102]

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[102] Bothe (note 100), 65.

In this perspective any attempt to clearly distinguish between the enunciation of a new rule and the identification or interpretation of an existing legal rule by a court may be a fiction because there is no organ in international law other than a court capable of finding out whether a certain rule of international law does or does not exist, or what the exact meaning of a certain treaty provision is, or whether a court decision, contentious or advisory, has "created" law; this issue cannot be answered authentically. This finding leads to the conclusion that *de jure* advisory opinions are not acts of legislation, although *de facto* a clear distinction between law-making and law-identification cannot be drawn. In the present context, it may therefore be stated that advisory opinions of international courts or tribunals can at least be considered as formulating shared or community expectations – what is in the interest of the court itself as well as in the interest of the judicial function a contribution to the development and certainty of international law – and that they do in fact govern the further behavior of those they address, irrespective of their binding or non-binding effect or their legal impact on international law.