Panel II: Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes?

Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes?

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I. Introduction

An advisory opinion given by an international court or tribunal is an authoritative but, in principle, non-binding statement or interpretation of international law. To use advisory opinions as a means to clarify a legal issue is not of recent origin. It should be recalled that pursuant to Art. 14 of the Covenant of the League of Nations, the Permanent Court of International Justice (PCIJ) was not only called upon to render judgments but was entrusted with the competence to give an advisory opinion on any dispute or any point submitted to it by the Council or the Assembly.[1]

The institution of the advisory procedure was maintained for the International Court of Justice (ICJ) albeit with a reformulated task – further elaborated by the Court's jurisprudence – and an increased number of potential applicants.[2] Under Art. 65 of the ICJ Statute two different categories of advisory opinions are to be identified, a third one is based upon particular international agreements.[3]

Also other legal regimes provide for the possibility to give an advisory opinion. These procedures are different in objective and scope. They are the UN Convention on the Law of the Sea, the European Convention on Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the Protocol to the African Charter on Human and Peoples' Rights establishing the African Human Rights Court. Therefore, speaking of advisory opinions means speaking of dif-

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[1] Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 195. The first drafts of the Covenant included no provision on advisory opinions. With the view to provide a mechanism for the interpretation of the Statute the French delegation proposed to include such a competence to deal with 'any issue with regards to the interpretation of the Covenant'. After a controversial discussion the above mentioned formula was included in the Covenant not, however, in the Statute of the Court (see T.M. Ndiaye 'The Advisory Function of the International Tribunal for the Law of the Sea' [2010] 9 Chinese JIL 565 paras 8–9); for an analysis of Art. 14 of the Covenant of the League of Nations and the jurisprudence of the Permanent Court of International Justice see J.A. Frowein and K. Oellers-Frahm 'Article 65' in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds) *The Statute of the ICJ: A Commentary* (OUP Oxford 2006) paras 1–5.

[2] For a comparison of the procedures under Art. 14 of the Covenant of the League of Nations and Art. 65 of the ICJ Statute see Frowein and Oellers-Frahm (note 1) paras 6–8.

[3] For details see below p. 40 et seq.

ferent procedures; caution is requested to borrow from one to the other.

The UN Convention on the Law of the Sea (Convention)[4] as well as the Rules of the International Tribunal for the Law of the Sea (Rules of the Tribunal)[5] provide for the competence of the Seabed Disputes Chamber and the Tribunal as such to render advisory opinions. They have been tailored upon the procedures of the ICJ. One may *cum grano salis* identify three different procedures for the Law of the Sea Tribunal: Advisory opinions of the Seabed Disputes Chamber requested by the Assembly or the Council of the International Seabed Authority according to Art. 191 of the Convention; advisory opinions delivered by the Seabed Disputes Chamber in the context of commercial arbitration (Art. 188 (2) of the Convention); and advisory opinions rendered by the Tribunal as a whole in accordance with Art. 138 of the Rules of the Tribunal. The procedure is different for each of them.[6]

Further, according to Art. 64 of the American Convention on Human Rights[7] the Inter-American Court of Human Rights (IACtHR) can give advisory opinions regarding the interpretation of the American Convention on Human Rights. Here again, several categories of procedures are to be identified.[8]

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[4] United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) (1982) 21 ILM 1261.

[5] Rules of the Tribunal (as amended on 17 March 2009) Doc. ITLOS/8 <http://www.itlos.org/start2_en.html> (7 February 2011).

[6] A. Aust 'Advisory Opinions' (2010) 1 Journal of International Dispute Settlement 123–51.

[7] American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (Pact of San José).

[8] For details see below. The advisory jurisdiction of the Inter-American Court of Human Rights is intensively analyzed by J. Calidonio Schmid 'Advisory Opinions on Human Rights: Moving beyond a Pyrrhic Victory' (2006) 16 DukeJComp&IL 415–55. See also K.J. Keith *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Sijthoff Leyden 1971); D. Pratap *The Advisory Jurisdiction of the International Court of Justice* (Clarendon Press Oxford 1972); T. Buergenthal 'The Advisory Practice of the Inter-American Human Rights Court' (1985) 79 AJIL 1; J.E. Alvarez 'The New Dispute Settlers: (Half) Truths and Consequences' (2003) 38 TexasILJ 405; J.M. Pasqualucci 'Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law' (2002) 38 StanfordJIL 241.

Compared to the international courts and tribunals the advisory jurisdiction of the European Court of Human Rights (ECtHR) is limited. It may give an advisory opinion on a legal question put to the Court by the Committee of Ministers concerning the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[9] The European Court of Human Rights has so far received three requests and declined one for the lack of jurisdiction.[10]

The African Court of Human and People's Rights has a broad advisory jurisdiction. The Court may render advisory opinions on 'any legal matter relating to the Charter or any other relevant human rights in-

[9] Art. 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

[10] In May 2004, the Committee of Ministers of the Council of Europe requested the Court, under Art. 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to give an advisory opinion on the matter raised in Recommendation 1519 (2001) of the Parliamentary Assembly of the Council of Europe, concerning 'the co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights', and the implications for States which had ratified both Conventions. ECtHR 'First Decision on Court's Competence to Give an Advisory Opinion' (Press release issued by the Registrar, 2 June 2004) <http://www.echr.coe.int/ECHR/EN/hudoc> (12 January 2011); ECtHR 'Annual Activity Report 2002' (Grand Chamber) <http://www.echr.coe.int/NR/rdonlyres/5CD0E552-0D28-4A95-B335-6DB669C7E078/0/2002GrandChamberactivityreport.pdf> (12 January 2011). The Court stated that Art. 47(2) sought to exclude the Court's jurisdiction on the legal questions submitted to it where the Court may be called in the future to address in its 'primary judicial function' the examination of the admissibility or merits of concrete cases. As applied to the case before them, the Court noted it was possible that the procedure under the CIS Convention might later have to be examined in a substantive application to determine whether it was a 'procedure of international investigation or settlement'. Therefore, the Court held that the request for an advisory opinion was not within the Court's competence as defined in Art. 47 of the Convention; ECtHR *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* (Grand Chamber, 12 February 2008); ECtHR *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 (No. 2)* (Grand Chamber, 22 January 2010).

strument provided the subject matter of the opinion is not related to a matter being examined by the African Commission'.[11]

Historically several international bodies, including the Bureau of the Universal Postal Union, the International Commission for Air Navigation, and the League of Nations Advisory and Technical Committee for Communication and Transit had the statutory authority to issue advisory opinions.[12] These bodies had no judicial but rather a technical character and the scope of any advisory opinion given necessarily would have been limited.

The views on the suitability of advisory opinions are quite controversial. Some argue that advisory proceedings are less controversial than contentious proceedings since States are not parties to a conflict. They do not have to defend a particular position, although they might do so and they are, so it is said, – at least formally – assistants to the court or tribunal in question. As Judge Buergenthal has put it in respect of the Inter-American Court of Human Rights: '[…] an advisory opinion […] does not stigmatize a government as a violator of human rights […], however, it makes the abstract legal issue perfectly clear for any government wishing to avoid of being held in violation of international legal obligations'.[13] In essence advisory opinion procedures are particularly suitable to clarify a disputed point of law. The proponents of this view may refer to the possibility of States to voice their views in the written and oral proceedings.[14] Others take a different view. They see with concern that the ICJ is increasingly giving advisory opinions on highly political issues and they fear that this may undermine the dispute settlement process based upon the consent of States necessary for the

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[11] Art. 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) (1999) 20 HRLJ 269.

[12] M.O. Hudson *The Permanent Court of International Justice, 1920-1942* (MacMillan New York 1943) 484/5.

[13] 'Address by Judge Thomas Buergenthal before a Special Session of the OAS Permanent Council' (3 December 1986) <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/4/pr/pr8.pdf> (20 January 2011) 130.

[14] For example, States have participated in the hearings on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* (22 July 2010) ICJ Doc. 2010 General List No. 141.

Court to deal with contentious cases.[15] For example the United States have argued in the *Nuclear Weapons* case[16]:

> 'The question presented is vague and abstract, addressing complex issues which are the subject of consideration among interested States and within other bodies of the United Nations which have an express mandate to address these matters. An Opinion of the Court regard to the question presented would provide no practical assistance to the General Assembly in carrying out its functions under the Charter. Such an Opinion has the potential of undermining progress already made or being made on this sensitive subject, and, therefore is contrary to the interests of the United Nations Organization'.[17]

This paper will argue that advisory opinions are a suitable – perhaps even a logical – mechanism to clarify questions of a legal nature in situations governed by multilateral rather by reciprocal or a net of reciprocal obligations.

II. The Various Procedures – An Overview

1. Procedure before the International Court of Justice

a. Jurisdiction

The competence of the International Court of Justice to give an advisory opinion is based upon Art. 65 (1) of the ICJ Statute which contains a cross reference to the UN Charter. The provision states:

> 'The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request'.

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[15] Aust (note 6) 147.

[16] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 226.

[17] Ibid. Written Statement of the United States (20 June 1995) 1–2; going into the same direction United Kingdom (16 June 1995) paras 2.23–2.45; France (20 June 1995) paras 5–9; Finland (13 June 1995) paras 1–2; The Netherlands (16 June 1995) paras 6–7; Germany (20 June 1995) 3–6.

It has been argued that the corresponding Art. 96 of the UN Charter and Art. 65 of the ICJ Statute do not fully match since the former does not clearly indicate whether the ICJ has discretionary power as to whether to give an advisory opinion.[18] The relevant Art. 96 of the UN Charter reads:

> 'a. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
>
> b. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities'.

One should take into consideration, though, that Art. 96 of the UN Charter only deals with the question who may request an advisory opinion whereas Art. 65 of the ICJ Statute provides for the competence of the ICJ and establishes under which condition it may do so.

The UN Charter distinguishes between advisory opinions requested by the UN General Assembly or the UN Security Council on the one side and other organs and Specialized Agencies of the United Nations on the other.

In both cases a formal request is necessary. Equally in both cases the body or organization must be authorized to request an advisory opinion. The authorization of the UN General Assembly and of the UN Security Council is contained in Art. 96 of the UN Charter. The other bodies or organizations require an authorization from the UN General Assembly; their competence is thus a derived one.

It is for the Court to verify that the UN organ or the organ of the organization having filed the request for an advisory opinion was authorized to do so and that the decision on the request in the proper procedure for such a decision. This means the Court has to scrutinize whether the internal law was properly applied. In the *Wall* advisory opinion[19] and in advisory opinion on the *Unilateral Declaration of Independence of the Kosovo*[20] the Court deals in detail with the procedure used by the UN General Assembly. This jurisprudence of the ICJ is to

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[18] Frowein and Oellers-Frahm (note 1) para. 30.

[19] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep. 136 (145–48).

[20] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14).

be interpreted that the Court does not consider itself able to act on a request which was not adopted in the proper procedure.[21]

Art. 96 (1) and (2) of the UN Charter both refer to legal questions on which only an advisory opinion may be requested. This question may be an abstract one or one which is pending between two or more States.[22] This is recognized in the Rules of the Court whose Rule 102 (3) provides for the appointment of a judge *ad hoc* in the case that an advisory opinion is requested on a question 'actually pending between two or more States'. The Rules of the ICJ were inspired by an equivalent provision for the PCIJ applicable to advisory opinions, proposed by Judge Anzilotti in 1927, which was providing that, on a question relating to an existing dispute between two or more States, Art. 31 of the PCIJ Statute relating to the maintenance of national judges and the appointment of *ad hoc* judges should apply. It is evident from this provision that there is no clear cut line between cases to be dealt with in contentious cases and advisory opinions and that one can hardly argue that a request for an advisory opinion should be denied since such dispute was to be dealt within a contentious case. No such priority for contentious cases exists. It is rather for the Court in such cases to make use of its procedural rules with the view to ensure that those States whose interests are involved receive the procedural means to protect their interests in the proceedings. The ICJ went into this direction by giving the Kosovo and Serbia more time in the hearing in the proceedings of the Advisory Opinion *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.[23]

This limitation of the competence of the ICJ to give advisory opinions on legal questions – as opposed to a political question – is a matter of consequence. As far as the interpretation of the notion 'legal question' is concerned the ICJ has taken a rather flexible approach. It has remarked on several occasions that questions 'framed in terms of law and raising problems of international law […] are by their very nature susceptible of a reply based on law'.[24] One may safely say, considering the jurisprudence of the ICJ that there is a clear presumption that questions phrased as legal questions are to be considered as such. But even in

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21 Frowein and Oellers-Frahm (note 1) para. 19.

22 Pratap (note 8) 126 et seq.

23 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14).

24 *Western Sahara (Advisory Opinion)* [1975] ICJ Rep. 12 para. 15.

these cases where a question is formulated as a legal question it is for the Court to ascertain whether the question is just phrased as a legal one but *de facto* constitutes primarily a political question since it is – as stated frequently by the ICJ – for the Court to establish its jurisdiction. Although this seems to be in principle the view of the ICJ it is rather unlikely that it will dismiss a request for an advisory opinion formulated as a legal question on the grounds that it constitutes *de facto* a political question. The Court has stated more than once that even if the question has a political aspect – which will be normally the case as far as questions of the UN General Assembly or the UN Security Council are concerned – this does not deprive it of the character as a legal question.[25]

It is evident that the competence of the International Court of Justice to give an advisory opinion upon the request of Specialized Agencies or other organs of the UN than the UN General Assembly or the UN Security Council is restricted. The ICJ has so far once declined to accept an advisory opinion on the ground that it did not have jurisdiction. In the Advisory Opinion requested by the WHO on the *Legality of the Use by a State of Nuclear Weapons in an Armed Conflict*[26] the Court held that it had no jurisdiction to accede to the request. Although the WHO was authorized to request an advisory opinion and the question asked was a legal one the Court denied that the question was arising within the scope of the activities of WHO as required under Art. 96 (2) of the UN Charter.

In spite of the wider scope of Art. 96 (1) of the UN Charter as far as requests of the UN General Assembly or the UN Security Council is concerned the Court has considered whether the questions raised was serving the UN General Assembly in performing its functions. This particular issue came up in the Advisory Opinion concerning *Kosovo*. The Court did not establish the dogmatic background for such a limiting interpretation of Art. 96 of the UN Charter. It merely stated:

> 'While paragraph 1 of Article 96 confers upon the General Assembly the competence to request an advisory opinion on "any legal

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[25] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal (Advisory Opinion)* [1973] ICJ Rep. 166 para. 14; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) para. 41, quoting from *Legality of the Threat or Use of Nuclear Weapons* (note 16) para. 13.

[26] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep. 66 (71–72).

> question" the Court has sometimes in the past given certain indications as to the relationship between the question which is the subject of a request for an advisory opinion and the activities of the General Assembly […]' .[27]

In the proceedings it had been argued that due to Art. 12 of the UN Charter the UN General Assembly lacked the competence to request an advisory opinion concerning the Kosovo since that issue, including the declaration of independence had been on the agenda of the UN Security Council. However, the Court emphasized the general competence of the UN General Assembly to discuss 'any matters within the scope of the present Charter' in accordance with Art. 10 of the UN Charter and distinguished between the competence of the UN General Assembly to make recommendations which in fact is limited under Art. 12 (1) of the UN Charter and the request for an advisory opinion.[28]

Several other objections have been voiced in the proceedings against the Court giving an advisory opinion such as that the question was historic, abstract or academic. The Court has dismissed them all pointing out that it may give an advisory opinion on any legal question.[29]

Finally, the Court has more than once emphasized that no consent of those States is needed whose interests may be affected by the advisory opinion. This approach was confirmed, amongst others, in the *Namibia*,[30] the *Western Sahara*,[31] the *Privileges and Immunities*[32], the

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[27] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14) para. 21. A justification may be gained from H. Kelsen *The Law of the United Nations* (Stevens London 1950) 546 who argues that such limitation is inherent – no organ can go beyond the functions assigned to it – and hence the limitations in paragraph 2 were redundant.

[28] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14) para. 24; this issue had been left open in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) para. 16.

[29] See, for example, *Western Sahara* (note 24).

[30] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep. 16 paras 23–24.

[31] *Western Sahara* (note 24) para. 30.

[32] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion)* [1989] ICJ Rep. 177.

Wall[33] and in the *Kosovo*[34] case. Mostly the Court dealt with the lack of consent – if invoked – under its jurisdiction as well as under its discretionary power. The gist of the argument that no consent is required in all these cases which relied on earlier statements of the Court, was that the advisory opinion was not binding and was meant for guidance to the organ or organization having requested the advisory opinion, only.[35] This does not fully reflect the political realities. Although technically the advisory opinion is not binding it has in reality as will be indicated later quite some relevance in practice. The reasoning of the Court clearly shows its intention not to restrict its jurisdiction in this respect being fully aware that advisory opinions may have a hybrid character. Although serving the interests of the organ having requested an advisory opinion in the first place it may help in overcoming an actual legal dispute amongst States as the possibility for the States concerned to appoint *ad hoc* judges shows. Apart from that the Court has indicated that the lack of consent may be taken into account when the judicial propriety to give an advisory opinion is considered.[36]

b. Discretion

The Court has frequently emphasized that having jurisdiction does not mean it is obliged to exercise it.[37] The Court has stated this discretion-

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[33] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) para. 47.

[34] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14).

[35] The Court stated in the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion) (First Phase)* [1950] ICJ Rep. 65 (71): 'The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent giving an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it'.

[36] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) para. 47.

[37] Ibid. para. 44.

ary power is meant to protect the integrity of the courts juridical function and its nature as a principle juridical organ of the United Nations.[38] One may wonder whether this is a convincing explanation of the discretionary power the Court enjoys since other courts and tribunals are obliged to render an advisory opinion. Does that mean their judicial function is not worth protecting? Apart from that such interpretation of the discretionary power seems to indicate that the organs or organizations which have the right to request an advisory opinion from the ICJ are not considered being sufficiently aware of the judicial function of the Court. It is rather to be assumed that such discretionary power exists so as to enable the Court to honor the competences of the UN General Assembly and of the UN Security Council and to achieve through that a 'balance of power'. It should be taken into account that the Court may use its discretionary power in several ways; it may refrain from giving an advisory opinion *in toto* but it may – and this is the more likely option – refrain from answering certain questions or parts thereof. To that extent the discretionary power of the Court is a flexible mechanism to steer clear from infringing into the competences of the organs or organizations concerned or the interests of particular States.

In practice the ICJ has never refused to give an advisory opinion requested by the UN General Assembly and it has done so only in respect of one request from a Specialized Agency. This decision, however, was based upon the lack of jurisdiction rather than an exercise of discretionary power. Only the Permanent Court of International Justice has once dismissed a request for an advisory opinion, namely in the *Eastern Carelia*[39] case using its discretionary power. Although this may be considered a particular situation it may be worth taking cognizance of the reasoning. The Council of the League, at the instance of Finland, had asked for an Opinion as to the obligations of the Soviet Union under the Treaty of Dorpat. The Soviet Union which was not a member of the League challenged the competence of the Court and declared it would not participate in the proceedings. The Court cited 'a fundamental principle […] of the independence of States':

> 'it is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States ei-

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[38] *Status of the Eastern Carelia (Advisory Opinion)* PCIJ Series B No. 5, 29; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal* (note 25) para. 24; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) paras 44–45.

[39] *Status of the Eastern Carelia* (note 38).

> ther to mediation or arbitration, or to any other kind of peaceful settlement'.[40]

In fact, it was not the lack of competence the Court wanted to address – otherwise it would have been dealt with under the rubric of jurisdiction – but the lack of competence of the requesting organ, the League Council.[41]

The ICJ has pointed out that the advisory jurisdiction is not a form of juridical recourse but it is a competence of the Court to assist the UN General Assembly or the UN Security Council or other Bodies of the UN in carrying out their activities.[42] This interpretation of the meaning of an advisory opinion is quite relevant since it means that the advisory opinion is given to the organ having requested it and the political motives of individual States having initiated such request or having argued such a request are without relevance.[43] The Court does not expect that the organ requesting the advisory opinion to substantiate why and for what reason it is going to be used for as long as it is established that such request falls within the competence of the organ. Nor does the Court consider it competent to substitute its assessment of the usefulness of the opinion requested for that for the organ that seeks such opinion.[44]

In the Advisory Opinion dealing with the Kosovo the Court considered in detail whether it should use its discretionary power to refuse the request for an advisory opinion on the ground that the issue had been dealt with by the UN Security Council. The Court declined this by referring to the wide ranging power of deliberation of the UN General Assembly.[45]

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[40] Ibid. 27.

[41] See the detailed analysis of Sir K. Keith 'The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections' (1996) 17 AustralianYbIL 39 (43 et seq.).

[42] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14) para. 33.

[43] This has been made quite clear in the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* (note 16) para. 16.

[44] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) para. 62.

[45] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 14) paras 33 et seq. and subsequently re-

c. Advisory Opinions Provided for in Other International Agreements

According to the Headquarters Agreement between the United States and the United Nations the Arbitral Tribunal established therein as a means for a settlement of disputes, the two parties shall have regard to the opinion of the ICJ where this opinion has been requested.[46] In the Convention on the Privileges and Immunities of the United Nations it is stated that a request shall be made for an advisory opinion on any legal question involved and that the opinion given by the Court shall be accepted as decisive by the parties.[47] Advisory opinions relating to the review of the ILO Administrative Tribunal (ILOAT) are binding.[48] The reason for such particularity may be seen in the limited scope of the advisory jurisdiction of ICJ in this respect.

This type of advisory opinion is somewhat neglected in literature although it gives evidence to the fact that advisory opinions may be used for the final settlement of legal disputes.

2. Procedure before the International Tribunal for the Law of the Sea/ the Seabed Dispute Chamber

a. Seabed Disputes Chamber

aa) Jurisdiction

As indicated in the introduction, the Seabed Disputes Chamber as well as the International Tribunal for the Law of the Sea both have the competence to give advisory opinions. Whereas the competence of the Seabed Disputes Chamber is set out in Art. 191 and Art. 159 (10) of the

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ferring to the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) para. 30.

[46] UNGA Res. 169 (II) 'Agreement between the United Nations and United States of America regarding the Headquarters of the United Nations' (31 October 1947) GAOR 2nd Session Resolutions 91, Art. VIII Section 21(b).

[47] UNGA Res. 22 (I) 'Convention on the Privileges and Immunities of the United Nations' (13 February 1946) Resolutions adopted by the General Assembly during the first part of its first session, from 10 January–14 February 1946 (A/64) 25, Art. VIII Section 30.

[48] Statute of the Administrative Tribunal of the International Labour Organization (adopted and entered into force 9 October 1946) (ILO Geneva 1947), Art. XII.

Convention, the competence of the Tribunal is only contained in Art. 138 of the Rules of the Tribunal.

As far as the Seabed Disputes Chamber is concerned one may distinguish three different procedures. Art. 159 (10) of the Convention provides that upon written requests addressed to the President of the Assembly of the International Seabed Authority by at least one fourth of its members for an advisory opinion on the conformity with the Convention or a proposal before the Assembly on any matter, the Assembly shall request the Seabed Disputes Chamber of the Law of the Sea Tribunal to give an advisory opinion thereon. No vote will be taken upon the proposal before the Authority pending the receipt of the advisory opinion.

Additionally according to Art. 191 the Assembly and the Council of the Seabed Authority may request an advisory opinion on legal questions arising within the scope of their activities.[49] It is to be noted that the wording of Art. 191 of the Convention resembles the one of Art. 65 (2) of the ICJ Statute which means that the Assembly's and Council's competence to request an advisory opinion are limited compared to the competence of the General Assembly and the Security Council of the United Nations. This reflects the limited mandate of the International Seabed Authority compared to the one of the United Nations. It is not for the Assembly or the Council of the International Seabed Authority to request an advisory opinion on other matters than those related to activities in the area.

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[49] On 25 February 2010 the International Seabed Authority published a draft revised Agenda with the 16th Session of the Council (International Seabed Authority 'Provisional Agenda of the Council' [25 February 2010] ISBA/16/C/L.1/Rev.1). This new agenda item was entitled 'Proposal to seek an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea pursuant to article 191 of the United Nations Convention on the Law of the Sea on matters relating to the responsibility and liability of sponsoring States'. A note verbal was also sent to member States and observers of the Authority notifying them of the change. This has led to a request for an advisory opinion which was submitted to the Registry of the International Tribunal for the Law of the Sea on 11 May 2010. The Advisory Opinion *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area (Request for Advisory Opinion Submitted to the Seabed Disputes Chamber)* ITLOS Case 17 was delivered 1 February 2011 <http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=17&lang=en> (3 February 2011).

Art. 191 of the Convention makes it quite clear that the Seabed Disputes Chamber has to ascertain whether it has jurisdiction to give an opinion on an issue as requested. This involves a twofold test namely whether the request is on an issue falling within the competence of the Seabed Authority in general and into the competence of the requesting organ, the Assembly or the Council.

As the Assembly – according to the wording of the Convention the supreme organ of the Authority to which the other principal organs are accountable[50] – has broad powers and functions it is hard to imagine that an issue concerning deep seabed activities would not fall in the competence of the Assembly.[51] The competences of the Council are somewhat more limited. The Council is the executive organ of the Authority. It has the power to establish, in conformity with the Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question on matter within the competence of the Authority. The competences of the Council have been further strengthened by the Implementation Agreement on the Application of Part XI of the Law of the Sea Convention.[52] Considering its competences it is equally unlikely that a request for an advisory opinion dealing with deep seabed matters will be deemed not come 'within its activities' and thus not to meet the requirements of Art. 191 of the Convention.

Although Art. 191 of the Convention speaks of any legal question this does not mean that the Seabed Disputes Chamber may only consider abstract questions. In that respect the situation is identical to the one of the ICJ in respect of requests for advisory opinions under Art. 65 of the ICJ Statute. This is reflected in Art. 130 (2) of the Rules of the Tribunal. It obliges the Chamber to consider whether the request for an advisory opinion relates to legal question pending between two or more parties. If the Chamber so determines, the rules concerning the maintenance of national judges and appointment of *ad hoc* judges apply. This rule is based upon Art. 102 (3) of the Rules of the ICJ. In effect, this brings

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50 Art. 160 (1) of the Convention.

51 Ibid.

52 Annex to UNGA Res. 48/263 'Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982' (17 August 1994) UN Doc. A/RES/48/263.

such advisory proceedings close to contentious cases.[53] As already indicated when discussing the advisory opinions before the ICJ such possibility may be considered as alleviating the dividing line between contentious cases and advisory opinions. However, in respect of legal disputes between States concerning deep seabed activities an additional consideration has to be borne in mind. Although the Seabed Disputes Chamber has a monopoly concerning the decision on such legal disputes the access to the Seabed Disputes Chamber is limited.[54] This may increase the readiness to seek advisory opinions.

In establishing its jurisdiction the Seabed Dispute Chamber has to ascertain that the request was decided in the correct procedure. The Seabed Disputes Chamber followed in this respect the jurisprudence of the ICJ which in the *Wall* Advisory Opinion deals in detail with the procedure used by the UN General Assembly.[55] Since it is for the international court or tribunal concerned to establish its jurisdiction it cannot refrain from looking into the internal law of the organ submitting the request.[56]

Art. 191 of the Convention refers to a 'legal question', the term being used also in Art. 65 of the Statute of the International Court of Justice. Therefore one may assume that the Seabed Dispute Chamber may follow the jurisprudence of the International Court of Justice concerning the interpretation of this term. However one should notice in this context that the competence of the Seabed Disputes Chamber as of the Tribunal is limited compared to the one of the ICJ. Whereas the ICJ applies international law the Seabed Disputes Chamber as well as the Tribunal applies, according to Art. 293 of the Convention, the Convention and international law not incompatible with the Convention. This

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53 J.L. Jesus 'Article 130' in P. Chandrasekhara Rao and P. Gautier (eds.) *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (Nijhoff Leiden 2006) 377.

54 See Art. 187 of the Convention.

55 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) 145–48.

56 This issue was taken up in the written statements of the United Kingdom of Great Britain and Northern Ireland (29 July 2010) and Mexico (17 August 2010) in the proceedings of the International Tribunal for the Law of the Sea, Advisory Opinion *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area* (note 49). The Advisory Opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19) deals with this issue in paras 29–33.

means *de facto* that the Convention establishes a legal hierarchy with the Convention and related implementations agreements on top of the pyramid followed by other rules of international law – treaty law as well as customary law and general principles – under the condition they are not incompatible with the Convention. This means the interpretation of the term 'legal question' must be interpreted on this basis. One may wonder whether Art. 189 of the Convention further limits the competence of the Seabed Disputes Chamber. This provision provides that the Tribunal shall not substitute its discretion for that on the Authority. Considering that an advisory opinion is not binding it is doubtful whether giving an advisory opinion can be considered to be able to substitute a decision of the International Seabed Authority.

bb) Admissibility

It is to be noted that different from the International Court of Justice the Seabed Dispute Chamber has no discretionary power as to give an advisory opinion. Art. 191 of the Convention uses the word 'shall' where Art. 65 of the ICJ Statute speaks of 'may'. Certainly the ICJ has, so far, not used its discretionary power to dismiss a request for an advisory opinion, in the contrary it has made it quite clear that, unless exceptional circumstances exist, it will admit a request for advisory opinion if it has jurisdiction. Thus, the ICJ enjoys some flexibility. For the Seabed Disputes Chamber the situation is more complicated, according to the wording of Art. 191 of the Convention it lacks such flexibility. As several written statements have pointed out in the oral proceedings on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the International Seabed Area* before the Chamber it is not under an absolute obligation to give an advisory opinion.[57] One may consider situations, though, where it would be advisable for the Seabed Disputes Chamber to decline a request for an advisory opinion. This however does not fall under discretionary powers but rather under admissibility. In the Advisory Opinion *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the International Seabed Area* the Seabed Disputes Chamber touched upon these issues leaving it open whether the Chamber may decline a request.[58] Nevertheless, one may wonder about

[57] See Written Statements (note 56).

[58] *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area* (note 49) paras 43–45.

the rationale of Art. 191 of the Convention to provide for an obligation of the Seabed Disputes Chamber to give an advisory opinion. This sheds a light on the function the Seabed Disputes Chamber is meant to play. The Seabed Disputes Chamber is the guarantor for upholding the rule of law in respect of deep seabed mining and in that respect its function is to be likened to the one of a constitutional court or the European Court of Justice. In fact some of the procedural rules pertaining to the Seabed Disputes Chamber were positively or negatively influenced by the example of the European Court of Justice.

cc) Procedural Rules

As Art. 130 (1) of the Rules of the Tribunal indicate the Seabed Disputes Chamber shall use, to the extent to be considered applicable, the procedural rules on contentious cases. This provision is modelled on Art. 40 (2) of the ICJ Statute. The provision attempts to assimilate, to the extent possible, the procedures to be followed by the Seabed Disputes Chamber in dealing with an advisory opinion to those of the Statute and the Rules applicable in contentious cases before the Seabed Disputes Chamber and the Tribunal. As already indicated this follows the example of the ICJ which again had recourse to the Statute of the PCIJ.[59] Which of the procedural rules are to be applied is an open question and responses thereto may only develop in practice. However, some rules are set out in the rules dealing with advisory proceedings.[60]

b. Tribunal for the Law of the Sea

The competence to give an advisory opinion for the Tribunal rests in Art. 138 of the Rules. It reads:

> '(1) The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion.
>
> (2) A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.

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[59] For details see Jesus (note 53) 376.

[60] Arts 130–37 of the Rules of the Tribunal.

(3) The Tribunal shall apply *mutatis mutandis* articles 130 to 137'.

Paragraph 1 describes who may request such an advisory opinion and under which condition. It establishes at the same time the jurisdiction of the Tribunal to give an advisory opinion. It is to be noted that under Art. 138 (1) of the Rules of the Tribunal the latter has a discretion as to whether to accept such request or not. This deviates from Art. 191 of the Convention and is closer to the approach taken by Art. 65 of the ICJ Statute.

It has been discussed whether this rule fully conforms to the Convention. In literature the provisions of Art. 288 (2) of the Convention and those of Art. 21 of the Statute of the Tribunal have been invoked to justify the advisory jurisdiction of the International Tribunal for the Law of the Sea.[61] This has been questioned by others.[62] The probably most convincing answer to this question is that Art. 138 of the Rules establishes a consensual solution. If the jurisdiction of international courts and tribunals is based upon the consensus of the parties concerned there is no reason to deny them to establish an additional jurisdiction.

The conditions set by Art. 138 of the Rules of the Tribunal for submitting a request constitute a high threshold which makes it rather unlikely that States may use this option. States or international organizations – not necessarily only States Parties to the Convention – considering filing an request for an advisory opinion must first conclude an international agreement (within the meaning of the Vienna Convention on the Law of Treaties) related to the purposes of the Convention. This could be an agreement on fisheries or on the protection of the marine environment. But it could be also an agreement on the filing of a request for an advisory opinion to the extent it identifies the questions to be raised. This agreement has to specifically provide for the submission of such a request and it must identify a body – not necessarily an organ – to file such request.

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[61] Jesus (note 53) 393–94; You, Ki-Jun 'Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited' (2008) 39 Ocean Development and International Law 360–71.

[62] T.M. Ndiaye 'The Advisory Function of the International Tribunal for the Law of the Sea' (2010) 9 ChineseJIL 565 para. 61.

c. Procedure under Art. 188 of the Convention

The procedure under Art. 188 of the Convention is not flagged as an advisory opinion although one may qualify it as such. The objective of this procedure is to ensure that the monopoly of the Seabed Disputes Chamber to interpret the legal deep seabed regime should not be infringed. This procedure covers the following scenario, namely a legal dispute concerning the interpretation or application of a contract between parties to the contract submitted to binding commercial arbitration. When such dispute also involves a question of the interpretation of Part XI (including the Annexes III and IV) of the Convention with respect to activities in the Area the question shall be referred to the Seabed Disputes Chamber for ruling. The arbitral tribunal shall render its award in conformity with the ruling of the Seabed Disputes Chamber which means, in other words, this ruling is binding.

d. Critique

The drafters of the UN Convention on the Law of the Sea were rather reluctant to entrust the Tribunal, including the Chamber for Deep Seabed Disputes, with competences to give advisory opinions equivalent to the ones of the ICJ. Considering the expertise of the Tribunal the reason for such reluctance is difficult to understand since the ICJ is competent to give advisory opinions on law of the sea matters if such requests are filed in accordance with Art. 65 of the ICJ Statute. For example International Maritime Organization (IMO) and Food and Agriculture Organization of the United Nations (FAO) may use such opportunity. It would have been a matter of consequence to entrust international organizations such as FAO and IMO with the right to request advisory opinions from the Tribunal. However, this still is pursuing a conservative course. One could have considered entrusting the Meeting of States Parties – in particular the Meeting of States Parties of the UN Convention on the Law of the Sea – with the competence to file requests for advisory opinions considering that they necessarily deal with legal matters in performing their functions. The same is true for the Continental Shelf Commission which equally in formulating its recommendations has to interpret the Convention which means it has to deal with legal issues.

3. Procedure before the Inter-American Court of Human Rights

The jurisdiction of the Inter-American Court of Human Rights concerning advisory opinions is governed by Art. 64 of the American Convention on Human Rights. Art. 64 provides:

> '1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
>
> 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments'.

The purpose of the Court's advisory opinion is 'to assist the American States in fulfilling their international human rights obligations and to assist the different organs of the Inter-American system to carry out the functions assigned to them in this field'.[63] According to the legislative history of Art. 64 of the American Human Rights Convention it was the intention to define the advisory jurisdiction of the Inter-American Court of Human Rights in the broadest terms possible.[64]

One may, from the wording of Art. 64 of the Convention, deduce that there are three categories of advisory procedures differing somewhat in objective.

As already indicated all member States of the Organization of American States (OAS) and all the organs listed in the applicable section of the OAS Charter have standing under Art. 64 of the American Convention to request an advisory opinion of the Inter-American Court. This means that the jurisdiction of the Court *ratione personae* is much broader than it is for the Permanent Court of International Justice or the International Court of Justice or the European Court of Human Rights and the Law of the Sea Tribunal. Only the African Court on Human and Peoples' Rights will have a broader jurisdiction *ratione*

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[63] *'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights) (Advisory Opinion OC-1/82)* IACtHR Series A No. 1 (24 September 1982) para. 25.

[64] Ibid. para. 17.

personae since the Organization of African Unity (OAU), OAU member States, any OAU organ and any African organization recognized by the OAU is authorized to request an advisory opinion.

There are differences concerning the jurisdiction *ratione materiae* and concerning the procedure.

What is remarkable is that any OAS member State has a right to request an advisory opinion even if that particular State is not a State Party to the American Human Rights Convention. Organs authorized to request advisory opinions are the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission of Human Rights, the General Secretariat, the Specialized Conferences and the Specialized Organizations. However their competence to request an advisory opinion is limited to 'their spheres of competences'. According to the jurisprudence a question in the field of competence of an OAS organ is one in which that entity has a 'legitimate institutional interest'.[65] This limitation is the equivalent to the notion of 'within the scope of their activities' referred to in Art. 96 (2) of the UN Charter. The meaning of these two categories of procedure is to provide for a coherent interpretation of as well as other human rights treaties. The reasons why requests are filed may differ. States may want an interpretation to guide them in their implementation of their human rights commitments; they may also seek such advice to induce other States to more effectively apply the Convention or the human rights agreement concerned. The organs in question may seek the advice to better perform their functions or to criticize member States.

Further a member State to the OAS also has the right under Art. 64 (2) of the American Convention to request an advisory opinion as to whether its domestic laws are compatible to the American Convention and other treaties. The objective of this procedure is different from the ones mentioned so far. It is meant to assist member States to better implement their human rights commitments. A request under Art. 64 (2) must be made by the organ in power to speak for the State on the international plane.[66] The wording clearly establishes that no State may use

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[65] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75) (Advisory Opinion OC-2/82)* IACtHR Series A No. 2 (24 September 1982) para. 14.

[66] In *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica (Advisory Opinion OC-4/84)* IACtHR Series A No. 4 (19 January 1984) a committee of the legislative assembly that was empowered to

that procedure to seek an opinion on other States' domestic law. There is no obligation for a State though to seek such an advisory opinion. However, the possibility exists that the Human Rights Commission, for example, may request such an advisory opinion. This has happened in *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*[67] dealing with the application of the death penalty by Peru. The Court held that the Commission on Human Rights had the right to request such advisory opinion under Art. 64 (1) whereas Peru held that this was a circumvention of Art. 64 (2).

It is for the Court to decide whether the organ in question acts within his field of competence. The Court stated that the Inter-American Commission on Human Right has an absolute right to request advisory opinions on the American Convention.[68] When the Commission, however, requests an opinion concerning other treaties it is required to explain its interests.

Ratione materiae the Court's advisory jurisdiction covers three areas: questions concerning the interpretation of the American Convention, including associated Protocols, questions relating to the interpretation of other treaties concerning the protection of human rights in American States and thirdly requests as to whether the States domestic laws are compatible with the American Convention or other treaties on Art. 60 (2).

III. The Procedure for Delivering an Advisory Opinion

The ICJ and the Seabed Disputes Chamber use more or less the same procedure delivering an advisory opinion. For the ICJ the *Advisory Opinion Accordance with International Law of the Unilateral Declara-*

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study amendments to the Costa-Rican Constitution initially submitted a request to the Court. The Court however did not deal with the matter until the Minister of Foreign Affaires filed the formal request.

[67] *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights) (Advisory Opinion OC-14/94)* IACtHR Series A No. 14 (9 December 1994).

[68] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)* (note 65) para. 16.

tion of Independence in Respect of Kosovo may serve as an example. The UN Secretary-General officially communicated to the ICJ the decision taken by the UN General Assembly to submit a request for an advisory opinion formulated in Resolution 63/3 of 8 October 2008. In accordance with Art. 66 (2) of the ICJ Statute notice of the request for an advisory opinion was given to all States entitled to appear before the Court. In accordance with Art. 66 (2) of the ICJ Statute the Court decided that the United Nations and its Member States would have the right to furnish information on the question and fixed the time-limit within which written statements might be submitted on the question. The Court set a further time-limit within which States and organizations having presented written statements might submit written comments on the other written statements in accordance with Art. 66 (4) of the ICJ Statute. The Court finally decided that the authors of the Declaration of Independence were considered likely to be able to furnish information on the question and decided to invite them to make written contributions to the Court within the set time-limits.[69] 36 Member States and the authors of the Declaration of Independence filed written statements or a written communication, respectively, 14 Member States and the authors of the Declaration of Independence took advantage of the second round of written statements. The Member States of the UN and the authors of the Declaration of Independence were informed that they could present oral statements or comments, regardless of whether or not they had submitted written statements. The Court heard oral statements from 28 Member States and the authors of the Declaration of Independence. The hearing started with the oral statement of the Republic of Serbia to be followed by the statement of the authors of the Declaration of Independence followed by the Member States of the UN in the alphabetical order according to the French names of the States concerned.

The procedure of the Inter-American Court of Human Rights for advisory opinions resembles the one of the ICJ. Here, too, written statements are invited by the Court[70] from the Member States of the Organization of American States as well as from the organs referred to in

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[69] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Order of 17 October 2008)* [2008] ICJ Rep. 409.

[70] In accordance with Art. 52 of the Rules of Procedure of the Court (as approved 28 November 2009) <http://www.corteidh.or.cr/reglamento_eng.cfm> (20 Feburary 2011).

Chapter X of the Charter of the OAS that might have an interest in the matter. In the Advisory Opinion *Restrictions to the Death Penalty*[71] communications were received from five States and several organs. Further, the Court accepted *amici curiae* briefs from NGOs and universities. At the public hearing some States made oral statements. On the request for an Advisory Opinion on *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law* [72] several States organs, NGOs and individuals submitted written or oral statements.

The Seabed Disputes Chamber is seized with a request for an advisory opinion.[73] In organizing its hearing it followed in general the practice of the ICJ. The Chamber rendered the Opinion on 1 February 2011.

On 6 May 2010 the Council of the International Seabed Authority adopted a decision (ISBA/16/C/13), by which it decided to request an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. The text of the Decision was transmitted to the Chamber by a letter from the Secretary-General of the Authority. The questions, generally speaking, called for an interpretation of the rules governing the responsibilities and liability of States sponsoring persons and entities with respect to activities in the Area. By an Order of 18 May 2010 the President of the Chamber decided that the International Seabed Authority and the organizations invited as intergovernmental organizations to participate as observers in the Assembly of the Authority were considered likely to be able to furnish information on the questions submitted to the Chamber. States Parties to the Convention, the International Seabed Authority and the intergovernmental organizations referred to were invited to submit written statements on the questions submitted to the Chamber. Altogether twelve States, the International Seabed Authority as the initiator of the request and two organizations, one of them the International Union for the Conservation of Nature took advantage of this opportunity and submitted written statements. Also a statement of Greenpeace and the

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[71] *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights) (Advisory Opinion OC-3/83)* IACtHR Series A No. 3 (8 September 1983).

[72] *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law (Advisory Opinion OC-16/99)* IACtHR Series A No. 16 (1 October 1999).

[73] *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area* (note 49).

World Wide Fund for the Conservation of Nature was received. In the light of Art. 133 of the Rules of the Tribunal, the statement was not included in the case file but was placed on the website of the Tribunal. Some oral statements referred to it later. Member States of the Convention and the organizations referred to were also invited to make oral statements in the hearing. Twelve States and organizations[74], not having submitted a written statement, made use of this opportunity. The hearing started with the oral statement of the International Seabed Authority which was allotted more time than most of the others. Also Nauru, the initiator of the request occupied quite some time. The oral statements differed considerably in style and content. Some reiterated the written statement or focused on one or several aspects of the written statements. Some commented on the written statements or even on the oral statements delivered earlier.

IV. Relevance of Advisory Opinions: Some Preliminary Observations

Advisory opinions were in fashion in the period of the League of Nations. The Permanent Court of International Justice gave 29 judgments on contentious matters and 27 advisory opinions. One explanation for this comparatively high figure is – the International Court of Justice, so far, has delivered 25 advisory opinions (one still pending) amongst them only one initiated by the UN Security Council – that the organs of the League, in particular its Council, were inclined to shift the burden of taking decisions to the Court.[75] The Permanent Court of International Justice had discretion as the ICJ to give an advisory opinion and has denied to render one namely on *Eastern Carelia*.[76]

As far as the International Court of Justice is concerned most of the requests for rendering an advisory opinion have been made by the UN General Assembly or bodies established by it. Two have been made by the UN Economic and Social Council (ECOSOC) and one by the UN Security Council. The Specialized Agencies of the UN which have, on the basis of their constituent instruments, the right to seek an advisory

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[74] International Seabed Authority, Intergovernmental Oceanographic Commission and International Union for the Conservation of Nature.

[75] Aust (note 6) 129.

[76] *Status of the Eastern Carelia* (note 38).

opinion have made little use thereof. UNESCO and IMO have each requested one advisory opinion, the World Health Organization (WHO) has requested two of which one was declined.[77] Assessing this praxis of the ICJ from the point of view of jurisdiction and admissibility one has to state that unless the Court found it had no jurisdiction[78] it used its discretionary power always to accede to the requests. As far as the Inter-American Court of Human Rights is concerned it has given most advisory opinions requested.

The advisory opinions rendered differ significantly as far as their substance is concerned; this is due to mandate of the court or tribunal in question.

The broadest competences rest in this respect with the UN General Assembly or the UN Security Council. This is matched by the advisory jurisdiction of the ICJ regarding requests from these two organs.

The mandate of the Court is limited, though, in respect of advisory opinions coming from organs of the United Nations and Specialized Agencies. This reflects their more limited functions. Therefore one may say the jurisdiction *ratione materiae* of the ICJ to give an advisory opinion corresponds to the functions entrusted to the international organization in question. This limitation is the most relevant safeguard against the ICJ using its advisory jurisdiction in a way not commensurate to the object and purpose of the advisory procedure namely to assist the organization or organ in the performance of its functions.[79] That the ICJ is conscious of this restriction is to be seen when the Court dismissed the request for an Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*[80] submitted by the WHO.

The mandates of the other courts or tribunals which have the competence to give an advisory opinion are *ab initio* more limited. This is equally but a matter of consequence; all these courts or tribunals have been established by a particular international treaty and are mechanisms to settle disputes under and interpret this particular treaty regime. Accordingly, the European Court of Human Rights may give an advisory

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77 Figures provided for by Aust (note 6) 130.

78 Ibid. 131.

79 This function of advisory opinions has frequently been underlined by the Court.

80 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (note 26).

opinion on a legal question put to the Court by the Committee of Ministers concerning the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the several protocols to it. The Inter-American Court of Human Rights can give an advisory opinion regarding the interpretation of the American Convention on Human Rights and other Human Rights treaties. The Seabed Disputes Chamber according to Art. 191 of the Convention shall give an advisory opinion at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Also the competence of the Seabed Disputes Chamber under Art. 188 (2) of the Convention[81] is to give an interpretation of Part XI of the Convention and the competence of the Tribunal to render an advisory opinion under Art. 138 of the Rules is limited to the interpretation of the Convention.

But it is not only the objective of advisory opinions to render assistance to organizations, organs or States. Advisory opinions also have the function directly or indirectly to settle disputes among States. Otherwise the rules of the ICJ as well as of the Tribunal providing for the possibility to appoint judges *ad hoc* would have no justification. In that respect the rules of the PCIJ were somewhat more leading than the ones of the ICJ or the Law of the Sea Tribunal respectively.

It is difficult to give a founded assessment of the relevance of advisory opinions. The practice of the Inter-American Court of Human Rights seems to be encouraging in this respect. For example, the Inter-American Court of Human Rights having been requested by Mexico on the question whether the Vienna Convention on Consular Relations requires an arresting State to inform detained foreigners that they had the right to confer with their national consuls gave an affirmative interpretation of the Convention.[82] In consequence thereof the US Department of State disseminated a handbook to all local, state and federal law enforcement departments in the United States explaining the importance of compliance with the required procedure.[83]

Another example where the relevance of an advisory opinion was clearly demonstrated is the reaction of the Supreme Court of Israel in

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[81] See above p. 55.

[82] *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law* (note 72).

[83] Pasqualucci (note 8) 242.

the *Mara'abe case*.[84] In that case the Supreme Court considered the obligations that were placed on Israel in the *Construction of a Wall Opinion*.[85] At the end the Supreme Court did not follow the reasoning of the ICJ, nevertheless it gave this reasoning credit.

Finally, the ICJ Advisory Opinion in the *Unilateral Declaration of Independence of the Kosovo* resulted in a General Assembly Resolution which politically had a positive effect upon the relationship between Serbia and the Kosovo.

To conclude it seems that the relevance of advisory opinions may exceed or at least equal the one of judgments in contentious cases. This is due to two factors, namely that advisory opinions do not artificially reduce a legal dispute to a matter of bilateral relations. This may also be due to the non-binding, nevertheless authoritative character of advisory opinions.

V. Conclusions, Advantages, Disadvantages

In the following an attempt will be made to highlight the pros and cons of advisory opinions.

1. Wide Participation of States and of International Organizations and Entities such as the Kosovo

One clear advantage of advisory opinions lies in its procedure. It allows a wide participation of States and it seems to be the practice of the international courts or tribunals concerned not to limit such participation. The International Tribunal for the Law of the Sea provided for the possibility of a participation of international and even non-governmental organizations. The ICJ allowed the Kosovo to participate not being a member of the UN. States and entities consider themselves as assisting the court or tribunal in question and these take such contributions seriously as can be seen from the reasoning. What in fact develops is a dis-

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[84] *Mara'abe v. The Prime Minister of Israel (Judgment of 15 September 2005)* Supreme Court of Israel 45 (2006) 202.

[85] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 19).

course between the States and the entities and the court or tribunal in question. The interpretation of the legal norm under consideration is – in the ideal case – the outcome of an embracing process.

Such process has a positive bearing upon the acceptability and thus upon the legitimacy of advisory opinions.

2. Adequateness for Multilateral Agreements

The possibility to involve all interested States or entities in the deliberative process of interpreting an international agreement or customary international law is commensurate to the multilateral nature of such agreements and customary international law. All member States are interested in the interpretation. The rigid rules for intervention in contentious cases do not allow them to voice their views beside the views of the parties to the conflict. Contentious cases in which such agreements are being interpreted thus create an artificial bilateralism which does not correspond to the multilateral character of the instrument in question. For example, the question whether a right of a detainee exists under the Vienna Convention on Consular Relations to consult a consul of one's own nationality is not only an issue between Mexico and the United States[86] or Germany and the United States[87] but an issue of concern to all member States of the Vienna Convention on Consular Relations. There was no room to other States Parties of the Vienna Convention on Consular Relations to intervene. There was, however, the possibility for other States to voice their views in the procedure of the Advisory opinion before the Inter-American Court of Human Rights.

3. Lack of Consent

Other than for contentious cases advisory opinions do not depend upon the consent of States even if their legal position is being considered. They cannot block a dictum of the court or tribunal. This has been frequently emphasized in international jurisprudence. This was

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[86] *Avena and Other Mexican Nationals (Mexico v. United States of America)* [2004] ICJ Rep. 12.

[87] *LaGrand (Germany v. United States of America) (Judgment)* [2001] ICJ Rep. 466.

underlined by the Inter-American Court of Human Rights in the Advisory Opinion OC-3/83.[88]

In contentious cases the exercise of the Court's jurisdiction ordinarily depends upon a preliminary and basic question, involving the State's acceptance of or consent to such jurisdiction. If the consent has been given, the States which participate in the proceedings become, technically speaking, parties to the proceedings and are bound to comply with the resulting decision of the Court. By the same token, the Court cannot exercise its jurisdiction.

None of these considerations is present in advisory proceedings. There are no parties in the sense that there are no complainants and respondents; no State is required to defend itself against formal charges, for the proceeding does not contemplate formal charges; no judicial sanctions are envisaged and none can be decreed. All the proceeding is designed to do is 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.

The Court recognizes, of course, that a State's interest might be affected in one way or another by an interpretation rendered in an advisory opinion. For example, an advisory opinion might either weaken or strengthen a State's legal position in a current or future controversy. The legitimate interests of a State in the outcome of an advisory opinion proceeding are adequately protected, however, by the opportunity accorded it under the Rules of Procedure of the Court to participate fully in those proceedings and to make known to the Court its views regarding the legal norms to be interpreted and any jurisdictional objections it might have (Art. 52 of the Rules of Procedure).

4. Urgent Procedure

Advisory procedures are considered urgent procedures. They are given preference in the jurisprudential activities of the international court or tribunal concerned. Apart from that, the international courts or tribunals are only called upon to rule on legal not on factual matters. This allows to concentrate on the legal questions and no possibility exists to

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[88] *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)* (note 71).

avoid answering legal questions due to factual circumstances – a not uncommon policy.

5. Disadvantage: Not Binding – Does it really Make such a Difference?

How shall a court deal with the legal analysis if faced with the same legal question in a contentious case – the same problem may come up in subsequent contentious cases. The major disadvantage of advisory opinions is their non-binding character. One may wonder whether this really matters. The enforceability of international judgments is limited and their implementation depends very much upon their acceptability. In that respect the difference between judgments and advisory opinions undeniably exist but is more of theoretical but of practical relevance.

In conclusion one may argue that advisory opinions in comparison to judgments in contentious cases may gain the same relevance as non-binding international norms in comparison to hard law. In particular concerning the interpretation of multilateral agreements they may – at least in early stages of a dispute and if no factual issues are controversial – become a substitute for contentious cases.

*Comment by Pierre-Marie Dupuy**

The question which was put to us was: are advisory opinions a suitable alternative for the settlement of international disputes? And it seems that Rüdiger Wolfrum answered today a quite different question, which is: are advisory opinions able to provide the international community with a clarification, or even more a normative development, as far as the international rule of law is concerned? The first question approaches the advisory opinions as an alternative mean for the settlement of international disputes (not necessarily limited to inter-State disputes); the second, instead, deals with the normative potential of advisory opinions as compared to judgments. This is a very interesting issue which is nonetheless distinct from the previous one even if the two of them are or may be, from case to case, interconnected. That being said, keeping in mind the question as it had been put to us by the organizers of this symposium, I shall structure my comments in two brief parts.

The first one will deal with the comparison between advantages and disadvantages of the advisory opinion as compared to contentious jurisdiction. The second one will raise the issue of the lessons which might be drawn from the actual practice of the Court.

I. Advantages and Disadvantages of Advisory Opinions

As far as advantages and disadvantages are concerned, Rüdiger Wolfrum already raised the essential points and I shall simply add the following.

I see personally three main features which could plead in favour of opting for an advisory proceeding instead of a contentious one: a) it is an open procedure; b) it may have under certain conditions an important political potential and c) it has in several respects more procedural flexibility than the contentious proceedings.

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As far as the open feature of the procedure is concerned *ratione materiae*, the ICJ is entitled to deal with every legal question submitted to it; it is in this respect relevant to distinguish between such an almost open-ended jurisdiction and the more restrictive one exercised by specialized courts.[1] *Ratione personae*, as already pointed out by Rüdiger Wolfrum, this type of proceedings is open to the participation of every UN member State without any specific pre-recognition of the Court's jurisdiction (contrary to what is requested under Art. 36 of the ICJ Statute with regards to the contentious jurisdiction). Also, as demonstrated by some of the advisory opinions delivered by the Court over the last twenty years – here, I think in particular of the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996)[2], the Court may receive, at least through the channel of the UN General Assembly, questions at the origin of which non-State actors, i.e. in this case, important non-governmental organizations (NGOs), are in reality to be found.

This is connected to the second feature mentioned above, which is the political potential of advisory opinions as they may make it possible to raise and discuss some highly delicate issues, although such a discussion rests before the ICJ on purely legal grounds. One thing is for the Court, as it constantly does[3], to limit its jurisdiction to the treatment of the legal dimension of the issues raised by the question, a case law which provides us, as Jean d'Aspremont has clearly stated in his interesting paper[4], with some guidance as to the delimitation of the boundary between the political and the legal spheres; another is to notice that

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[1] For a recent illustration, with reference to the power of the UN General Assembly to ask for an Advisory Opinion 'on any legal question', see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* (22 July 2010) ICJ Doc. 2010 General List No. 141 paras 21–22.

[2] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 226.

[3] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 1) para. 27: 'Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, an assessment of an act by reference to international law'. Cf. *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Rep. 155.

[4] See below p. 271 et seq.

an advisory opinion issued by the ICJ, precisely because it is restricted to the legal aspects of a more complex matter, does in itself represent a political fact which may impact upon the evolution of the situation at stake. The ICJ opinions, such as the one concerning the construction of the Wall by Israel in Cisjordania in blatant violation of a number of its cardinal international legal obligations (2004)[5], was dealt with by the Court quite in a straightforward way. It is fair to recognize that in this case, the Court did not escape its responsibilities and treated the different legal aspects of the issue with precision and clarity, even if one may still discuss or criticize one or the other aspect of the motivations put forward in this Opinion. The latter unfortunately also demonstrates the very limited political impact of such a judicial stance if the overall political context within which it takes place is not favourable.

Whatever that may be, if, on the contrary, these conditions were to be met in other situations in the future, there still would be the possibility for an advisory opinion issued by the main judicial organ of the United Nations to help in creating a new course of action.

The third advantage of an advisory opinion, very much linked with the previous one, as it also deals with the distinction between law and politics, is its procedural flexibility. Indeed, the Court is empowered to reformulate the question raised in the request if the latter is considered as being confusing or not precise enough; such an initiative is properly not feasible within the contentious jurisdiction of the Court, as for it is entirely dependent on the free will of the parties.

One could add that advisory opinions are able to cover disputes which are not inter-State in their very essence. In that respect, the *Western Sahara* case[6] is a good example (as the Sahraouian people, if accepted as distinct from that of Morocco, is and was, at the time of the 1975 Advisory Opinion, in a pre-State situation) as well as the very complex *Kosovo* case. Advisory opinions may equally be issued with regard to situations directly involving interest of States that would otherwise never accept to defer their dispute to the Court under its contentious jurisdiction. They then provide a solution to overcome the consent of the litigating State or States; here again, one may think of South Africa at the

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

[6] *Western Sahara (Advisory Opinion)* [1975] ICJ Rep. 12.

time of the *Namibia* case (1971)[7] or of Israel with regard to the *Construction of a Wall* (2004).

It is true that advisory opinions are not binding, at least for States. The question is rather then to determine whether such a non-binding effect represents an advantage or a disadvantage. It might prove to be an advantage if we refer to what Georges Abi-Saab said this morning about what he called in an interesting way the 'massage' of sovereignty! The Court *indicates* only to the States the proper behaviour to adopt in order to comply with the law; it does not make it compulsory. The Court states what the law is; it does not impose it on the parties. It informs the actors about their legal obligations; it does not sanction them for having infringed these obligations.

It is also true that the lack of compulsory authority may also prove to be quite disadvantageous. Now, let's turn to the practice of the Court to assess the level of accuracy of these considerations.

II. The Practice of the Court

To make a long story covering 25 opinions issued from 1947 to 2010 short, one may try to classify the advisory opinions of the ICJ in, at least, three categories.

In a first category of cases, the ICJ stands plainly as the judicial organ of the UN endowed with the power of clarifying the law of the United Nations on the basis of the UN Charter, conceived in these cases as the true Constitution of the Organization without belonging necessarily to the 'constitutionalist' school of law.[8] It comes as no surprise that the most frequent cases falling into this category were to be found during the first two decades of the history of the UN itself. Let's analyze for instance the Advisory Opinion on the *Conditions of Admission of a State to Membership in the United Nations* (1947)[9], the Advisory Opinion on the *Reparation for Injuries Suffered in the Service of the United*

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[7] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep. 16.

[8] See P.-M. Dupuy 'The Constitutional Dimension of the Charter of the United Nations Revisited' (1997) 1 Max Planck UNYB 1.

[9] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep. 57.

Nations (1949)[10], the one dealing with the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (1954)[11], or the Opinion on *Certain Expenses of the United Nations* (1962).[12] They are all very rich in terms of interpretation of the 'constitutional law' of the UN and for some of them, in particular the 1949 Opinion on *Reparation for Injuries*, we have not finished yet to elaborate on the audacious vision of the Court when dealing with the crucial question of international legal personality as applied to the UN itself and other entities. This was really a most imaginative, creative and inspiring advisory opinion as far as the theory of subjects of international law is concerned.

Nevertheless, it should not necessarily be expected that the Court faces in the near future an opportunity to issue again such kind of opinions. The latter are indeed relatively few and their number has decreased in the history of the Court; this may be explained, in particular, by the fact that the first twenty years of the UN constituted a period during which the political tensions among the Member States gave rise to a series of contradictory interpretations of some of the main provisions of the UN Charter for which it was necessary for the Court, almost acting as a Constitutional Court, to give the true significance.

The second category of advisory opinions would be composed of answers to issues of general international law. As stated earlier with regard to the 1949 Opinion on *Reparation for Injuries*, every question considered by the Court in the framework of advisory proceedings may raise issues of general international law. Still, some questions submitted to the Court are specifically dealing with general international law; this was for instance the case in 1950 with the request for an advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*[13] where the Court was able to enunciate the new leading principles governing the validity, opposability and effects of reservations. Another case belonging to that second category is the 1996 Opinion on the Legality of the *Threat and Use of Nuclear*

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[10] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep. 174.

[11] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep. 47.

[12] *Certain Expenses of the United Nations* (note 3).

[13] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep. 15.

Weapons[14], a much criticized and debatable case.[15] As far as I am concerned, I have always argued that it was quite an interesting case indeed as it gave an opportunity to the Court to pronounce itself on the connection between *lex specialis* and general international law as well as on the notion of 'intransgressible' principle of humanitarian law as compared to a peremptory norm of international law, and to use almost in an ironical way the notion of 'fundamental rights of every State to survival' in the context of the use of nuclear weapons.[16] In that respect, I would agree entirely with my friend and colleague Rüdiger Wolfrum when he affirms that an advisory opinion may prove to be extremely useful for the interpretation of general international law rules.

A third category does exist, on the reality of which the participants to this symposium were most probably invited to pay a specific attention, as its very title asks the question whether advisory opinions are 'a suitable substitute to contentious cases'. As often, one could say: 'the answer is "yes", but by the way, what is the question?'. If advisory opinions are mainly perceived in their dimension of jurisdictional acts providing the Court with an opportunity to elaborate on the meaning and scope of international law norms, the answer to this question may then be positive, as previously discussed, keeping in mind that, precisely because of the absence of compulsory effect, the Court may, from time to time, be incited to issue *obiter dicta* more easily than in the specific context of contentious cases.

Nevertheless, if advisory opinions are foreseen from another perspective, namely as possible substitutes to judgments (as the title referred to above seems to invite us to think) then, on the basis of the Court's practice, the answer can only remain extremely careful. Let's think in particular of the *Western Sahara*, the *Wall in Palestine* and the *Kosovo* Opinions. In terms of settlement of inter-State disputes, the very issue lying – quite evidently – behind the question asked to the Court, the result reached in each of the three cases is not necessarily very convincing. The Western Sahara dispute between Morocco and Algeria (not to speak of Mauritania) was hardly settled by the 1975 Advisory Opinion[17] of the Court and serious tensions are still now easily discernible

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[14] *Legality of the Threat or Use of Nuclear Weapons* (note 2).

[15] L. Boisson de Chazournes and P. Sands (eds.) *International Law, the International Court of Justice and Nuclear Weapons* (CUP Cambridge 1999).

[16] See P.-M. Dupuy 'Between the Individual and the State: International Law at a Crossroads?' in Boisson de Chazournes and Sands (note 15) 449–61.

[17] *Western Sahara* (note 6).

between the two States with regard to the Western Sahara issue. The Wall in Palestine is, to say the least, not more convincing, even for the authority of the Court the courage and determination of which are to be saluted in this case. As everyone knows, Israel simply did not take into account any of the very rich and interesting points of law including the relationship between *lex specialis* and *lex generalis*, humanitarian law, human rights and rights of people, the content and extent of the obligations of the occupying power, and so on. Israel simply ignored the whole of the ICJ's Advisory Opinion.

As far as *Kosovo*[18] is concerned, the story is still going on. It is true that Serbia made a declaration after the issuing of the opinion stating that it would take it into account; but this result was in fact achieved thanks to a visit of Guido Westerwelle, the Foreign Minister of Germany, who rushed to Belgrade after he heard that the Serbian Government was absolutely decided not to change its opinion about the situation of the Kosovo after the Opinion given by the ICJ. And he told them in substance: 'if you don't change your mind, you will never enter the European Union!'. I am not saying that the Court is necessarily to be blamed for the absence of actual impacts of its opinions related to the settlement of disputes. On the basis of its Statute, Serbia is not bound by the Opinion on Kosovo; one could even say that it is primarily Serbia itself, together with the countries that formulated the question submitted by the General Assembly to the Court which are to be criticized for not having been able to elaborate a more precise and constructive question.

Now, did the Court at least provide the most directly concerned actors as well as the international community with a substantial contribution as far as the legal rules and principles of reference are concerned, such rules and principles being potentially helpful to solve the many legal problems raised by the situation prevailing in Kosovo?

As we all know, there exist quite different views about this. One should of course not underestimate the difficulty of the task given to the Court on the basis, first, of the very restrictive formulation of the question put to it, and, second, of the delicate political background in which the Court had the primary duty not to get involved. Whatever the case may be, it seems possible, as Judge Simma and some others among his colleagues explicitly did[19] to regret that the Court did not say more about

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[18] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 1).

[19] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) (Declaration of Judge*

strictly legal issues, such as the possible legal grounds likely to be invoked in order to justify a unilateral declaration of independence; how to reconcile the rights of people with the territorial sovereignty of a State now that the time of decolonization has historically come to an end? One may also have the feeling of a somewhat confusing analysis of the way in which the members of the provisional institutions of the self-government of Kosovo acted without binding the body to which they belonged (although the very formulation of the question asked to the Court by the UN General Assembly showed that this organ did consider that the declaration of independence was attributable to the Provisional Institutions of Self-Government of Kosovo [PISG] itself). One could have also expected more from the Court on the interpretation of UN Security Council Resolution 1244[20], which gave guarantees on Serbia's territorial integrity. Finally, the Court neither made any statement covering Kosovo's statehood nor did it indicate the possible impact of recognition of Kosovo by third States.

One may answer that these issues were not raised by the question brought to the Court by the UN General Assembly. One may also say that they were definitely implied by it and that the Court simply left aside an opportunity to clarify the law as well as to contribute to the settlement of some tricky legal problems. It's a matter of judicial policy for which the Court itself is responsible, in the short, middle and long term.

In that respect I would be tempted to say that such kind of advisory opinions are not necessary self-serving for the Court itself in terms of its authority *vis-à-vis* the member States of the United Nations although some of them may have been happy to hear from it that, back to the *Lotus* Case, under modern international law, everything which is not forbidden is permitted!

In the *Kosovo* case, contrary to what it had done in the Opinion issued about the construction of a Wall, the Court has thought that it could take advantage of the restrictive formulation of the question it had to

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Simma) (22 July 2010) ICJ Doc. 2010 General List No. 141 para. 9: 'By reading the General Assembly's question as it did, the Court denied itself the possibility to enquire into the precise status under international law of a declaration of independence'.

[20] UNSC Res. 1244 (1999) (10 June 1999) SCOR 54th Year 32.

answer for issuing an opinion *a minima* of which only the future will say whether it was a good choice in terms of efficiency.

Thank you very much.

*Comment by Alena F. Douhan**

Advisory Opinions of the Economic Court of the Commonwealth of Independent States: A New Means of Settlement of International Disputes in the Region?

The very notion of advisory opinions of international courts is complex and inconsistent. As J.B. Moore asserted with regard to the Permanent Court of International Justice 'no subject connected with the organization of [international courts] has caused so much confusion and proved to be so baffling as the question whether and under which conditions

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[they] shall undertake to give "advisory" opinions'.[1] Until the present, there has been very limited consensus on the nature, scope and effect of advisory opinions in international relations. Every element or characteristic of advisory opinions has caused, and still causes, heated debate. Until very recently it has even been questioned whether the advisory activity of international courts falls within their judicial function, since 'historically the function of the Courts has been to settle controversies between parties who have a real continuing adversary interest'[2] by means of decisions binding upon the parties.[3]

It is not, however, the purpose here to discuss in detail whether advisory opinions fall within the judicial function of international courts. This contribution, rather, seeks to establish whether interpretative decisions and advisory opinions of the Economic Court of the Commonwealth of Independent States (CIS EC) play a role in the settlement of international disputes in the region.

The impact of advisory opinions on international dispute settlement is sometimes considered in the international legal doctrine.[4] At the same time, the studies are mainly focused on the functions and practice of the International Court of Justice and stay silent as for regional courts.[5]

To determine the role of the CIS EC advisory opinions, this contribution will proceed in several steps. After considering the very notion of advisory opinions in international law, it will discuss in detail their intrinsic characteristics (mostly based on ICJ practice). The second part

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1 PCIJ 'The Question of Advisory Opinions: Memorandum by Mr. Moore, February 18th, 1922' PCIJ Series D No. 2, 383.

2 K.J. Keith *The Extent of the Advisory Jurisdiction of the International Court of Justice* (Sijthoff Leyden 1971) 15–22.

3 J.G. Merrils *International Dispute Settlement* (3rd edn. CUP Cambridge 1998) 121.

4 P. Kovács 'Rather Judgement than Opinion? Or Can We Speak about the Third Type Judicial Procedure before the International Court of Justice?' (2004) XX Anuario de Derecho International 447 (460); M. Pomerance 'The Advisory Role of the International Court of Justice and Its 'Judicial' Character: Past and Future Prisms' in A. Muller, D. Raič and J.M. Thuranszky (eds) *The International Court of Justice: Its Future Role after Fifty Years* (Nijhoff The Hague 1997) 271 (272–75).

5 As one of very few works on the topic, see T. Buergenthal 'The Advisory Practice of the Inter-American Human Rights Court' in Inter-American Court of Human Rights *La Corte Interamericana de derechos humanos: Estudios y documentos* (Corte IDH San José 1999) 27.

of the contribution focuses on several aspects. First, it provides a brief overview of the specifics and challenges of the CIS legal database. Then it will pay some attention to the legal regulation and judicial practice of the CIS EC. Third, through the lens of characteristics of advisory opinions, it seeks to qualify interpretative decisions and advisory opinions of the CIS EC as advisory opinions of international courts. And finally, it seeks to assess the role of advisory opinions in the settlement of international disputes with emphasis given to CIS EC interpretative decisions and advisory opinions.

I. Advisory Opinion: Notions and Characteristics

1. Historical and Conceptual Background

The notion of an advisory opinion is neither new nor exceptional in international judicial practice.[6] Twenty seven advisory opinions[7] were given by the PCIJ pursuant to Art. 14 of the Covenant of the League of Nations.[8] Before that, the advisory function had been inherent in national courts.[9]

Presently, the constituent documents of both the ICJ and regional courts (European Court of Human Rights, Inter-American Court of Human Rights, African Court on Human and Peoples' Rights, CIS EC, European Court of Justice) endow them with advisory jurisdiction (the Charter of the United Nations, Art. 96[10]; the ICJ Statute, Art. 65 [11];

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6 For the history of advisory opinions, see e.g. Pomerance (note 4) 271.

7 See Publications of the Permanent Court of International Justice (1922–1946) Series B *Collection of Advisory Opinions* <http://www.icj-cij.org/pcij/series-b.php?p1=9&p2=2> (7 February 2011); Series A/B *Collection of Judgments, Orders and Advisory Opinions* <http://www.icj-cij.org/pcij/series-a-b.php?p1=9&p2=3> (7 February 2011).

8 Covenant of the League of Nations (signed 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 195.

9 M.M. Aliaghoub *The Advisory Function of the International Court of Justice 1946-2005* (Springer Berlin 2006) 14; S. Rosenne *The World Court: What it is and How it Works* (5th edn. Nijhoff Dordrecht 1995) 106.

10 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 805.

Protocol No. 2 to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1950], Art. 1[12], American Convention on Human Rights [1969], Art. 64[13]; 1998 Protocol to the African Charter on Human and People's Rights [1981], Art. 4[14], Constitution of the Economic Court of the Commonwealth of Independent States [1992], para. 5[15] (CIS EC Constitution), Treaty on Functioning of the European Union (TEU) , Arts 218 (11), 267.[16]

Despite some past and existing doubts about the judicial nature of advisory opinions[17], it is generally agreed that advisory opinions are given by international courts in the course of exercising their judicial functions.[18] The same idea was repeatedly upheld by the PCIJ and ICJ.[19] In

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[11] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.

[12] COE 'Protocol No. 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Conferring upon the European Court of Human Rights Competence to Give Advisory Opinions' (opened for signature 6 May 1963, entry into force 21 September 1970) ETS No. 44.

[13] American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

[14] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) (1999) 20 HRLJ 269.

[15] Polozhenie ob Ekonomicheskom Sude Codruzhestva Nezavisimykh Gosudarstv, approved by the Agreement on the Status of the Economic Court of the Commonwealth of Independent States of 06 July 1992, *Sodruzhestvo*, 1992 (6).

[16] Treaty on the Functioning of the European Union (signed 13 December 2007, entered into force 1 December 2009) [2008] OJ C115/47.

[17] See e.g. Keith (note 2) 15–22; Merrils (note 3) 121.

[18] G. Griffith and C. Staker 'The Jurisdiction and Merits Phases Distinguished' in L. Boisson de Chazournes and P. Sands (eds) *International Law, the International Court of Justice and Nuclear Weapons* (CUP Cambridge 1999) 59 (67); R. Donner *International Adjudication: Using the International Court of Justice* (Suomalainen Tiedeakatemia Helsinki 1988) 119; K.J. Keith 'The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections' (1996) 17 AustralianYbIL 39 (42); Keith (note 2) 22–23; Aliaghoub (note 9) 117.

[19] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion)* [1960] ICJ Rep. 150 (153); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion) (22 July 2010)*

the *Northern Cameroon* case the ICJ clearly stated that 'both the Permanent Court of International Justice and this Court have emphasized the fact that the Court's authority to give advisory opinions must be exercised as a judicial function'.[20] Moreover, when giving advisory opinions, the ICJ has constantly been mindful of its responsibilities as 'the principal judicial organ of the United Nations' pursuant to Art. 92 of the UN Charter.[21]

Although the advisory jurisdiction of international courts is a usual part of their judicial function, it is not, however, intrinsic to the status of a body as an international court. The powers to give advisory opinions are to be set forth in the constituent documents of a particular court.

2. Characteristics of Advisory Opinions

Constituent documents of international courts and tribunals contain neither the definition nor characteristics of advisory opinions. They usually confine themselves to the minimal set of rules concerning the advisory jurisdiction of a particular court. Meanwhile, characteristics of advisory opinions have been neglected in the international legal doctrine. An attempt to sort out specific features of advisory opinions has been made, e.g., by H. Thirlway and T. Buergenthal.[22] H. Thirlway, in the *Encyclopedia of Public International Law*, refers to the legal nature of the request; the frequent (but not obligatory) relevance to the current

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ICJ Doc. 2010 General List No. 141 para. 27; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep. 16 (23); *Western Sahara (Advisory Opinion)* [1975] ICJ Rep. 12 paras 23–24, 32–33.

[20] *Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections)* [1963] ICJ Rep. 15 (30); on this problem see also Keith (note 2) 20–21.

[21] *See inter alia Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal (Advisory Opinion)* [1973] ICJ Rep. 166 para. 24; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal (Advisory Opinion)* [1982] ICJ Rep. 325 para. 22; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep. 136 paras 44–45.

[22] H. Thirlway 'Advisory Opinions' (2006) in R. Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law* <www.mpepil.com> (7 June 2011); Buergenthal (note 5).

international dispute; forwarding of requests by a defined class of international bodies rather than States; and the advisory rather than binding character of the opinion.[23] T. Buergenthal, analyzing the advisory function of the Inter-American Court of Human Rights, limits himself to the purposes of advisory opinions: 'to assist the American States in fulfilling their international human rights obligations'[24] and to articulate the general legal principles.[25] It is maintained here, however, that a determination of intrinsic characteristics of advisory opinions is necessary in order to be able to decide on their role in international dispute settlement.

Some basic guidelines can be derived from the wording of the ICJ Statute as well as from its practice: 1) ICJ has to act within the constraints of its constituent documents both as regards the subject matter and entitled applicants; 2) a request for an advisory opinion has to contain the exact statement of the question upon which an opinion is required; 3) advisory opinions are given on legal rather than political questions; 4) a request for an advisory opinion is often relevant to the existing dispute between States, between a State and UN organs and specialized agencies, or between a State and other subjects of international law; 5) when giving an advisory opinion the Court is to ascertain the applicable rules of international law; 6) the request for an advisory opinion can have some measure of abstractness; and 7) advisory opinions are not binding upon States.[26] Let me turn now to each of these in turn.

a. Applicants

Requests for advisory opinions can only be submitted by actors duly authorized by the court's constituent documents. Thus, it follows that the list of possible applicants may be different for every international court. As indicated in academic writings, drafters of the ICJ Statute took a negative attitude towards the possibility of allowing particular

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[23] Thirlway (note 22) para. 1.

[24] Buergenthal (note 5) 33.

[25] Ibid. 49.

[26] Art. 65 of the ICJ Statute; see also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion)* [1950] ICJ Rep. 65 (79); *Western Sahara* (note 19) para. 31; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) para. 47.

States to request advisory opinions from the ICJ independently.[27] Apparently only the UN General Assembly, the UN Security Council or other organs or specialized agencies of the UN duly authorized by the UN General Assembly may request advisory opinions of the Court (Art. 96 of the UN Charter). Regional courts *per contra*, due to their limited membership and specific jurisdiction, can give advisory opinions upon the request of international institutions and its member States (sometimes regardless of their non-recognition of contentious jurisdiction of a particular Court).[28]

b. Legal Nature of the Question

When a question is put before the ICJ, one or several States may claim that the nature of the dispute is political rather than a legal one and that therefore the Court has no jurisdiction over it (Art. 65 of the ICJ Statute limits its advisory jurisdiction to 'legal' questions). This question is particularly tricky because every international dispute always has important political aspects[29] and can sometimes even be viewed either as purely legal or purely political.[30]

The ICJ Statute does not explain which questions are 'legal' but some guidance can be found in the ICJ practice. In particular, the Court has assessed as 'legal' all questions which are 'framed in terms of law and rais[ing] problems of international law [..] are by their very nature susceptible of a reply based on law'[31]; issues of compatibility of any situation, fact or behavior with the relevant principles and norms of interna-

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[27] E. Hambro 'The Jurisdiction of the International Court of Justice' (1950-I) 76 RdC 121 (193, 196); B.A. Ajibola 'Dispute Resolution by the International Court of Justice' (1998) 11 LJIL 123 (125).

[28] Art. 64 (1) of the American Convention on Human Rights [1978]; para. 5 of the CIS EC Constitution (note 15); Arts 218, 267 of the TEU; Art. 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (note 14).

[29] A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds) *The Statute of the International Court of Justice: A Commentary* (OUP Oxford 2006) 1409; see also Griffith and Staker (note 18) 64.

[30] Keith (note 2) 50–62.

[31] *Western Sahara* (note 19) para. 15; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 19) para. 25.

tional law[32] and questions formulated in abstract terms requiring the interpretation of a treaty provisions.[33] The ICJ thus asserted that the existence of political aspects does not deprive a question of its 'legal' character.[34]

The task of regional courts is often, indeed, much easier. Their advisory jurisdiction is usually more specific and includes the interpretation of legal norms, and also how they correspond to the constituent documents of a particular organization or other international legal principles and norms (Art. 64 (1) of the American Convention on Human Rights; Para. 5 of the CIS EC Constitution; Art. 1 (1) of Protocol 2 to the European Convention on Human Rights).

c. Relationship to International Disputes

It is often asserted that most of the advisory opinions of the PCIJ and ICJ related to actual international disputes.[35] It is true that no actor will

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[32] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep. 226 para. 13; see also Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1408–09; Aliaghoub (note 9) 56–57.

[33] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep. 57 (61).

[34] *Conditions of Admission of a State to Membership in the United Nations* (note 33) 61–62; *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* [1950] ICJ Rep. 4 (6–7); *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter) (Advisory Opinion)* [1962] ICJ Rep. 151 (155). See also *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (note 21) para.14; *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 13; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) para. 27.

[35] Keith (note 2) 23–25; see e.g. *German Settlers in Poland (Advisory Opinion)* PCIJ Series B No. 6; *Access to German Minority Schools in Upper Silesia (Advisory Opinion)* PCIJ Series A/B No. 40; *Minority Schools in Albania (Advisory Opinion)* PCIJ Series A/B No. 64; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (note 26); *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (note 19); *Western Sahara* (note 19); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 19). In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) Israel argued that the subject matter of the request concerned the dispute between Israel and Palestine and 'more properly belonged before the Court in a contentious case'

intend to request an advisory opinion on a purely hypothetical question. It is asserted here, however, that not every situation causing a request for an advisory opinion really constitutes an international dispute, which is viewed as a specific disagreement on a point of law or fact between two subjects of international law expressly advancing conflicting claims and assertions.[36] When no specific claim or complaint has been openly advanced, one can speak about the controversy that can give rise to a conflict/ dispute.[37]

Due to the relevance of questions put before the ICJ to the existing disputes or controversies, the issue of the consent of involved States has repeatedly been invoked by States in the PCIJ and ICJ practice.[38] The only known case when the Court declined the request for an advisory opinion due to the lack of consent of all relevant States dates back to 1923 (*Status of Eastern Carelia*).[39] The ICJ, however, insists that con-

(ibid. para. 56). See also Fr.R.J. Araujo 'Implementation of the ICJ Advisory Opinion – Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [Do Not] Make Good Neighbors?' (2004) 22 Boston University International Law Journal 349 (361–63); I. Seidl-Hohenveldern 'Access of International Organizations to the International Court of Justice' in Muller, Raič and Thuranszky (note 4) 189.

[36] In *Mavrommatis Palestine Concessions (Greece v. Great Britain) (Jurisdiction)* PCIJ Series A No. 2 (11), which is universally viewed as constituting a starting point for defining what an international legal dispute is, the Permanent Court of Justice defined a dispute as 'a disagreement on a point of law or fact, a conflict of legal views or interests between two persons'. An open claim by one party and an open rejection of this claim is already sufficient for the ICJ to recognize the existence of an international dispute. See also R.B. Bilder 'An Overview of International Dispute Settlement' in M.E. O'Connell (ed) *International Dispute Settlement* (Ashgate Aldershot 2003) 3 (6); M.N. Shaw *International Law* (6th edn. CUP Cambridge 2008) 1068–69; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) (Preliminary Objections)* [1996] ICJ Rep. 595 para. 29; *Certain Property (Liechtenstein v. Germany) (Preliminary Objections)* [2005] ICJ Rep. 6 para. 25; Pomerance (note 4) 299–303.

[37] Shaw (note 36) 1068; Merrils (note 3) 463.

[38] *Status of the Eastern Carelia (Advisory Opinion)* PCIJ Series B No. 5, 29; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (note 26) 71; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (note 19) para. 101; *Western Sahara* (note 19) paras 12, 21, 24–34; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) paras 46–47.

[39] On this issue see also Keith (note 2) 89–95.

sent of the States involved is not entirely relevant in the advisory proceedings and only 'compelling reasons' could lead the Court to a refusal to give an opinion on this ground.[40]

d. Abstractness of Advisory Opinions

The approach of States towards the scope and exactness of questions submitted to the ICJ for advisory opinions has always been twofold. Some States and writers have maintained that the ICJ was not entitled to deliver advisory opinions related to the disputes existing between States in the absence of their consent, and that therefore the request for an advisory opinion could only be abstract.[41] Others, on the contrary, have questioned the authority of the Court to deliver advisory opinions with regard to any abstract questions.[42] The issue of abstractness of the request for an advisory opinion has been repeatedly considered by the PCIJ and ICJ. They both have repeatedly declined objections regarding the lack of authority to give an opinion as concerns abstract questions.[43]

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[40] *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO (Advisory Opinion)* [1956] ICJ Rep. 77 (86); *Certain Expenses of the United Nations* (note 34) 155; *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (note 19) 27; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (note 21) 183; *Western Sahara* (note 19) paras 24–30; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations (Advisory Opinion)* [1989] ICJ Rep. 177 paras 37–38; *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 14.

[41] Pomerance (note 4) 313.

[42] See e.g. written statements of States in the *Legality of the Threat or Use of Nuclear Weapons* (note 32); United States of America, Written Statement 1–7; United Kingdom, Written Statement paras 2.23–2.45; France, Written Statement paras 5–9; Finland, Written Statement 1–2; Netherlands, Written Statement paras 6–13; Germany, Written Statement para. 2 (b). See also Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1410.

[43] See e.g. *Certain German Interests in Polish Upper Silesia (Germany v. Poland) (Merits)* PCIJ Series A No. 7 18–19; *Western Sahara* (note 19) para. 19; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (note 26) 71; *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 15; *Conditions of Admission of a State to Membership in the United Nations* (note 33) 61; see also *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep. 47 (51); *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (note

Moreover, the allocation of the authority to request advisory opinions only to UN organs and specialized agencies promotes a further degree of abstractness. It guarantees that the question submitted for interpretation to the ICJ will be of a comprehensive rather than bilateral character.[44]

Although the abstractness of the request for an advisory opinion provides some advantages including the remoteness from the particular international dispute, no direct effect on the rights, duties and sovereignty of involved States, broader jurisdiction and flexibility of the court itself[45], it should, however, be upheld that the term 'abstract' is not to be understood as purely hypothetical, unclear or vague.[46] International courts are not academic institutions. It is thus asserted by the ICJ itself, as well as maintained in the legal doctrine, that a general reply goes beyond the judicial function of the Court. Such an opinion would only serve to confuse the issue and would not advise the requesting organ in respect of the problem which it faced.[47]

Meanwhile, in order to give a well-grounded advisory opinion, a court must be aware of facts and circumstances underlying the request. Although a court can make an inquiry into details of the underlying situa-

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19) para. 40; *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 15; Hambro (note 27) 166.

[44] Questions arising from the interpretation of bilateral arrangements (contrary to multilateral issues or matters of universal concern) are usually excluded from the scope of advisory jurisdiction of the ICJ because of their primary concern of bilateral relations. See in particular *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) para. 49; *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 12. See also Kovács (note 4) 450; Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1412–13.

[45] See *inter alia* Keith (note 2) 71.

[46] According to the *Webster's Third New International Dictionary* 'abstract' could be viewed as 'considered apart from any application to a specific object or specific instance' or as 'impersonal'. P.B. Gove (ed.) *Webster's Third New International Dictionary* (Encyclopaedia Britannica Chicago 1981) Vol. I *A to G* 8. M.O. Hudson views abstract questions as purely hypotherical, M.O. Hudson *The Permanent Court of International Justice 1920–1942: A Treatise* (MacMillan New York 1943) 497.

[47] *Legality of the Threat or Use of Nuclear Weapons* (note 32) para.15; *Legal Consequences of the Continued Presence of South Africa in Namibia (Separate Opinion of Judge Onyeama)* [1971] ICJ Rep. 144 (144–45); *Western Sahara (Separate Opinion of Judge Petrén)* [1975] ICJ Rep. 104 (108); see also Keith (note 2) 65; Pomerance (note 4) 286, 314; Griffith and Staker (note 18) 68–69.

tion itself[48], a question put before it by a request for interpretation, nevertheless, is not to be general or hypothetical. An application is supposed to make clear the facts, norms or situations to be considered or taken into account by the Court. I would therefore support a statement made by M.M. Aliaghoub, that a balance between abstractness and elements of factuality should be present in any request for an advisory opinion.[49]

The principle of significant abstractness remains valid for the essence and wording of advisory opinions themselves. It comes from the very nature and purpose of advisory opinions (to provide a guideline rather than to settle an international dispute[50]), that despite the exercise of its judicial function by a court when giving advisory opinions, as well as the existence of the controversy or a dispute related to requests, questions submitted for advisory opinions can not be handled in an equal manner to those in contentious cases.[51]

As a result, in order to render an opinion an international court has to ascertain the existence or absence of applicable legal principles and norms[52], and explain how they are to be applied. The latter could involve the court's statement on powers, rights and duties of relevant ac-

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48 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (note 19) 27; *Western Sahara* (note 19) paras 17–18.

49 Aliaghoub (note 9) 63.

50 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (note 19) para. 32; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep. 15 (19); *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 15. This approach has also been accepted by UN institutions, see e.g. UNGA Res. 1731(XVI) 'Administrative and Budgetary Procedures of the United Nations' (20 December 1961); UNGA Res. 3292(XXIX) 'Question of Spanish Sahara' (13 December 1974); UNGA Res. 42/229 B 'Report of the Committee on Relations with the Host Country' (2 March 1988). See also Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1410.

51 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep. 73 (97).

52 *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 105; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (note 19) 43–44; *International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep. 128 (143).

tors[53], as well as provide an abstract guideline for all States and institutions that face similar situations.

e. Legal Force of Advisory Opinions

It is universally recognized that advisory opinions are not binding upon either the parties of the relevant dispute (because no dispute is formally brought to the Court and no parties stand before it[54]) or on the requesting institutions.[55] The non-binding character of advisory opinions derives from their very nature and purpose – to assist 'the UN organs in the performance of their functions'[56] by the means of an authoritative legal advice or guideline in respect to their actions.[57] The ICJ has repeatedly maintained that advisory opinions are given not to the States, but to the requesting organ.[58]

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[53] *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep. 174 (187–88); *Competence of the General Assembly for the Admission of a State to the United Nations* (note 34) 10; *International Status of South-West Africa* (note 52) 144; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (note 26) 77; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (note 50) 28–30; *Competence of the General Assembly for the Admission of a State to the United Nations* (note 33) 65.

[54] See also Keith (note 2) 195; Donner (note 18) 112.

[55] See also S.K. Kapoor 'Enforcement of Judgments and Compliance with Advisory Opinions of the International Court of Justice' in R.P. Dhoralia and B.C. Nirmal (eds) *International Court in Transition* (Chugh Allahabad 1994) 300 (312); Seidl-Hohenveldern however asserts that opinions are binding upon the requesting institutions – see Seidl-Hohenveldern (note 35) 191; Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1415.

[56] See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (note 26) 72.

[57] See also *'Other Treaties' Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights) (Advisory Opinion OC-1/82)* IACtHR Series A No. 1 (24 September 1982) para. 25; Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1403, 1410.

[58] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (note 26) 71; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (note 50) 19; *Judgments of the Administrative Tribunal of the ILO* (note 40) 86; *Certain Expenses of the United Nations* (note 34) 155; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (note 40) 189; *Legality of the Threat or*

It is nevertheless maintained in this contribution that such an approach to advisory opinions is too formalistic. In practice, even the ICJ in its very carefully phrased opinions admitted that some effects of advisory opinions could go 'beyond the scope attributed to it by Charter'.[59] It is generally agreed in the international legal doctrine that because of the high authority of international courts, their opinions, although formally non-binding, have important effects on the development of international law, the activity of requesting institutions and the legislation of member States[60] and could also have a precedential value equal to that of a judgment.[61]

Publicists agree that UN organs and specialized agencies always have taken due account of the findings of the Court when deciding the matter before it, and have mostly acted in accordance with them.[62] As noted above, international courts in their advisory opinions ascertain the existence or absence of international legal norms and explain how they are to be implemented. The *Construction of the Wall* case could be an illustrative example. The ICJ without imposing directly any obligations over States and UN organs, ascertained their duties in accordance with international law.[63] Hence it follows that activity which conforms to the Court's conclusions is legal, but activity contrary to them is not. States can thus rely on the Court's expertise and apply countermeasures to the latter activity, and cannot claim illegality towards the former.[64]

These all bring me to some general conclusions about the nature and characteristics of advisory opinions:

Use of Nuclear Weapons (note 32) para. 14; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) para. 64.

[59] *Judgments of the Administrative Tribunal of the ILO* (note 40) 82.

[60] Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1415; Buergenthal (note 5) 49, 59.

[61] This position is, in particular, maintained by Pomerance (note 4) 273; Kapoor (note 55) 312.

[62] See also Aliaghoub (note 9) 116–17; Keith (note 2) 205–21; Rosenne (note 9) 110.

[63] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (note 21) 201–02. This advisory opinion has been considered in details by Kovács (note 4) 455–56; Araujo (note 35) 382–97.

[64] For the analysis of legal consequences of advisory opinions see also Buergenthal (note 5) 1416, 1419.

1. Advisory jurisdiction of international courts falls within their judicial function.
2. Jurisdiction to give advisory opinions is not intrinsic to the status of a body as an international court. The competence of a court to give advisory opinions is to be expressly set forth in its constituent documents.
3. Advisory opinions are given on legal questions. The scope of advisory jurisdiction is defined by the constituent documents of a particular court.
4. Requests for advisory opinions are always relevant to the existing international dispute or controversy.
5. Both the request for an advisory opinion and an opinion itself should maintain a balance between abstractness and factual accuracy.
6. The purpose of the advisory opinion is to provide legal guidance for the requesting actor and in practice also for member States of a particular organization, as to the existence/absence of legal norms in a particular case, the proper behavior, etc.
7. International courts are judicial rather than legislative organs.[65] They are entitled neither to create new international legal norms nor to impose any obligations upon the States in the course of their advisory function. At the same time, if a court ascertains the existence of applicable treaty or customary norms, both requesting institutions (States) and other members of organizations (organs of this organization) will be bound by their relevant norms, due to their binding nature.

II. Advisory Opinions of the CIS Economic Court

1. CIS Legal System

Before turning to the role of advisory opinions of the CIS EC, let me provide some background on the complexity of the CIS legal system.

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[65] See A. Boyle and C.M. Chinkin *The Making of International Law* (OUP Oxford 2007) 266–68.

Today, 19 years after the establishment of the Commonwealth of Independent States (CIS)[66], a complicated, multi-layer and often conflicting network of international organizations and inter-State entities has been created in the region. Due to the existence of multiple organizations and inter-State institutions with concurrent membership and similar competence, legal regulation of particular matters is often replicated and fragmentary.

The CIS is presently the most representative international organization in the region[67] with relatively broad subject competence. At the same time, the CIS organizational and legal framework is still very uncertain, confusing and fragmentary. To evaluate this point, the following problems are to be mentioned:

1. The system and legal status of the CIS organs are uncertain and contradictory with relatively low participation levels.[68]
2. Legal regulation in different areas of co-operation is currently rather considerable but the level of participation is, however, not that high. More than 29 per cent of adopted documents have been recognized as void after the inventory in 2008–2009.[69] 57.7 per cent of CIS documents, which were supposed to be either ratified or accepted through some other internal

[66] The CIS has been established in accordance with Soglashenie o Sozdanii Sodruzhestva Nezavisimykh Gosudarstv (Agreement on the Establishment of the Commonwealth of Independent States [CIS Agreement] [8 December 1991]) (1992) 1 Sodrizhestvo; Protokol k Soglasheniu o Sozdanii Sodruzhestva Nezavisimykh Gosudarstv [Protocol to the CIS Agreement] [21 December 1991]) (1992) 1 Sodruzhestvo; Alma-Atinskaya Deklaratsia [Alma-Ata Declaration] [21 December 1991]) (1992) 1 Sodruzhestvo; Ustav Sodruzhestva Nezavisimykh Gosudarstv [CIS Statute] [22 January 1993]) (1993(1)) 9 Sodruzhestvo).

[67] There are currently 11 member States (Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, Ukraine).

[68] According to information of the Legal department of the CIS Executive Committee, there are currently 82 organs in the CIS incl. 7 statutory organs and 75 organs of sectoral cooperation. There are also 9 bodies with unclear status, which stay in some conjunction with the CIS. Information about CIS organs are available at <http://cis.minsk.by/page.php?id=2374> (8 June 2011).

[69] According to information of the Legal department of the CIS Executive committee, 1925 documents have been adopted by CIS organs in the period from December 1991 to June 2010. 566 of them (29.4 per cent) became invalid after the inventory of 2008–2009; see <http://cis.minsk.by/page.php?id=8926> (8 June 2011).

procedure, came into force for more than half (6 of 11) of member States (38.4 per cent of documents adopted in 2001–2010). 15.4 per cent (25.4 per cent correspondingly) of the above acts came into force for only 2 or 3 CIS member States.[70]

3. Until the present no clear decision-making process exists within the CIS.[71] Some decisions are taken by means of signature and provide for either ratification or certain internal procedures, or the notification that no internal procedure is required.[72] Some of these decisions correspond to qualifying criteria set forth by Art. 2 of the Vienna Convention on the Law of Treaties of 1969.[73] As a result, it is hardly possible to distinguish between international treaties, acts of the Council of the Heads of States and acts of the Council of the Heads of Governments.[74]

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[70] Information on Fulfillment of Internal Procedures as for Documents Adopted within CIS 1991–2010 is available at <http://cis.minsk.by/page.php?id=8926> (8 June 2011).

[71] According to Art. 23 of the CIS Statute and Rule 16 of the Rules of Procedure (O Pravilakh Protsedury Soveta Glav Gosudarstv, Soveta Glav Pravitelstv, Soveta Ministrov Inostrannykh Del I Ekonomicheskogo Soveta SNG, Reshenie Soveta Glav Gosudarstv SNG [On the Rules of Procedure of the Council of the Heads of States, Council of the Heads of Governments, Council of the Ministers of Foreign Affairs, CIS Economic Council, Decision of the CIS CHS (Rules of Procedure)] of 22 October 2002, *Sodruzhestvo* 41 2002(2)), decisions of CIS main organs are taken by consensus. In practice they are signed by the representatives of States and sometimes are also ratified. According to para. 7 of the Decision of the CHG of 2 April 1999 'O Sovershenstvovanii I reformirovanii sisttemy organov SNG' (On the Perfection and Reformation of the Structure of CIS Organs) of 2 April 1999, *Sodruzhestvo*, 31 (1999(1)), decisions of CIS statutory organs are binding for States parties to these decisions and only for them.

[72] More than 296 of 1353 valid decisions: <http://cis.minsk.by/page.php?id=8926> (8 June 2011).

[73] Vienna Convention on the Law of Treaties (concluded 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[74] According to the Rule 16 of the Rules of Procedure 'Highest organs of the CIS could take within their competence statements, addresses and protocol decisions. During the sessions of the abovementioned organs, international treaties are concluded. Decisions are taken in the sphere of institutional law'. See also I.A. Barkovskij *Pravotvorchskaia Deiatelnost' Sodruzhestva Nezavisimykh Gosudarstv* (Norm-creating activity of the Commonwealth of Independ-

4. Due to the mutually exclusive provisions of legal documents on the norm-creating process within the CIS, and their incomparability with standards of institutional law, it is currently impossible to distinguish between institutional and operational acts of the CIS. Decisions in both spheres are sometimes taken by the minority of states (e.g. by 2 or 3 of 11) and come into force, but are obligatory only for those States which voted for them[75].
5. A vast number of documents adopted within the CIS is rather general and fragmentary.
6. As a result, a lot of discrepancies appear. Therefore, there is a clear need for legal advice of some authoritative judicial body or some effective mechanisms of settlement of the existing disputes and discrepancies.

2. Non-inherent Right to Interpret – Historical Background on the CIS Economic Court's Right to Interpret

The CIS EC was established in 1992,[76] shortly after the disintegration of the Soviet Union, with the purpose of settlement of economic disputes between newly independent States (Art. 5 of the Agreement on the Measures to Ensure an Accounting between Enterprises of CIS

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ent States 2007) 89; I.A. Barkovskij 'Specifics of the CIS Legal Acts' (2004(4)) Belarusian Journal of International Law and International Affairs <http://evolutio.info/index.php?option=com_content&task=view&id=710&Itemid=55> (8 June 2011); I.A. Korolev 'Problems Sootnozhenija Pravovykh Aktov Gosudarstv-Uchastnikov SNG I Reshenij Organov SNG' (Problems of Relation of the Legal Acts of the CIS member States and Decisions of CIS Organs) (1995(2)) State and Law 3; V.P. Kirilenko, I.V. Mishal'chenko 'Pravo Sodruzhestva Nezavisimykh Gosudarstv v. Sisteme Mezhdunarodnogo Prava' (Law of the Commonwealth of Independent States in the International Legal System) (2003(3)) Moscow Journal of International Law 109 (114).

75 There are no provisions about the required number of supporting States. However, the fact that States do not sign a decision doesn't preclude it from being taken and coming into force (Art. 23 of the CIS Statute).

76 Soglashenie o statuse Economicheskogo Suda Sodruzhestva Nezavisimykh Gosudarstv (Agreement on the Status of the CIS Economic Court) of 6 July 1992 (1992(6)) Sodruzhestvo 6.

States[77]). In fact, it was designed as a substitute for the USSR Supreme Economic Court.[78]

Constituent documents endow the CIS EC with rather limited jurisdiction. In accordance with Art. 32 of the CIS Statute and para. 3 of the Constitution of the CIS EC,[79] the Court is entitled to settle disputes between the States parties to the CIS EC Agreement 'concerning the fulfillment of economic obligations arisen from international agreements, acts of the CIS Council of the Heads of States, Council of the Heads of Governments and other CIS Institutions; as well as concerning the compliance of CIS acts adopted on economic matters to the agreements and other acts adopted within the CIS'. Any other disputes could be considered by the Court upon the agreement of parties.

Due to the narrow jurisdiction of the CIS EC and unwillingness of CIS member States to submit their disputes for international adjudication,[80] in the period of 1994 to 2010 only eleven applications for dispute settlement had been submitted to the CIS EC. In five cases the Court found that it had no jurisdiction either *ratione personae*[81] or *ratione materiae*.[82]

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77 Soglashenie o merach po obespecheniu uluchshenia raschetov mezhdu khozyajstvennymi irganizatsiami stran uchastnits Sodrozhestva Nezavisimykh Gosudarstv (Agreement on the Measures to Enhance Payments between entities of the CIS Member States) of 15 May 1992 (1992(5)) Sodruzhestvo 5.

78 For the history, functions, procedures and activity of the CIS EC in detail see A.F. Douhan (et al.) *Ekonomicheskij Sud Sodruzhestva Nezavisimykh Gosudarstv: 15 Let* [The Economic Court of the Commonwealth of Independent States: 15 Years] (Kovcheg Minsk 2008).

79 Confirmed by the CIS EC Agreement.

80 Presently no CIS member State has recognized compulsory jurisdiction of the International Court of Justice on the basis of Art. 36 of the ICJ Statute – ICJ 'Declarations Recognizing Jurisdiction of the Court as Compulsory <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (8 June 2011); only 6 member States are currently members of the Agreement on the CIS EC Status – CIS Economic Court history <http://www.sudsng.org/about/history/> (8 June 2011).

81 Orders No. 01–1/4–2000 of 20 December 2000, No. C–1/8–96 of 9 April 1996, No. 01–1/3–2000 of 7 July 2000; No. 01–1/5–03 of 19 November 2003; CIS Economic Court Archives (2010).

82 Order No. C–1/16–96 of 6 February 1996; CIS Economic Court Archives (2010).

If the CIS EC were only entitled to settle international economic disputes, the proponents of its ineffectiveness would be right. Constituent documents of the Court, however, endow it with a competence to interpret 'provisions of international agreements, CIS acts and legal acts of the former USSR in the period of their mutual application' upon requests of State authorities, Supreme Economic Courts of CIS member States, and CIS institutions (Art. 32 of the CIS Statute; para. 5 of the CIS EC Constitution). Neither the CIS Statute nor the CIS EC Constitution provide any guideline regarding the procedure and form of interpretative acts. These issues are clarified in the Regulations of the Court.[83] According to Chapter 6 of the Regulations, the CIS EC, in response to the request for interpretation, can take an interpretative decision or an advisory opinion (paras 127 and 143). As for August 2010, the CIS EC has considered 89 requests for interpretation, took 59 decisions, 25 advisory opinions and 14 orders interpreting earlier decisions and advisory opinions.[84]

3. CIS Economic Court Acts as Advisory Opinions

Whereas the CIS EC takes different acts upon requests for interpretation, I intend now to look at them through the lens of characteristics discussed in the first part of this contribution, to determine whether interpretative decisions and advisory opinions of the CIS EC can be viewed as advisory opinions of an international court.

a. Jurisdiction

In accordance with its constituent documents and provisions of other treaties the CIS EC is empowered to interpret provisions of international treaties, acts of CIS institutions, legal acts of the former USSR mutually applied by the CIS member States (para. 5 of the CIS EC Constitution; Art. 32 of the CIS Charter), international treaties concluded within the Eurasian Economic Community (EurAsEC), acts of EurAsEC institutions (Art. 13 (3) of the Statute of the EurAsAC

[83] Reglament Ekonomicheskogo Suda Sodruzhestva Nezavisimykh Gosudarstv (Regulations of the CIS EC) <http://www.sudsng.org/download_files/docs/regl_2010.pdf> (8 February 2011).

[84] Survey of the CIS EC practice <http://www.sudsng.org/database/sudobzor/> (8 June 2011); CIS EC Archive (2010).

Court[85]), constituent documents of the Customs Union (of Belarus, Russia and Kazakhstan), Acts of the Customs Union's institutions (Art. 13 (4) of the Statute of the EurAsEC Court).[86]

b. Applicants

Requests for interpretation can be submitted only by duly authorized institutions. They are: State authorities and Supreme economic courts of CIS and EurAsEC (as concerns EurAsEC and Customs Union issues) member States, CIS institutions, the Interstate Council, the Interparliamentary Assembly and Integration Committee of EurAsEC (para. 5 of the CIS EC Constitution; Art. 13 (3) Statute of EurAsEC Court).

c. Legal Question

According to its constituent and other documents, the CIS EC is only entitled to interpret provisions of international treaties and acts taken by international institutions that constitute, as clearly asserted by the

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[85] Statut Suda Evrazijskogo Economicheskogo Soobschestva (Statute of the Court of the Eurasian Economic Community), Decision of the EurAsEC Interstate Council No. 502 (5 July 2010) CIS EC Archives (2010).

[86] In accordance with Arts 1, 3 of the Agreement between the Commonwealth of Independent States and Eurasian Economic Community on the Endowment of the CIS Economic Court with Functions of the EurAsEC Court (3 March 2004), CIS EC acts as the EurAsEC Court. See Soglashenie mezhdu Sodruzhestvom Nezavisimykh Gosudarstv I Evrazijskim Ekonomicheskom Soobschestvom o Vypolnenii Ekonomichskim Sudom SNG Funktsij Suda EvrAzES (Agreement between the CIS and EurAsEC on the Fulfillment by the CIS EC of the EurAsEC Court's Functions) (3 March 2004) *Electronic Legal Database Konsul'tant Plus: Belarus'. Technologiia 3000*. Interpretation of acts of the Customs Union can be currently done intermediately through the functions of the EurAsEC Court. The CIS Economic Court is planned to be expressly endowed with this sanctions as soon as the corresponding protocol comes into force. See Proekt Protokola o Vnesenii Izmenenij v. Soglashenie o Vypolnenii Ekonomicheskom Sudom SNG Funktsij Suda EvrAzES (Draft Protocol on Amendment of Agreement on the Endowment of the CIS EC with Functions of the EurAsEC Court), Annex to the Decision of the EurAsEC Interstate Committee No. 502 (5 July 2010); Archives of the CIC EC (2010).

ICJ, 'legal' questions.[87] This basically means that the scope of the CIS EC advisory jurisdiction is narrower than that of the ICJ. At the same time this narrower competence makes the task of the CIS EC easier. The CIS EC is not to decide whether the question is legal or political. The appropriateness of the subject matter of the request can not be the question of interpretation as well.[88]

d. Existence of an International Dispute

A wide range of requests for interpretations has been related to existing disputes between CIS member States or between States and CIS institutions.[89] Other requests for interpretations have arisen from controversies between the CIS member States and/or CIS institutions, *inter alia* as concerns the uniform application of legal acts adopted within the CIS. In particular, a significant number of requests in social and economic matters have been submitted by CIS institutions after multiple complaints from individuals and legal entities about the ambiguous and contradictory interpretation of particular treaties and CIS acts, their non-uniform implementation and application by member States.[90]

e. Abstractness of the Request

A request for an interpretation is to contain the exact statement of the question to be answered by the CIS EC (para. 117 of the CIS EC Regu-

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[87] *Competence of the General Assembly for the Admission of a State to the United Nations* (note 34) 61; *Legality of the Threat or Use of Nuclear Weapon* (note 32) para. 13; see also Zimmermann, Tomuschat and Oellers-Frahm (note 29) 1408–09; Aliaghoub (note 9) 56–57.

[88] Decision No. C–1/9–96 of 15 May 1996.

[89] See e.g. Decisions No. 14/95/C-1/7-96 of 14 March 1995; No. 11/95/C-1/4-96 of 25 March 1997; No. 01-1/1-02 of 24 June 2002; No. 01-1/6-03 of 11 March 2004; No. 01-1/2-05 of 2 March 2006, No. 01-1/4-06 of 5 June 2007; No. 01-1/1-02 of 24 June 2002; No. 01-1/7-08 of 13 June 2008; No. 01-1/9-08 of 16 September 2008; No. 01-1/1-06 of 10 August 2006; Advisory Opinion No. 01-1/2-2000 of 26 July 2000.

[90] See e.g. Advisory Opinions No. 01-1/3-08 of 20 April 2009; No. 01-1/2-08 of 6 February 2009; No. 01-1/1-09 of 28 September 2009;No. 01-1/2-09 of 3 February 2010; No. 01-1/2-2000 of 26 July 2000; Decisions No. 01-1/4-07 of 17 March 2008; No. 01-1/5-07 of 10 April 2008; No. 01-1/1-07 of 20 September 2007; No. 01-1/3-03 of 16 December 2003.

lations; Art. 26 (4) of the Statute of the EurAsEC Court). In view of the CIS EC competence, such question(s) should concern the interpretation of a particular legal norm, rather than to submit a dispute or a situation to the Court that by itself provides some abstractness. Moreover, due to the general unwillingness of CIS member States to submit disputes for international adjudication, they often try to distance themselves from the request and submit it through CIS institutions.[91]

At the same time, questions laid before the CIS EC are not purely hypothetical. As noted above, they are always relevant to international disputes or controversies. Applicants refer to the ambiguous understanding or application of a particular legal norm or norms by CIS member States or institutions;[92] the conflict between specific legal norms;[93] unclear or framework nature of regulation or particular legal norm.[94] All necessary materials are to be submitted together with the application (para. 5 of the CIS EC Constitution; Art. 26 (4) of the Statute of the EurAsEC Economic Court).

f. Legal Force of Interpretative Acts

Neither the constituent documents nor the Regulations of the CIS EC regulate the legal force of acts taken upon requests for interpretation. In view of the derivative nature of the CIS EC, it thus follows that interpretative decisions and advisory opinions of the CIS EC are not binding. Art. 26 (4) of the Statute of the EurAsEC Court clearly states that advisory opinions are recommendatory.

Historically the wording of CIS EC Regulations has been slightly confusing on this point. In particular, Regulations adopted in 1994 provided for the possibility to appeal both the interpretative decisions and

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[91] According to the information of the CIS EC Secretariat, 64 per cent of requests for interpretation have been submitted by CIS and EurAsEC Institutions <http://www.sudsng.org/database/sudobzor/> (8 June 2011).

[92] See e.g. Advisory Opinions No. 01-1/2-98 of 23 June 1998; No. 01-1/2-02 of 10 September 2002; No. 01-1/4-09 of 1 March 2010; Decisions No. 07-95 of 21 December 1995; No. 01-1/5-99 of 20 January 2000; No. 01-1/2-05 of 2 March 2006.

[93] Decision No. 01-1/2-06 of 21 February 2007; Order No. 01-1/4-08 of 10 February 2009.

[94] Advisory Opinions No. 01-1/6-06 of 22 March 2007; No. 01-1/3-07 of 9 November 2007; No. 01-1/5-09 of 22 March 2010.

advisory opinions to the plenary session of the Court;[95] this could be a relic of the USSR Supreme Economic Court, taken as a pattern for the CIS EC. As far as this approach was incompatible with the very notion of advisory opinions and undermined the authority of the CIS EC as an international court, it was excluded from the Regulations adopted in 1997 (which are still currently in force with amendments of 14 April 2010).

Despite the non-binding character of interpretative decisions and advisory opinions of the CIS EC, States and CIS institutions usually take due account of the conclusions of the Court. Several times the Court has been requested to interpret the very framework documents before CIS institutions and States could decide on their further steps, e.g. as concerns the status of associated members[96] or the process of drafting of international treaties within the CIS.[97]

g. Abstractness of Interpretative Decisions and Advisory Opinions

Acts taken by the CIS EC upon requests for interpretation are usually rather abstract. The Court does not attempt to impose any obligations on particular States. Usually it confines itself to answering the questions put before it, a statement of the relevant rules of international law and the way they are to be applied (e.g. '[…] relations are to be regulated […]'; 'the term […] is to be understood as […]'; 'in accordance with […] norm the following steps are to be taken […]'). The wording 'States should' despite its abstract nature has been used very rarely.[98] Due to the non-binding nature of interpretative acts, the CIS EC never prescribes any specific steps either to CIS member States or CIS institutions. Sometimes the CIS EC makes recommendations, which can be

[95] Interpretative decisions of the period 1994–1997 refer to the possibility to appeal within 1 month – 3 months term – see e.g. Decisions No. 07/95 of 21 December 1995; No. C-1/17-96 of 23 January 1997; No. C-1/12-96/C-1/18-96 of 21 January 1997; No. 13/95/C-1/6-96 of 28 February 1996; No. 05/95 of 30 May 1995.

[96] Advisory Opinion No. 01-1/6-06 of 22 March 2007.

[97] Advisory Opinion No. 01-1/3-07 of 9 November 2007.

[98] See e.g. Advisory Opinions No. 01-1/1-09 of 28 September 2009; No. 01-1/4-09 of 1 March 2010.

(as opposed to the relevant binding legal norms ascertained by the Court) easily ignored by States.[99]

h. Forms of Acts

According to the CIS EC Regulations two different types of acts can be taken in response to a request for an advisory opinion: interpretative decisions and advisory opinions (paras 127 and 143). This does not concern situations when the CIS EC acts as the EurAsEC Court. According to Art. 26 of the Statute of the EurAsEC Court, it can then take only advisory opinions.

Para. 127 of the Regulations stays silent concerning the moment when the form of an interpretative act is to be chosen. The Court's practice has, however, shown that it can be taken at any moment before the decision is announced. The Regulations also provide no guidelines concerning the difference between these acts. It only says that advisory opinions can be given both for the whole request and for any particular question.[100] The CIS EC in fact responds in the form of an advisory opinion when the question put before it has been too abstract or when a request concerns the interpretation of a document as a whole rather than of some particular legal norms, often with the use of universal legal norms and international legal doctrine in the absence of applicable CIS norms.

It seems, therefore, that invention of advisory opinions as a separate form of interpretative act has been developed with the intention of broadening the otherwise fairly limited advisory jurisdiction of the CIS EC. Both forms of interpretative acts are taken upon requests for interpretation; they give interpretations in response to the legal questions put before the Court, and the same rules are to be applied in the process of consideration (para. 127 of the CIS EC Regulations). Consideration of the characteristics of the CIS EC interpretative jurisdiction brings me to the conclusion that both interpretative decisions and advisory opinions of the CIS EC are advisory opinions as they are viewed in the world practice.

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[99] See e.g. Advisory Opinion No. 01-1/3-07 of 9 December 2007; Decisions No. 01-1/2-07 of 26 March 2008; No. 01-1/5-07 of 10 April 2008; No. 01-1/6-07 of 20 May 2008; No. 01-1/2-06 of 21 February 2007.

[100] See e.g. Decision No. C-1/19-96 of 15 May 1997 and Advisory Opinion No. C-1/19-97 of 15 May 1997.

i. Advisory Opinions as a Means of Settlement of International Disputes

As repeatedly asserted in the earlier parts of this contribution, a dispute or a controversy related to the questions put before an international court can always be found in any request for an advisory opinion. Therefore the question about the role of advisory opinions in the international dispute settlement is not of purely academic but rather of essential practical importance. It has been periodically debated in the international legal doctrine[101] but no clear answer has been given.

It has been generally maintained, including by the ICJ itself, that advisory opinions cannot be formally viewed as a means of international dispute settlement. The ICJ clearly stated in the *Legality of the Use of Threat of Nuclear Weapons* that 'the purpose of the [opinion] is not to settle – at least directly – disputes between States, but to offer legal advice to the organs and institutions requesting the opinion'.[102]

At the same time, despite its non-binding character, States and international organizations do always take due account of findings of international courts in advisory proceedings. As it had been claimed shortly after the establishment of the ICJ, advisory opinions have precedential moral value equal to those of the decisions in contentious cases.[103] By ascertaining facts (including the fact of the breach of particular legal norms[104]), as well as the existence or absence of applicable legal norms and clarifying the way of their application, they provide guidance for States and international organizations concerning the limits of their behavior in a particular situation or similar ones.[105] The view of the ICJ

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[101] P. Couvreur 'The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes' in Muller, Raič and Thuranszky (note 4) 83 (85, 113); Kovács (note 4) 460–63; K.H. Kaikobad *The International Court of Justice and Judicial Review: A Study of the Court's Powers with Respect to Judgments of the ILO and UN Administrative Tribunals* (Kluwer The Hague 2000) 120; Thirlway (note 22).

[102] *Legality of the Threat or Use of Nuclear Weapons* (note 32) para. 15.

[103] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion) (Separate Opinion of Judge Azevedo)* [1950] ICJ Rep. 79 (80); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Advisory Opinion) (Dissenting Opinion of Judge Winiarski)* [1950] ICJ Rep. 89 (91).

[104] Kovács (note 4) 462.

[105] *Interpretation of Peace Treaties (Dissenting Opinion of Judge Winiarski)* (note 90) 97; *Interpretation of Peace Treaties (Dissenting Opinion of Judge Zoričić)* [1950] ICJ Rep. 98 (87).

about the failure of international commitments and the breaches of international law, as rightly noted by P. Kovács, can hardly be challenged.[106]

I therefore join those publicists who consider that advisory opinions, though not being formally binding and varying from judgments[107], are in essence not that far removed from them.[108] I would indeed maintain that the development of international law[109] is not the only contribution of advisory activity of international courts in international dispute settlement. Although not being directly aimed at dispute settlement, advisory opinions can nevertheless have a very significant mediated pacifying effect, through establishing facts of breaches of international law, ascertaining the existence of legal rights and obligations of States and international organizations in a particular or similar situations, determining the limits of legal behavior, especially in situations when legal regulation is rather framework or uncertain, and contributing to the development of international law so that it can prevent future disputes. Due to the fact that requests for advisory opinions can relate not only to existing disputes but also to controversies that may give rise to a dispute in future, I will express this idea in different words: advisory opinions of international courts do have a significant impact on the settlement of existing international disputes and the prevention of prospective ones.

4. CIS Economic Court's Interpretative Acts – Dispute Settlement Effect

The advisory activity of the CIS EC has been by now fairly extensive. From 1994 to 2010 the Court has considered 88 cases upon requests for interpretation from CIS organs and member States and one case upon request of the EurAsEC Inter-parliamentary Assembly. Due to the limited membership in the relevant organizations and also the caution of member States towards the advisory jurisdiction of the Court, it has

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106 Kovács (note 4) 460.

107 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (note 51) 97.

108 Kaikobad (note 101) 56; see also Aliaghoub (note 9) 120; Kovács (note 4) 460–63.

109 On this issue see Couvreur (note 101) 85, 113; Keith (note 18) 40.

never been involved in considering the profound legal issues that the ICJ has had. It has, however, provided interpretation on a series of issues important for shaping the CIS and the CIS legal system and promoting the rule of law between and within CIS member States. The outcome of the CIS EC 'advisory' activity can be summarized as the following:

The CIS EC ascertained rights and duties of the CIS and EurAsEC as international organizations;[110] interpreted CIS membership issues;[111] developed criteria for the qualification of inter-State entities established within the CIS;[112] advised on the status and powers of CIS institutions;[113] and CIS employees.[114] The Court interpreted several issues concerning the succession of assets and debts of the former USSR, non-military sea craft and Komsomol property.[115]

The CIS EC ascertained criteria for the qualification of legal acts as either international treaties or acts of CIS institutions[116] and qualified every act being subject to interpretation in every request laid before it. In a view of the uncertain character of documents issued within the CIS, it provided CIS institutions and member States with some guidelines in the area and has been used by them in the inventory, for the

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[110] Advisory Opinions No. 01-1/2-98 of 23 June 1998; No. 01-1/3-05 of 10 March 2006.

[111] Decisions No. 01/94 of 31 March 1994; No. 02/94 of 31 March 1994; Advisory Opinion No. 01-1/6-06 of 22 March 2007.

[112] Decisions No. 07/95 of 21 December 1995; No. 08/95 of 13 December 1995; No. 01-1/3-98 of 15 September 1998; No. 01-1/1-2000 of 27 June 2000; No. 01-1/5-04 of 31 January 2005.

[113] Decisions No. C-1/9-96 of 15 May 1996; No. C-1/17-6 of 23 January 1997; No. 01-1/7-97 of 30 January 1998; No. 01-1/7-07 of 13 June 2008; No. 01-1/9-07 of 16 September 2008; Advisory Opinion No. 01-1/4-05 of 18 April 2006.

[114] Decisions No. 01-1/2-2001 of 2 October 2001; No. 01-1/7-04 of 11 November 2005; No. 01-1/1-05 of 22 November 2005; No. 01-1/2-05 of 2 March 2006; No. 01-1/1-06 of 10 May 2006; Advisory Opinions No. 01-1/4-03 of 17 February 2004; No. 01-1/4-09 of 1 March 2010.

[115] Decisions No. 14/05/C-1/7-96 of 14 March 1996; No. C-1/10-96 of 22 May 1996; Advisory Opinion No. 10/95/C-1/3-96 of 23 May 1996.

[116] Decisions No. C-1/3-97 of 15 January 1998; No. 01-1/1-98 of 22 June 1998; Advisory Opinion No. 06/95/C-1/1-96 of 15 May 1996.

Single Register of the CIS legal acts, as well as when drafting the Convention on the Status of the CIS Legal Documents.[117]

The CIS EC interpreted issues on the validity of reservations to international treaties, in particular because of their incompatibility with the object and purpose of the treaty.[118] It helped to settle some disputes between the CIS member States and prevented new disputes, as far as multiple reservations made to international agreements concluded within the CIS (and sometimes even to decisions of CIS institutions) have often been incompatible with the purpose and object of the relevant treaty.

The CIS EC persistently declared its adherence to the principle *pacta sunt servanda* and advised on the methods of implementation of international obligations into national legislation.[119] Twenty two interpretative decisions and advisory opinions concerned social guarantees of individuals, e.g. retirement, health insurance, and migration issues.[120] These issues became extremely urgent because of repeated population migrations in the Soviet and post-Soviet periods, framework regulation within the CIS and conflicting national legislation of member States.

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[117] See para. 9.1. of the Plan of Action of the Concept of Further Development of CIS; Kotseptsia Dalnejshego Razvitia Sodruzhestva Nezavisimykh Gosudarstv, Plan Realizatsii Kontseptsii, Reshenie Soveta Glav Gosudarstv SNG (Concept of the Future Development of the Commonwealth of Independent States, Plan of Action) Decision of the CIS CHS (5 October 2007) *Electronic Legal Database Konsul'tant Plus: Belarus'. Technologiia 3000.*

[118] Decision No. 01-1/1-98 of 22 June 1998; Advisory Opinion No. 06/95/C-1/1-96 of 15 May 1996. T. Buergenthal sees this as a good example of preventive activity – Buergenthal (note 5) 43; *Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts 74 and 75) (Advisory Opinion)* IACtHR Series A No. 2 (24 September 1982); *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights) (Advisory Opinion* OC-3/83) IACtHR Series A No. 3 (8 September 1983) para. 22.

[119] Advisory Opinions No. C-1/2-97 of 15 September 1997; No. 01-1/6-09 of 28 April 2010; Decisions No. C-1/3-97 of 15 January 1998; No. 01-1/2-01 of 2 October 2001; No. 01-1/2-03 of 24 June 2003.

[120] Decisions No. 13/95/C-1/6-96 of 28 February 1996; No. C-1/11-96 of 4 September 1996; No. 01-1/5-99 of 20 January 2000; No. 01-1/3-03 of 16 December 2003; No. 01-1/5-06 of 13 April 2007; Advisory Opinion No. 01-1/1-09 of 3 February 2010.

III. Conclusion

This contribution started with the question whether advisory opinions of international courts play any role in international dispute settlement. Despite the formal vagueness and abstractness of advisory opinions, the invariable aspiration of States to avoid any interference with their domestic policy and repeated objections over the ICJ advisory jurisdiction, in practice the answer is quite clear: yes, they do.

Indeed, advisory opinions are not designed to directly settle international disputes. They do it indirectly by establishing facts, breaches of international legal standards, ascertaining the existence or absence of international legal norms and imposing thereby constraints over the behavior of States, as well as through the impact they have on the development of international law and the promotion and protection of the rule of law in international relations. Those advisory opinions which relate to the controversies rather than to international disputes help to prevent the emergence of the latter.

The CIS EC is a relatively new international court that is not that well-known. It has rather limited subject competence. CIS member States are reluctant to submit their disputes for its consideration and sometimes even discuss perspectives for its liquidation.

At the same time the CIS legal system itself is of a rather framework and contradictory nature, that gives rise to the repeated controversies and disputes in the region. The approach of CIS member States to the CIS EC as an international court is not surprising. They are unwilling to submit their disputes to any form of international adjudication. In view of the existing advisory practice of the CIS EC, it may already be concluded that it has enough powers and authority to settle or prevent international disputes in different subject areas by the means of interpretation. Despite its limited competence and the cautious approach of the CIS member States, the Court currently appears to be the only feasible judicial institution for the settlement and prevention of international disputes in the region.

Discussion

A. von Bogdandy: Thank you for three excellent presentations with many interesting questions to discuss. Just to name some: we have had a powerful plea for the use of advisory opinions for the progressive development of international law and the plea to use more soft law instruments. And we also have the issue of whether the *Kosovo* Opinion has been successful or not.

T. Treves: Just a few observations. I have become actively involved in advisory opinions in the latest months as I am chairing the Sea Bed Disputes Chamber of the International Tribunal for the Law of the Sea in charge of delivering the first advisory opinion requested to that body. But of this Rüdiger Wolfrum has already spoken in his report.

I would like to make just a few very general observations which refer mostly to the International Court of Justice. In my view, the main reason for advisory jurisdiction is to compensate for the lack of ius standi of international organizations before the Court. While the Court is open only to States, international organizations are now protagonists of international life. They can somehow access the Court through the request of advisory opinions. In my view advisory opinions, read in that way, have performed quite well and they could further expand. What becomes more complicated is when advisory opinions become involved with States and their disputes. We cannot deny that, as shown very eloquently by Rüdiger Wolfrum, the applicable instruments permit this. In fact there are some disputes involving States that are submitted to the Court under the mask of an advisory opinion. There are even proposals to make the possibility for States to resort to advisory opinions more explicit. There are for instance – and here I include discussions concerning advisory opinions by the Law of the Sea Tribunal in its plenary composition – debates as to whether States or maybe little groups of States together, could request an advisory opinion. The proposal takes into consideration situations in which States don't dare to go to court for a real contentious case, or are prevented from doing so by cultural traditions diffident of the contentious approach to the settlement of disputes. I'm not sure this is a very wise course to pursue. Advisory opinions of course have a multilateral element, which can be very useful. I wonder, however, whether in many cases the idea of intervention

under Art. 63, intervention as of right, couldn't be a useful tool. Of course the fact that in this case the opinions are binding can be seen as a drawback.

In papers and interventions a long list of advantages of advisory opinions was developed. I would like to add one such advantage to the list. Advisory proceedings are more amenable to transparency than contentious cases. Indeed, the Rules of the Law of the Sea Tribunal as far as advisory opinions of the Sea Bed Disputes Chamber are concerned, make a contribution to that. All papers are available to everybody almost from the beginning. And if you look at the Law of the Sea Tribunal's website you will see what I mean.

One other element which has not been addressed very much apart from Rüdiger Wolfrum's report, is the question of discretion. I think the possibility for the ICJ to use its discretion in order not to accept to deal with a request for an advisory opinion is an underused tool. In the case most of the Advisory Opinions that have been heavily criticized, and I refer with approval to the remarks made by Pierre Dupuy, the undeniable difficulties underscored in the criticisms the opinions have received, could have been avoided by judicial restraint. In most advisory opinion cases before the Court, lawyers spend hours in explaining that the Court should not take the case. It has become almost a perfunctory ceremony, as they have never been followed since the Carelia case. So, in my view, the Court should exercise more generously its discretion by not taking up cases where it knows that the result can be dangerous or perhaps insignificant.

Y. Dinstein: Thank you very much, Mr. Chairman. I do not want to go into the very profound issue that Rüdiger Wolfrum mentioned *en passant*, namely, whether the legally binding can blend with the legally non-binding. As far as I am concerned, this is the equivalent of suggesting that the physical can blend with the metaphysical. The subject of soft law has recently become 'trendy', but I would caution against blurring the borderline between what is lawful and what is unlawful. In any event, the subject merits a full-scale discussion, and ought not to be treated lightly.

Let me focus, instead, on the theme before us. Do advisory opinions present a suitable alternative for the settlement of international disputes? Allow me to start with a counter-question: why are advisory opinions requested, in the first place, and why should a court of law comply with the request?

Obviously, there are exceptional instances in which the advisory opinion procedure is eminently useful and even indispensable. The best illustration that I can think of is the *Reparation for Injuries Advisory Opinion* of 1949. Remember the factual background. A dispute arose between a State (Israel) and the Secretary-General of the United Nations as to the competence of the Organization to bring an international claim against a Government, with a view to obtaining reparation for damages sustained by its agents in circumstances entailing State responsibility. What alternative modality existed for settling the dispute? After all, no contentious case could be envisaged before the International Court of Justice, since only States can be parties to such litigations. Even arbitration would have been useless if the United Nations lacked the competence to institute the proceedings. The long and the short of it was that the mechanism of seeking an advisory opinion from the Court as regards the legal standing of the Organization was the only practicable solution to a thorny problem. Indeed, once the Court pronounced that the United Nations possessed an international legal personality, and that it was vested with the capacity to bring international claims, the dispute was promptly settled in an amicable fashion.

Unfortunately, an advisory opinion of this category is the exception rather than the rule. Generally speaking, advisory opinions are sought and obtained in contexts where their usefulness is, to say the least, debatable. It will not be unjustified to ask ourselves what might be the reasons triggering recourse to the advisory opinion procedure. In my opinion, in most instances, one of three rationales lies behind the move to make use of this technique. Let me call them (i) stimulus; (ii) *deus ex machina* and (iii) false shortcut.

The first inducement to take the path of an advisory opinion, the one that I call stimulus, exists when judges sit idly by, waiting for contentious cases which fail to be filed. As a favour to the court, and to the system in which it operates, an artificial request for an advisory opinion may then be engineered, in order to keep the judges occupied. This is actually how the Inter-American Court of Human Rights started its business. The trouble is that, in such a setting, the topics raised are inescapably examined *in abstracto*. There are no concrete issues before the court because there is no genuine controversy, and there are no *bona fide* adversaries. An advisory opinion of this kind is liable to prove unsatisfactory in the long term. Once a real dispute relating to a similar *materia* flares up in the fullness of time, the advisory opinion may have to be revisited.

The second impulse to set in motion an advisory opinion – the one that I call *deus ex machina* – is entirely different. I am thinking about a scenario in which statesmen and scholars debate *ad nauseam* a particularly bothersome international legal bone of contention. Being unable to arrive at a compromise (let alone a consensus), they might feel frustrated enough to say: 'Why not bring the matter somehow before the International Court of Justice, which will shed light on the situation?'. The *Legality of Nuclear Weapons* Advisory Opinion is the paradigmatic example. There are two flies in this ointment. First, if statesmen and scholars are at loggerheads, who is to guarantee that the judges at The Hague will not be equally divided and driven to offer their advisory opinion by seven votes to seven, with the President casting the decisive vote? Moreover, even if the Court can reach a majority, the outcome is likely to be presented in Delphic language that does not seriously put dissensions to rest. There are numerous illustrations of this syndrome, from *Western Sahara* to *Kosovo*. For those who initiated the Advisory Opinions in these instances, the Court's answers to the questions posed may look beside the point and border on a fiasco. Thus, with respect to Kosovo, the Court completely (almost surrealistically) avoided coming to grips with the acute question whether there exists a right to secession from an existing State in exercise of the right of self-determination.

The third catalyst to leveraging an advisory opinion is the most dangerous of all, and that is the false shortcut. What I mean is that relations between certain States are strained by a tension-inducing dispute, but the International Court of Justice does not have contentious jurisdiction in the absence of consent of one or more of the parties. The temptation then is to persuade the General Assembly to ask the Court for an advisory opinion, outflanking the obstacle of lack of contentious jurisdiction. This is a bait that the Permanent Court decidedly declined to be hooked by in the famous *Eastern Carelia* case. In contrast, the present Court is continuously going in harm's way, offering the excuse that it is only assisting the General Assembly in discharging its duties under the UN Charter. No wonder that, when the Court comes up with an answer to the question put forward by the General Assembly, the Advisory Opinion is usually simply ignored by the State(s) concerned. That is what happened in the *Wall* Advisory Opinion, as well as in quite a few previous proceedings. The relevant pronouncements of the Court have remained transcribed in the ICJ Reports, but they have not impacted on real life. Israel's security barrier in the West Bank has actually been redemarcated several times in response to Judgments rendered by

the Israel Supreme Court, but the *Wall* Advisory Opinion by the International Court of Justice has practically been disregarded.

To conclude, the subject of this symposium is the settlement of disputes. What dispute between States has ever been resolved through an advisory opinion? I believe that this is a rhetorical question. Let me just add, as a PS, that when the International Court of Justice delivers an advisory opinion that purports to settle a dispute in the absence of State consent to do so, the aftereffects do not necessarily enhance the reputation of the Court.

A. Koroma: Thank you, Mr. Chairman. I'm not asking for the floor at this moment. I just wanted to indicate the following: It's my policy not to discuss the Judgments of the Court. They should speak for themselves. You ask for one example of an advisory opinion being successful. We have not heard the ICJ's Advisory Opinion on Namibia discussed here this afternoon. I think one could find that the Advisory Opinion of 1971 on Namibia contributed to the successful resolution of the Namibian problem. Moreover, I would like to add that there are other issues regarding advisory opinions which Rüdiger Wolfrum could have mentioned. Advisory opinions contribute to the development of international law. Whether a case falls under contentious or advisory jurisdiction, the Court still applies international law. The Court does not apply different international law in deciding issues which are involved in a request for an advisory opinion. One other matter: I think reference was made to the issue of international legal personality in the *Expenses* Case, as well as in the Advisory Opinions of the Court relating to the *Genocide Convention* and *Kosovo*. In the two former cases the issues decided by the Court have found their expression as part of international law. So if we are looking for innovation, for alternative methods of dispute settlement, the examples are many. We are not discussing specific cases here, I thought we just wanted to see how advisory opinions could be used to solve international disputes.

G. Abi-Saab: There are many things to be said. But I pick up the last word of Rüdiger Wolfrum. He said that he was a heretic by saying that there is not much difference between binding and non-binding. I accept that. But I will be more heretic than he is. 43 years ago, in my first published book, I defended the idea that an advisory opinion is binding. But on whom? I mean, you take Art. 59 of the ICJ Statute, it says a judgment is binding on the parties. Here we have one party who asks

for the advisory opinion. It is the organ that requests it. Now, the advisory opinion gives an interpretation which is a finding – a finding in law. This finding in law cannot be reversed by a political organ. If a political organ – like the General Assembly – is dealing with a dispute, it doesn't have to decide only on the basis of law. But when it comes to the question of law, I think the findings of the opinion are binding on the organ, not on States because States are not parties to the proceedings. I'm speaking technically. And I don't see how a finding by the International Court in an advisory opinion can be considered as not binding on the requesting organ.

As to the question of discretion. Again, I am even more heretical. I don't think the Court has discretion to effuse to give the opinion. In the *Eastern Carelia* case, the Council of the League of Nations asked for an advisory opinion in a dispute between Finland – a member State – and the Soviet Federative Republic as it was then called – which was not a member of the League. Art. 17 of the Covenant said that the Council can deal with disputes between a member State and a non-member State if the non-member accepts the competence of the Council, which the Soviet Republic did not. Thus, the Council was itself acting beyond its jurisdiction. The Court could not say that. So it formulated its refusal in terms of exercising a discretion rather than telling the Council 'you are acting *ultra-vires*'. But thereafter the Court has never declined a request. It's a kind of a mantra to say 'I have a discretion', but invariably it proceeds to give the opinion. However, if the request attempts to bring indirectly a dispute between two States without the consent of one of them, this would amount, in my opinion, to a ground of inadmissibility for the use of an inappropriate means of seizing the Court.

About the question how useful advisory opinions are, I concur with Abdul Koroma. If we look, for example, at the law of the UN Charter, most of the law of the UN Charter has been built on advisory opinions including the *Expenses* case. We cannot forget this aspect, which is very very important in the role of advisory opinions. Thank you.

H. Türk: First of all, I fully agree with Pierre-Marie Dupuy, that advisory opinions may be useful for interpreting points of law. And I would add, that indirectly, they contribute to the peaceful resolution of disputes. Rüdiger Wolfrum has stated that advisory opinions have a disadvantage in not being binding. Here again, like Pierre-Marie Dupuy, I believe that this may prove to be an advantage because we all know why States are so reluctant to submit disputes to judicial resolution. In my view, the answer to this question is very simple: because no one

wants to be the loser. In the case of an advisory opinion, there is, at least, no direct loser, if perhaps an indirect one.

Let me now turn to the Convention on the Law of the Sea. It is true that the drafters of the Convention were very reluctant to entrust advisory functions to ITLOS. In my view, this was a mistake; it is a *lacuna* which makes itself felt in practice. The Commission on the Limits of the Continental Shelf, for instance, is faced with interpreting provisions of the Convention in its daily work. This Commission consists of experts in hydrology, geology etc.; it does not have any lawyer on it. I am, however, sure that the Commission would be very happy if it could shift the burden of interpreting provisions of the Convention onto a tribunal. But unfortunately that is water under the bridge.

Let me address the advisory function of ITLOS on the basis of Art. 138 of its Rules, which states that the Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion. It is important to note that the Tribunal has discretion, to which Tullio Treves has already referred, because it might undermine the credibility of any judicial institution if a very far-fetched question were submitted and it did not have the discretion to say 'no'. It has been stated that this rule does not fully conform to the Convention. Here I again agree with Rüdiger Wolfrum, who said that the most convincing answer was that Art. 138 of the Rules established a consensual solution. It is obvious that international tribunals are not self-serving institutions. They assist States, the members of the international community, in resolving international disputes and clarifying points of international law. The consensual solution is thus a convincing argument.

However, with respect to the question as to whether the rule of Art. 138 constitutes a high threshold which makes it rather unlikely that States will use this option, as stated by Rüdiger Wolfrum, I would say that this should be viewed a bit more optimistically. If two or more States take a political decision to submit a question of international law to an international judicial institution for an advisory opinion, the technical problem of having to conclude an agreement within the meaning of the Vienna Convention on the Law of the Treaties will easily be overcome. It is only a matter of the political will of the States concerned. Thank you.

K. Oellers-Frahm: Thank you very much. I would like to make just three short remarks. The first one concerns the non-binding character of advisory opinions that has been underlined several times until now. I share the opinion of Rüdiger Wolfrum that the difference between non-binding and binding decisions in international law is not of the same relevance as it may be in national law due to the well-known lack of means for the coercive implementation of international decisions. On the other side it has to be stated that any action in conformity with what has been stated to be the law in a – non-binding – advisory opinion is justified, what may be considered as a sort of counter-balance to the non-binding character of advisory opinions.

My second remark concerns the discretion to deliver or not to deliver a requested opinion. This is a very delicate issue because it relates to the political implications of the cases brought to the Court. I share the view of those who argue that there were good reasons not to deliver the requested opinion not only in the *Wall* case, but perhaps even more so in the *Kosovo* case. However, there is another side of the coin: what would have been the public reaction if the Court would have declined to render an opinion on the question concerning the Construction of the Wall in the Occupied Palestinian Territory or on the Declaration of Independence of the Kosovo. These questions were highly debated by the international public and a decision of the 'World Court' declining to answer the question for good, though not compelling reasons would have met with incomprehension. Therefore, I think that there are some more aspects to be taken into consideration in particular with regard to requests for an advisory opinion concerning issues as those at stake in the *Wall* and in the *Kosovo* opinions.

This leads me to my third remark relating more concretely to the *Kosovo* opinion. It has rightly been referred to the critics expressed with regard to the Opinion not only by international lawyers, but also by members of the Court in their separate or dissenting opinions. Most of the critical remarks which center primarily on the fact that the Court strictly observed the extremely narrow frame set by the terms of the request are in fact justified. But the Court was in a dilemma: the question as it has been posed, namely its limited reach referring only to the *declaration* of independence was discussed in the General Assembly where the proposal to put the question into the wider context by requesting an opinion on 'the legal consequences of the declaration of independence' was explicitly rejected. The majority in the General Assembly insisted on the restricted terms of the request. Accordingly the Court would have acted *ultra vires* if it would have answered questions such

as whether the secession was legal or not. The fact that the narrowness of the request had been at issue in the discussion of the General Assembly and voluntarily been maintained prevented the Court from interpreting this part of the request in a more far-reaching manner, although some, however, small leeway for a more courageous decision may still have been available. As to the other part of the question, namely who were the authors of the declaration of independence, the situation is different. Pierre-Marie Dupuy expressed the opinion that this part of the request was clear, in that it considered the UNMIK government institutions as the authors of the declaration. But in my view the question who were the authors of the declaration could only be answered by examining the terms of the declaration of independence and not by simply referring to the wording of the request submitted by Serbia and accepted by the General Assembly. As the question of the authors was the central issue for assessing the legality of the declaration of independence it was for the Court, and not for the General Assembly, to decide this issue; the Court could not be bound in this context by any understanding of this aspect by the General Assembly, which, by the way, did not even discuss this question. Therefore I would like to stress that the Court's action in delivering an advisory opinion is always predetermined by the request which leaves only little room for interpretation, in particular where an issue was explicitly discussed by the requesting body. Nevertheless, in a case as the present one, where the Court decided to deliver the opinion despite of the problematic terms of the request, a more courageous action would be required in order to clearly answer the 'real' question at stake what in the *Kosovo* case was unfortunately done only in a rather biased, indirect manner.

T. Eitel: I have one remark and one question. My remark is going to voice my doubt regarding the 'heretical' part of Georges Abi-Saab's interesting statement. If I understood him correctly he believes that the UN General Assembly is bound by an earlier request, and result, of an advisory opinion. This would mean that the President of the General Assembly would be ill advised to put a matter, about which the Assembly had requested and received an advisory opinion, to a vote again, nor would the Delegates be allowed to vote on the matter other than reaffirming the opinion. I don't think that the representatives of sovereign Member States would accept this. Art. 10 of the Charter allows the General Assembly discussions and recommendations on 'any question or any matters within the scope of the present Charter' and the Court's opinion is an 'advisory' one.

The question came to my mind when thinking about 'binding' and 'non-binding' advisory opinions. When interpreting *national* courts' judgments, there is sometimes a discussion whether a certain statement in the judgment is an *obiter dictum*. If it were, this would take away much of the binding character that statement could have had. Since I don't recall having come across that discussion regarding parts of decisions of *international* courts, I wonder whether such decisions are at all capable of producing this kind of 'soft law' or whether their decisions are totally cast in bronze. On a lower level, the same question arises, at least for me, regarding advisory opinions. Thank you!

M. Bothe: I would like to address the issue of a difference between contentious proceedings and advisory opinions and I agree with all those, Rüdiger Wolfrum, Georges Abi-Saab, who said the difference is not as big as it might appear at a first glance. We have to distinguish, of course, two different functions of the judicial activity, namely deciding a case and contributing to law-making. If you look at the case decisions, the compliance record of the contentious cases of the Court is somewhat mixed. There are series of cases where there's a good compliance record, the delimitation cases for instance. There are others where this is not the case, take for instance *Nicaragua*. On the other hand, if you look at the law-making function, it is also a question of what the Court really says and a question of legal policy. There are contentious cases and advisory opinions which are decided on narrow grounds. The *Kosovo* Advisory Opinion is one of those which were decided on narrow grounds for reasons of political expediency, of judicial policy in this particular case. The formulation of the question is perhaps unfortunate. But if the Court had wanted to say something on those issues, it would have taken the liberty to reformulate the question a little bit and then to say what it had to say. But it did not want to do that for the reasons of the political context of the particular situation and the Court was in a way well advised to do so because the political realities had gone beyond the question. If you take other cases, for instance *Nicaragua*, which was decided on broad reasons, or the *Oil Platforms* case, there the Court said a number of things which were not strictly necessary for arriving at the final result, but which constitute up to this day a contribution to the development of international law in a question which seems to be particularly dear to the Court, namely the legal limitation on the use of force.

F. Pocar: I will shortly follow up on some issues that have been taken up by other speakers thus far. Concluding his thoughtful and stimulating presentation, Rüdiger Wolfrum has submitted a list of the advantages that advisory opinions may have over contentious cases in given situations. We can easily agree with his analysis, perhaps with some additional grounds. In particular, his comment with respect to the interpretation of multilateral agreements, that advisory opinions may become a substitute for contentious cases 'at least in early stages of a dispute and if no factual issues are controversial', may equally apply to cases in which factual issues are controversial, if the interpretation given in an advisory opinion renders the factual dispute moot. For example, an interpretation declaring that a given rule applies both to events that occurred in the high seas and in territorial waters, would render a factual dispute about the place where the event actually occurred irrelevant in a particular case.

After listing the advantages of advisory opinions, Rüdiger points out that 'the major disadvantage of advisory opinions is their non-binding character', but wonders whether this really matters, as the implementation of international judgments depends on their acceptability, thus making the difference between judgments and advisory opinions rather minimal. One may agree with this conclusion – although it has been described as metaphysical – but if so, why should one speak of disadvantages at all? Mentioning a disadvantage has a negative connotation and automatically implies a need for correction. But, irrespective of its connotation, is a correction of such a 'disadvantage' desirable? Would it be desirable to make advisory opinions binding? And binding on whom?

Georges Abi-Saab has already taken up the last question, binding on whom? On the institution that has requested the opinion? Of course, if one takes the UN General Assembly as the requesting authority, the problem is that the UN General Assembly is comprised of all States. It is true that it is formally possible to distinguish between the UN General Assembly as a UN organ and its Member States, but in fact, it would be rather odd to consider that what is binding for the UN General Assembly would not bind the States, its Member States, as well. On the other hand, if advisory opinions were assigned binding force on the UN General Assembly, effectively over the entire international community, they would become a sort of authentic interpretation of the law. Would we not thereby give an international jurisdiction, however authoritative as the International Court of Justice, a role which may be unjustified in the current context of international relations? This is without mentioning that the attribution of a binding nature to advisory

opinions would raise the issue of the duration of that binding force. Would it be subjected to the usual mechanisms for developing international law, or would a new pronouncement be necessary for changing the interpretation given by the court?

It clearly looks more appropriate to conclude that advisory opinions should remain, as they are, an authoritative, not an authentic, interpretation of the law. Such an interpretation is not binding, but allows any member of the international community to rely legitimately on the advisory opinion and to justifiably comply with its implications. As such, advisory opinions do not need to be binding in nature in order to correspond with the clarification and development of international law. I cannot see how their non-binding nature would result in a disadvantage in this respect.

A.F. Douhan: Thank you. I would like to add a couple of words concerning the non-binding character of advisory opinions. Currently, despite the growing number of international courts and tribunals, and probably due to it, quite a lot of disputes nevertheless stay unsettled. First of all, States are often unwilling to submit disputes for international adjudication, as far as they are afraid to be bound by the decision if they lose the case. And secondly, in a view of the conflicting jurisdiction of international courts in particular cases, the courts are often unable to decide on the case because of the fear to establish a collision with a decision of another court. In this situation, advisory opinions could be a very good alternative. The opinion itself is, naturally, not binding. At the same time, when taking an advisory opinion, a court states whether a breach of international law took place, and can ascertain the applicable rules of international law. I would like to draw your attention to the fact that the latter (applicable rules of international law) are by themselves binding. It means that the court, although not settling the dispute as it is, provides a legal guideline for States involved. I am also very doubtful that in a case if a State behaves in accordance with the findings of the Court, another State could feel itself right to apply any counter-measures. As a result, I believe that advisory opinions of international courts will make a significant impact to the settlement of international disputes.

P.-M. Dupuy: Thank you very much. I was very interested by the discussion which gave a clear picture of the mainstream position among the participants to this Symposium with regard to the legal potential

and impact of the ICJ's advisory opinions. I think that we all share the view expressed by Michael Bothe when he said with me that one should clearly distinguish between two functions: to decide a case and to develop the law. The way in which the question was put to us by the organizers of the symposium was whether an advisory opinion 'is a substitute to international dispute settlement'. The majority among us agree including Yoram Dinstein, Tullio Treves and myself as well as a number of other speakers that when it comes to dealing with a highly controversial case between two or more States, the advisory opinion is generally not the right format.

Now, we also agree that there are clear advantages, in particular in the multilateral dimension, i.e. participation of several UN Member States to the advisory proceedings, a point rightly raised by Tullio Treves.

No one discusses either that as far as the contribution to the development or clarification of the law is concerned, advisory opinions are equally able to provide the Court with an opportunity to do it as the contentious cases if not even more, inasmuch as it is not limited by the very terms according to which its jurisdiction is defined by the State or States within the contentious jurisdiction.

In that respect, I would like also to say a word about the *Namibia* case, which was mentioned by Abdul Koroma. It was indeed a very interesting case: in the background, there was a real dispute, not a bilateral one but a much larger one, between the international community of States, on the one side, and one single State, South Africa, on the other side. The legal issues at stake were a combination of rules of United Nations law and of general international law. In these respective perspectives, the *Namibia* case made it possible for the Court to issue decisive statements, may it concern the succession of the United Nations to the League of Nations system of mandates or the rules applicable in terms of interpretation of international legal acts.

It can be said at the same time that the *Namibia* Advisory Opinion most probably contributed in sustaining the overall pressure exercised by the international community on South Africa, a pressure which was finally successful. As far as the normative contribution of ICJ advisory opinions is concerned, the *Namibia* case belongs to the category of opinions where the Court has contributed to the clarification of positive international law, a category to which the *Kosovo* case does not belong.

In that respect, and to answer the concerns expressed by Michael Bothe, I would simply say that without even needing to reformulate the ques-

tion, the Court could have enlarged its vision of the legal problematic raised by it. Now, it is for the Court to decide, taking also into account the political context, whether it has to deal with a certain generosity with the issues raised before it. I easily recognize that it is not an easy task. But what is sure is that everybody is waiting for the opinions of the Court to help in clarifying the law, an expectation which, at least in that very case, was not satisfied.

R. Wolfrum: Let me start with the last point just mentioned by Pierre-Marie Dupuy: Whether and to what extent an advisory opinion can substitute for a contentious case. I approach that from the other side. Let's put it in the context of human rights issues. Human rights issues are normally not contentious cases between two States. When it comes to the interpretation of the Covenant on Civil and Political Rights or the Convention on the Elimination of All Forms of Racial Discrimination, that is actually a matter of interpretation concerning all States being parties to the respective instrument. In such a situation, and I am referring to all international instruments reflecting community interests, i.e. human rights treaties, international environmental agreements, the UN Convention on the Law of the Sea, there should be room for an advisory opinion. Let me give you two reasons for that. In many disputes, in particular environmental disputes, it is not easy to submit them to an international court or tribunal. For example, in a case of pollution of the high seas. How will you bring such a case before a court on the basis of a contentious case? Who could claim to have standing? These are the cases I mean, in particular. Let me advance my second argument. In all such cases the interests of all States parties are affected. As I said, in contradiction thereto a contentious case is artificially rendering such a dispute a bilateral one although it is of a truly international nature.

Now, as far as discretion is concerned, I agree with those who stated this meant flexibility, and I would also consider it a merit and an advantage for the ICJ that they have that flexibility. It is appropriate that rule 138 of the Rules of the Tribunal for the Law of the Sea provides for this discretion.

As to the non-binding character of advisory opinions, it may be an advantage, it may be a disadvantage. From a traditional point of view, it has been considered a disadvantage. But, as has been said in the discussion and I fully share that view, many States are in favour of advisory opinions exactly for the reason that they are technically not bound. And let us also consider the cultural differences. There are certain parts

of this world where you are not considered to go to court. In such regions legal disputes are settled differently – by negotiation. For such regions or for such States the advisory opinion could be a more acceptable mechanism, rather than the contentious case system.

Concerning transparency as mentioned by Tullio Treves, I share his view. Since the procedure for advisory opinions is a very open procedure, it can be followed from the outside. As such, transparency is a fact and provides for the legitimacy of the result.

As to the potential relevance of advisory opinions, my last point and the main point of Yoram Dinstein, let me say the following. It is always difficult to judge or to decide whether judgments or orders of courts are relevant in the reality of the world. Sure, it has been said and I agree, judgments on delimitation cases normally are fully implemented. But in respect of others, as Michael Bothe has pointed out, the record is somewhat mixed. As for advisory opinions, I am grateful to Abdul Koroma mentioning that several advisory opinions have left their trademarks, I may add, on the progressive development of international law. The *Genocide reservations* case is certainly an issue, for it triggered the interpretation of reservations commonly accepted at the moment. One should look upon the relevance of advisory opinions and judgments from a different point of view. Judgments should be implemented, as is happening in the delimitation cases. Advisory opinions may be more important for the progressive development of international law apart from what Georges Abi-Saab has pointed out, that they may be binding for the entity having requested them, and for the court having taken them. The latter has some inherent bearing upon all States parties to the particular instrument since they have a legal expectation that the interpretation given will be the one guiding the court in question in the future.