

**SPEECH BY H.E. JUDGE HISASHI OWADA, PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE, TO THE LEGAL ADVISERS OF UNITED NATIONS MEMBER STATES**

**Introductory remarks at the Seminar on the Contribution of the International Court of Justice to International Law**

**25 October 2011**

Madam Deputy Secretary-General,

Madam Legal Counsel,

Legal Advisers of United Nations Member States and distinguished guests,

I am delighted to address this conference of the Legal Advisers taking place within the framework of the International Legal Week of the United Nations. I welcome, in particular, those of you who have travelled, in some cases a long distance, in order to participate in this discussion. This is the third time since my assumption of office as President of the International Court of Justice that I have the honour to give this address. I am especially pleased that this presentation will form part of a seminar — the second in a three-year series organized by the United Nations Office of Legal Affairs — about the contribution of the work of the International Court of Justice to the development of international law.

Presenting my remarks primarily as an address to the Conference of the Legal Advisers during this “International Legal Week”, but using this occasion also to introduce a subject relating to today’s seminar on the contribution of the Court’s jurisprudence to international law, I have decided to focus my comments on one aspect of the seminar’s topic: the contribution that the Court has made to international law through its advisory procedure. When assessing the Court’s contributions to the development of international law, much attention has been focused on the Court’s contentious jurisdiction. After all, contentious cases constitute the majority of the Court’s docket, having made up over 80 per cent of cases on the Court’s General List. Contentious cases also take the form of binding decisions, which are *res judicata* for the parties. In spite of this importance placed on contentious proceedings, I wish to emphasize that the Court’s advisory function also should not be underestimated. In the PCIJ days, the Court, during its less than 20 years of activity, gave 29 Judgments in contentious cases, as against 27 Opinions in advisory procedures. Since its inception, the present Court has issued 26 Advisory Opinions, all of which

necessarily address “legal questions” in accordance with Article 96 of the United Nations Charter and Article 65 of the Statute of the Court. Despite their advisory nature, they constitute an important contribution to the law. From the viewpoint of their intrinsic value and the theoretical as well as practical implications for the development of international law, one should not lose sight of their significance as an authentic statement of the law simply because they do not have binding force.

In the remarks that will follow, I shall offer some general remarks about the importance of advisory procedures, in particular addressing why the Court’s Advisory Opinions play an important role in the development of international law. I will then focus on different categories of advisory opinions that, in my view, have contributed to the clarification of specific areas of international law. Finally, I take up some salient problems that arise in relation to the Court’s exercise of the advisory function. I should emphasize at the outset that these comments are made entirely in my personal capacity, and as such are not to be attributed to, nor do they necessarily reflect, the view of the Court of which I am President.

### **1. The Place of Advisory Opinions within the United Nations Mechanism for Peaceful Settlement of Disputes**

There are 21 organs, specialized agencies and related organizations (such as the IAEA) that currently have the power of requesting an advisory opinion, but to date the majority of requests have come from the General Assembly. Of the 26 Advisory Opinions that the Court has issued since 1948, 16 were the result of requests by the General Assembly. The other principal organ, the Security Council, has requested only one advisory opinion.

As everyone knows, advisory opinions are not binding even on the United Nations organ or specialized agency that requested them. Article 59 of the Court’s Statute provides that the Court’s decision in a case shall be binding only between the parties and in respect of that particular case; this Article refers to the Court’s decisions in contentious cases and not to advisory opinions. It is true that, in certain situations where advisory opinions are requested, a requesting body may decide to treat the Court’s advisory opinion as binding. For example, the General Assembly agreed in the Convention on the Privileges and Immunities of the United Nations that when a difference arises between the United Nations and a Member State, “a request shall be made for an advisory opinion

on any legal question involved” and “[t]he opinion given by the Court shall be accepted as decisive by the parties”<sup>1</sup>. Similarly, in the context of applications for review of decisions of the Administrative Tribunal of the International Labour Organization (as of the former United Nations Administrative Tribunal), the requesting body has agreed that the advisory opinion rendered by the Court be binding<sup>2</sup>. As such, and under the Statute of the Court, however, advisory opinions are only advisory and not binding. The agreement of the requesting body to consider a specific advisory opinion as binding does not transform its very legal nature.

Despite their non-binding nature, advisory opinions generally receive a lot of attention both within and outside the United Nations. One explanation for this attention may be that the subject-matter in which an advisory opinion is requested, especially when it is requested by political organs such as the General Assembly or the Security Council, has been the focus of intense debate in the organ concerned and that the elements of law involved in the subject-matter require elucidation for the solution of the problem. A request for an advisory opinion from such an organ very often relates to a politically sensitive subject-matter and the request for an advisory opinion is made on the basis of a vote in favour, normally by a majority of Member States making up that body. This means that the legal question that is submitted to the Court must be an issue regarded by a majority of those States to be sufficiently important to warrant asking the Court for an advisory opinion. Whenever an advisory opinion is requested, pursuant to Article 66, paragraph 2, of the Statute of the Court, all States entitled to appear before the Court are given notice thereof. It is in this broad political context that the advisory opinion receives much attention from the membership of the United Nations at large, as well as a fair amount of media attention.

The opinion is given to the organ of an international organization that has requested it. They are not addressed to individual States which might possess some interest of a legal nature in relation to that subject-matter, even if there were such States. Nevertheless, the opinion, in substance, will have a very persuasive force upon the members of that organ as an authoritative statement of the law in issue and will greatly influence the decision-making process of that organ in

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<sup>1</sup>Convention on the Privileges and Immunities of the United Nations, 13 Feb. 1946, Art. VIII, Sec. 30.

<sup>2</sup>Art. XII (2), Statute of the Administrative Tribunal of the International Labour Organization.

its treatment of the subject-matter and beyond (e.g., Advisory Opinion on Reservation to the Genocide Convention).

On this basis I would like to group the cases in which advisory opinions have been requested into a few specific categories: first, issues relating to the constitutional/administrative law of international organizations; secondly, issues relating to evolving fields of international law; and thirdly, issues relating to a concrete dispute between States, of which the requesting organ is seised.

**(a) *Issues relating to the constitutional administrative law of international organizations***

First, the Court has rendered several advisory opinions which clarify issues relating to the constitutional/administrative law of international organizations. In particular, a number of the General Assembly's requests for advisory opinions concerned legal questions relating to the competence of the General Assembly in relation to the competence of other organs of the United Nations in the context of the constitutional framework of the Organization. That the Court is sometimes called upon to clarify issues relating to the constitutional structure of the United Nations is a unique aspect of the Court's advisory proceedings; such problems involve legal questions which belong to the realm of the constitutional law of the United Nations that do not usually arise in contentious proceedings between States. In this area, the position of the Court could be compared, to a certain extent, to that of a Supreme/Constitutional Court in a domestic jurisdiction when it is engaged in the function of a judicial review — a role which, strictly speaking, is not assigned to the Court within the framework of the United Nations.

An example of an advisory opinion in which the Court clarified issues belonging to this field of law of the United Nations is its 1949 opinion in the case concerning *Reparations for Injuries Suffered in the Service of the United Nations*<sup>3</sup>. I would like to highlight two notable contributions to international law that the Court made in that case. First, it concluded that the United Nations possessed international legal personality. The Court explained that

“[T]he Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis

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<sup>3</sup>*Advisory Opinion, I.C.J. Reports 1949*, p. 174.

of the possession of a large measure of international personality and the capacity to operate upon an international plane.”<sup>4</sup>

In concluding that the United Nations possessed international legal personality by virtue of its functions and rights, the Court clarified an issue about which there had previously been uncertainty: to what extent international organizations, in addition to States, could possess international legal personality.

A second contribution that the Court made in this area can be seen in the *Reparations for Injuries* case. The Court developed the constitutional doctrine of implied powers of international organizations. The Court found that the United Nations “must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties”<sup>5</sup>. On that basis, the Court concluded that the United Nations had the power to bring an international claim against a State for damages suffered by an agent of the Organization. In the case of 1954 Opinion concerning *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, the Court concluded, on the basis of the same doctrine of implied powers, that the United Nations had the power to establish a judicial tribunal (the United Nations Administrative Tribunal) to adjudicate disputes arising out of employment contracts of United Nations staff<sup>6</sup>.

The Court has also used its advisory function to clarify the respective competence of the Security Council and of the General Assembly under the United Nations Charter. In the 1962 case concerning *Certain Expenses of the United Nations*<sup>7</sup>, the Court concluded that the Charter confers on the Security Council primary but not exclusive responsibility for the maintenance of international peace and security, and that the General Assembly may discuss questions relating to the maintenance of international peace and security and may make recommendations with regard to such questions to States and to the Security Council<sup>8</sup>. The Court also found that, while Article 11 (2) of the Charter provides that any question relating to the maintenance of international

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<sup>4</sup>*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 179.*

<sup>5</sup>*Ibid.*, p. 182.

<sup>6</sup>*Advisory Opinion, I.C.J. Reports 1954, pp. 56-58.*

<sup>7</sup>*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 162.*

<sup>8</sup>*Ibid.*, p. 163.

peace and security on which “action” is necessary must be referred to the Security Council, the word “action” refers only to “coercive or enforcement action” under Chapter VII of the Charter<sup>9</sup>.

The final example I would like to refer to in this section dealing with the administrative law of international organizations is the Court’s treatment, in its advisory jurisdiction, of the law relating to privileges and immunities of experts on mission. Article VI, section 22, of the General Convention on the Privileges and Immunities of the United Nations provides that “[e]xperts . . . performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions”<sup>10</sup>. In the 1989 Opinion concerning *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court concluded that Section 22 applied to every expert on mission, whether or not he or she travels, and that the functional privileges and immunities guaranteed by Section 22 could be invoked as against the expert’s State of nationality or of residence, provided that the State had made no valid reservation to Section 22<sup>11</sup>. The Court also concluded in that case, as well as in the 1999 case concerning *Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, that Rapporteurs and Special Rapporteurs appointed by certain United Nations human rights organs are qualified as experts on mission within the meaning of Section 22 and thus are entitled to enjoy privileges and immunities under that section<sup>12</sup>. In the latter case on *Immunity from Legal Process*, the Court also concluded that the United Nations Secretary-General had the authority and responsibility to make a finding whether an expert on mission was entitled to immunity under Section 22 (b)<sup>13</sup>.

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<sup>9</sup>*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, I.C.J. Reports 1962, pp. 164-65. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004 (I), para. 17.

<sup>10</sup>Convention on the Privileges and Immunities of the United Nations, 13 Feb. 1946, Art. VI, Sec. 22.

<sup>11</sup>*Advisory Opinion*, I.C.J. Reports 1989, pp. 195-196, paras. 50-52.

<sup>12</sup>*Ibid.*, pp. 196-197, para. 55; *Advisory Opinion*, I.C.J. Reports 1999 (I), p. 83, para. 43.

<sup>13</sup>*Advisory Opinion*, I.C.J. Reports 1999 (I), p. 84, para. 50.

**(b) Issues relating to evolving fields of international law**

I now turn to the second category of advisory opinions, i.e., advisory opinions relating to evolving fields of international law. The first example is the 1951 Advisory Opinion concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. In that opinion, the Court clarified that a State, in deciding whether to make a reservation to the Genocide Convention or to object to another State's reservation, must be guided by the test of compatibility of the reservation with the object and purpose of Convention<sup>14</sup>. The Court stated: "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them."<sup>15</sup> This approach was subsequently codified in Article 19 (c) of the Vienna Convention on the Law of Treaties, and has served as an important basis for the codification and development of the law on the scope of permissible reservations. The principle enunciated here was further developed in subsequent contentious cases of the Court, including in the Court's Judgment in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda, Preliminary Objection)*<sup>16</sup>.

The second example in this category is the one the Court gave in the area of international humanitarian law. Thus, in the 1996 Advisory Opinion concerning *Legality of the Threat or Use of Nuclear Weapons*, the Court identified two "cardinal principles" of humanitarian law<sup>17</sup>: first, "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets"; secondly, the Court broke new ground by applying the classical principle of the law of war — that it is prohibited to cause unnecessary suffering to combatants — in the context of nuclear weapons, declaring that it is "prohibited to use weapons causing them such harm or uselessly aggravating their suffering". The Court declared that the threat or use of nuclear weapons seemed scarcely reconcilable with respect for such requirements of international humanitarian law<sup>18</sup>, while refraining from "conclud[ing]

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<sup>14</sup>*Advisory Opinion, I.C.J. Reports 1951*, p. 24.

<sup>15</sup>*Ibid.*

<sup>16</sup>*I.C.J. Reports 2006*, pp. 32-33, paras. 66-70; p. 35, paras. 77-79.

<sup>17</sup>*I.C.J. Reports 1996 (I)*, p. 257, para. 78.

<sup>18</sup>*Ibid.*, p. 262, para. 95.

definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”<sup>19</sup>.

It may be a matter of speculation whether all these points that the Court enunciated in these pronouncements could have been made by the Court as the statement of law that the Court could apply in a setting of a contentious case relating to a concrete dispute between States. Another interesting development made by the Court in the *Nuclear Weapons* case is its declaration, that “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ . . .”, and that they “are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law”<sup>20</sup>. The Court, in the *Wall* case, declared that those rules of international humanitarian law “incorporate obligations which are essentially of an *erga omnes* character”<sup>21</sup>.

A third example in this category of advisory opinions is the issue of the relationship between international human rights law and international humanitarian law. In addressing this issue in the *Nuclear Weapons* case, the Court observed that, while the right to life as protected by the International Covenant of Civil and Political Rights does not cease in times of war, the test of what constitutes an arbitrary deprivation of life must “be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities”<sup>22</sup>. The Court addressed the question again in the *Wall* case, stating “that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights”<sup>23</sup>.

The fourth example that I wish to refer to in this category is another developing area, relating to self-determination. In the 1971 Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security*

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<sup>19</sup>*I.C.J. Reports 1996 (I)*, p. 266, para. 105.2 (E).

<sup>20</sup>*Ibid.*, p. 257, para. 79.

<sup>21</sup>*I.C.J. Reports 2004 (I)*, p. 199, para. 157.

<sup>22</sup>*I.C.J. Reports 1996 (I)*, p. 240, para. 25.

<sup>23</sup>*I.C.J. Reports 2004 (I)*, p. 178, para. 106.

*Council Resolution 276 (1970)*, the Court found that developments in “international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, [had] made the principle of self-determination applicable to all [such territories]”<sup>24</sup>. This laid the groundwork for the Court’s later pronouncement, in a contentious case, that the right of peoples to self-determination is today a right *erga omnes*<sup>25</sup>. In its Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, the Court had an occasion to examine this quotation and stated that “one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination”<sup>26</sup>, although the Advisory Opinion did not go beyond this statement of the final principle and test it in the context of the Kosovo situation.

Yet another area of law that the Court is increasingly called upon to consider in its advisory opinions is the field of international environmental law. In the *Nuclear Weapons* case, the Court recognized that States have a duty to protect the environment. The Court stated:

“The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”<sup>27</sup>

In the same case the Court also found that certain provisions of the 1977 Additional Protocol I to the Geneva Convention of 1949, taken together

“embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals”<sup>28</sup>.

Thus, in all of these diverse areas — reservations to treaties, international humanitarian law, self-determination, and environmental law — the Court has contributed to the evolution of the law in the newly developing fields of international law through its advisory jurisdiction.

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<sup>24</sup>*I.C.J. Reports 1971*, p. 31, para. 52.

<sup>25</sup>*East Timor (Portugal v. Australia)*, *I.C.J. Reports 1995*, p. 102, para. 29. See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, *I.C.J. Reports 2004 (I)*, paras 88, 156, 159.

<sup>26</sup>*Advisory opinion of 22 July 2010*, para. 82.

<sup>27</sup>*I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29.

<sup>28</sup>*Ibid.*, p. 242, para. 31 (citing Art. 35, para. 3 and Art. 55 of Additional Protocol I).

**(c) *Issues relative to a concrete dispute before the political organs of the Organization***

It has been sometimes argued that issues relating to a concrete dispute placed before a political organ (e.g., the Security Council or the General Assembly of the United Nations) should not be the object of advisory opinions of the Court, and that such advisory opinions should be limited to examining purely legal questions put before it by a requesting organ. In my personal view, however, this position fails to appreciate the historical development of the advisory opinion as a legal institution. In its historical origin, the *raison d'être* of the advisory opinion was quite broad. Under Article 14 of the Covenant of the League of Nations, which was the only article that governed the advisory jurisdiction of the Permanent Court of International Justice, the Permanent Court of International Justice was empowered to “give an advisory opinion upon any *dispute* or question referred to it by the Council or by the Assembly” (emphasis added). Thus, the Covenant explicitly allowed the Permanent Court to render advisory opinions with respect to existing disputes in those bodies. As Rosenne has observed:

“The Covenant envisaged that an advisory opinion might be requested as part of a process of peace-making (to use modern terminology) to settle an existing dispute, or to obtain authoritative guidance on a question of a legal nature arising during the Activities of the Council or the Assembly of the League . . .”<sup>29</sup>

Similarly, Hudson states that “[i]n a number of instances, the questions [posed for advisory opinions] had arisen as differences between States, so that there was a *dispute* in the narrower sense of the term . . .”<sup>30</sup>

I note that Article 65 of the Statute of the present Court, setting out its advisory jurisdiction, does not include an explicit reference to “dispute”. Rather, it states that the Court may give an advisory opinion “on any legal question”. Nevertheless, in certain advisory proceedings, some of the participants have argued that, the Court should not give an opinion relating to an existing dispute either by reason of jurisdiction or of discretion, when one of the parties had not consented

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<sup>29</sup>Shabtai Rosenne, *The Law and Practice of the Permanent Court 1920-2005*, Leiden, 2006, p. 274.

<sup>30</sup>Manley O. Hudson, *The Permanent Court of International Justice 1920-1942: a treatise*, New York, 1943, p. 494.

to the jurisdiction of the Court<sup>31</sup>. This issue will be addressed within the context of the Court's discretionary power, a question to which I now turn.

## **2. The Court's discretion in advisory proceedings**

Under the Charter of the United Nations, the power to request an advisory opinion from the Court is conferred upon (a) certain organs of the United Nations, that is, the Security Council and the General Assembly, with respect to any legal question (Charter, Art. 96, para. 1); and (b) other organs of the United Nations and specialized agencies upon authorization by the General Assembly, provided that their request concerns legal questions arising within the scope of their activities (Charter, Art. 96, para. 2). The fact that the Court has jurisdiction under these provisions to give an advisory opinion in a particular case does not mean that it is under an obligation to do so. The Court has recalled on many occasions that it is "mindful of the fact that its answer to a request for an advisory opinion 'represents its participation in the activities of the Organization, and, in principle, should not be refused'"<sup>32</sup>. The idea that the issuing of the advisory opinion represents its participation in the activities of the United Nations has been attributed to the constitutional relationship between the Court and the other principal bodies of the United Nations. This so-called constitutional relationship was different for the Permanent Court than it is for the present Court. The Permanent Court was not established concurrently with the League of Nations.

On the contrary, at the San Francisco conference, the "organic link" between the Court and the rest of the United Nations structure was explicitly established. Pursuant to Articles 7 and 92 of the United Nations Charter and Article 1 of the Statute of the Court, the Court was established as the "principal judicial organ of the United Nations". One can say that the role of the Court as one

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<sup>31</sup>*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71, the Court observed that the issue did not affect its jurisdiction to give an advisory opinion. In *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, paras 32-33), however, the Court added that such an issue should be taken into consideration by the Court when it decides whether or not to exercise that jurisdiction in virtue of its discretionary power.

<sup>32</sup>*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010*, para. 30 (citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44).

of the principal organs of the United Nations has made a significant impact on the way in which the Court dealt with requests for advisory opinions.

It has been accepted that the Court, when such a request is made, is not under the obligation to carry out its function to give an advisory opinion in question. The Court has consistently stated that

“Article 65, paragraph 1, of its Statute, which provides that ‘The Court *may* give an advisory opinion . . .’ (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met”<sup>33</sup>.

The practice of the Court on this point has been well established since the creation of this institution of advisory opinion at the time of the establishment of the Permanent Court of International Justice. The general yardstick for the exercise of the Court’s discretion is whether there is a compelling reason for it to decline to exercise the jurisdiction conferred upon it by the Charter and the Statute. In other words one can assume that the Court starts with a presumption — a presumption which is naturally debatable on the basis of the circumstances of the case — that once it has established its legal basis for its jurisdiction it should exercise it unless there is a “compelling reason” not to exercise it. This presumption to my mind is based on two premises: the good administration of justice and the place of the Court as one of the principal organs of the United Nations, side by side with the General Assembly and the Security Council. As the principal judicial organ of the Organization, the Court is expected, if not duty bound as a matter of law, to respond to the requests coming from these other political organs of the United Nations to elucidate and clarify the points of law involved in topics under consideration in those organs.

In this context, I would like to focus on two particular reasons advanced against the Court exercising its jurisdiction to render an advisory opinion.

**(a) *Existence of a dispute actually pending between parties and the lack of consent of one of the parties***

First, in certain advisory cases, as I have mentioned earlier, it has been argued that the Court should exercise its discretion not to answer the question put to it for an advisory opinion because

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<sup>33</sup>*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44.*

that question relates to a dispute pending between two parties, one of which has not consented to the jurisdiction of the Court to deal with that dispute. This was the situation in the case concerning the *Status of Eastern Carelia* in the Permanent Court of International Justice, the only time in which the advisory jurisdiction has not been exercised throughout the history of the Permanent Court and the present Court. In that case, the request for an advisory opinion arose in the context of a dispute between Finland and the USSR. The latter was not a Member of the League of Nations and had refused to consent to submit the dispute between it and Finland to the Council of the League for resolution. Thus, after noting that “[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes” to a specific method of peaceful settlement, the Court found it “impossible to give its opinion”<sup>34</sup>.

While the present Court has made clear that it will not allow its advisory function to be used to “circumvent[] the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent”<sup>35</sup>, it has, so far, not found this situation to arise. For example, in the *Peace Treaties* case in 1950, three States (Bulgaria, Hungary and Romania), all non-Member States of the United Nations, objected to the General Assembly’s request for an advisory opinion. Against the claim put forward by some participants that the prior consent by those States was required<sup>36</sup>, the Court decided, while taking note of the permissive character of Article 65 of the Statute, that the circumstances of the case were profoundly different from those of the *Eastern Carelia* case. According to the Court, the request was solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties and “in no way touch[ed] the merits of those disputes”<sup>37</sup>. Moreover, the Court found that, due to the fact that its opinion was only of an advisory character and to be given to the requesting organ (and not to the States concerned), there was no reason why it should refrain from replying to the request because of the opposition to that request by certain States<sup>38</sup>.

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<sup>34</sup>*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5, p.27-28.*

<sup>35</sup>*Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 25, para. 33.*

<sup>36</sup>*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Written Statements by Bulgaria, Ukraine, USSR, Byelorussia, Romania, Czechoslovakia.*

<sup>37</sup>*I.C.J. Reports 1950, p. 72.*

<sup>38</sup>*Ibid.*

In the case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, in response to the contention that a dispute existed between South Africa and other States, the Court ruled that the Eastern Carelia precedent was not applicable as South Africa was, as a Member of the United Nations, *ipso facto* bound by the Court's advisory jurisdiction under Article 96 of the Charter, and it had fully participated in the proceedings<sup>39</sup>.

In the *Western Sahara* case, in which the absence of Spain's consent was at issue, the Court acknowledged that "the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character"<sup>40</sup>, but concluded that such a situation did not arise in that case because the legal controversy had arisen "during the proceedings of the General Assembly and in relation to matters with which it was dealing. It [had] not arise[n] independently in bilateral relations."<sup>41</sup>

More recently in the *Wall* case, where some participants concerned presented divergent views, the Court did not consider that the subject-matter of the General Assembly's request was limited to a bilateral matter between them, but that the construction of the wall should be "deemed to be directly of concern to the United Nations"<sup>42</sup>. I might also mention the case concerning *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, in which the Court concluded that, because its opinion would be given, not to States, but to the organ which had requested it, "the motives of individuals States which sponsor, or vote in favour of, a resolution requesting an advisory opinion are not relevant to the Court's exercise of its discretion whether or not to respond"<sup>43</sup>.

**(b) *The place of the Court's advisory opinions in the constitutional structure of the United Nations***

Another situation in which the Court may have to consider whether to exercise its discretion to refuse to render an advisory opinion is when responding to that request could upset the

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<sup>39</sup>*I.C.J. Reports 1971*, pp. 23-24, para. 31.

<sup>40</sup>*I.C.J. Reports 1975*, p. 25, para. 33.

<sup>41</sup>*Ibid.*, p. 25, para. 34.

<sup>42</sup>*I.C.J. Reports 2004 (I)*, p. 159, para. 49.

<sup>43</sup>*Advisory Opinion of 22 July 2010*, para. 33.

constitutional or administrative structure of the United Nations. This issue arose recently in the case concerning *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. What was raised in that case was not strictly a constitutional issue, as the relations between the General Assembly and the Security Council are regulated by Article 12 of the United Nations Charter. But, it concerned an issue of the demarcation of the respective functions of the principal organs of the United Nations. The issue that arose was whether the Court should exercise its discretion to decline to respond to the General Assembly's request for an advisory opinion given that the situation in Kosovo had been the subject of Chapter VII action by the Security Council for over ten years prior to the request for an advisory opinion, whereas the involvement of the General Assembly with the situation in Kosovo had been more limited. As the Court noted in its opinion, it had been suggested in the case that,

“given the respective powers of the Security Council and the General Assembly, if the Court's opinion were to be sought regarding whether the declaration of independence was in accordance with international law, the request should rather have been made by the Security Council and that this fact constitutes a compelling reason for the Court not to respond to the request from the General Assembly”<sup>44</sup>.

This issue raises several interesting questions, including whether the General Assembly, as the requesting organ, had a sufficient interest in the subject-matter of the request, and whether the Court, by deciding to respond to the General Assembly's request, might be trespassing its proper function in relation to the proper field of competence of the Security Council in the exercise of its political function. Although the Court ultimately concluded that it should not decline to respond to the request for an advisory opinion, the Court's very consideration of the question highlights the existence of a constitutional structure within the United Nations, and of a division of powers between the Security Council, the General Assembly, and the Court. In any case, in deciding not to exercise its discretion, the Court stated, for example, that there was nothing incompatible with the integrity of the judicial function in interpreting and applying the provisions of Security Council resolution 1244<sup>45</sup>. The Court observed that

“[w]hile the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also

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<sup>44</sup>*Advisory Opinion of 22 July 2010*, para. 39.

<sup>45</sup>*Ibid.*, para. 47.

frequently been required to consider the interpretation and legal effects of such decisions”<sup>46</sup>.

### **3. Concluding comments**

I have tried to demonstrate that the Court has had the opportunity, through its advisory function, to identify and clarify some important principles in several areas of international law. This process, especially in the newly developing fields of law, may assist not only the organ or specialized agency that requested the advisory opinion, but also serve as an authoritative declaration of the law in fields where the law has not been entirely free from ambiguity or has at least been subject to some controversy. The pronouncement of the Court, even in the form of an advisory opinion not directly binding upon States, provides an authoritative clarification of principles of general international law.

Madam Deputy Secretary-General,

Madam Legal Counsel,

Legal Advisers and distinguished guests,

By way of conclusion, let me say that, in my view, the Court has made several significant contributions to the development of international law through its advisory opinions. The Court in those opinions is often called upon to clarify important principles of international law and to take stock of how certain international rules have developed over time. As such, advisory opinions receive much attention from States, from bodies working on the codification of international law, from academics, and among the general public. Although not as common as decisions in contentious cases, they are an integral part of the work of the Court.

I am most interested in hearing what other speakers have to say on the topic of the Court’s contribution to international law, so I am very happy to remain as a participant in the seminar which will now be launched by the Office of Legal Affairs. Thank you very much for the opportunity to address you today.

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<sup>46</sup>*Advisory Opinion of 22 July 2010*, para. 46.