VIII. ADVISORY PROCEEDINGS

In addition to its function of settling international disputes in accordance with international law, the Court is empowered by its Statute to give advisory opinions. The provision to that effect included in the Statute of the Permanent Court was something of an innovation; some, but by no means all, national supreme courts possessed a power of this kind, and on the international level, arbitration proceedings, from which the concept of an international tribunal sprang, were essentially means of reaching a binding settlement of a dispute. It was the organs of the League of Nations that were expected to feel a need for such an opinion, and from the beginning it was only such international organs, and not States, that were to be entitled to ask for advice in this form.

The essence of an advisory opinion is that it is advisory, not determinative: it expresses the view of the Court as to the relevant international legal principles and rules, but does not oblige any State, nor even the body that asked for the opinion, to take or refrain from any action. The distinction, clear in theory, is less so in practice: if the Court advises, for example, that a certain obligation exists, the State upon which it is said to rest has not bound itself to accept the Court's finding, but it will be in a weak position if it seeks to argue that the considered opinion of the Court does not represent a correct view of the law.

The essentially non-binding character of an advisory opinion has in the past given rise to some doubts as to the legal effect of a treaty commitment whereby an opinion of the Court is to be accepted, by the parties to the treaty, as binding. One field in which treaty provisions of this kind have proved useful is the relations between international organizations, particularly the United Nations itself, and States. Since an international organization cannot be a party to proceedings before the Court, a dispute between an organization and a State cannot be settled by contentious proceedings. A device that has been used to meet the difficulty is to provide in a convention (for example the 1946 Convention on the Privileges and Immunities of the United Nations) that, in the event of a dispute of this kind, the General Assembly will ask the Court for an advisory opinion on the point at issue, and that it is agreed in advance that the Court's opinion will be accepted as 'decisive' by the State and the organization. It is now established that since the essentially non-binding character of the opinion itself is not affected, there is no legal obstacle to the conclusion of an agreement of this kind.

Under the Charter, Article 96(1), the General Assembly and the Security Council are entitled to request the Court 'to give an advisory opinion on any legal question'. This is purely a faculty: nowhere in the Charter is there any obligation to seek the advice of the Court, and the Court has no power to offer it unasked. A proposal during the drafting of the Charter to give the Court responsibility for authoritative interpretations of the Charter was not adopted.

Article 96(2) provides that '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'. Such authorizations have in fact been given to the Economic and Social Council and to practically all the specialized agencies. The restriction as to the type of questions to be put was however held to debar the World Health Organization, which had received a general authorization from the General Assembly to request opinions, from asking for an opinion on the question whether the use of nuclear weapons by a State would be a breach of its obligations under international law 'including the WHO Constitution'. The Court held that under the 'principle of speciality' the WHO could not deal with matters beyond what was authorized by its Constitution; that the question of the legality of nuclear weapons was outside that Constitution; and accordingly the question was not one 'arising within the scope' of the activities of the Organization.[52] In another case, the question was raised whether a subsidiary organ of the General Assembly, whose sole function was in fact to ask for advisory opinions (on the validity of judgments of the United Nations Administrative Tribunal), had any 'activities' of its own for the purposes of this text; the Court ruled in the affirmative.[53]

The provision in the Statute that corresponds to this Charter text is Article 65, which provides that 'The Court may give an advisory opinion on any legal question' at the request of any authorized body. The use of the word 'may' signifies, as the Court has repeatedly emphasized, that the Court is not bound to give an opinion, but may decline to do so if it considers that course appropriate. It has never in fact done so, but has on a number of occasions considered the possibility of refusal. From the resulting jurisprudence it is clear that the reply of the Court, itself an organ of the United Nations, 'represents its participation in the activities of the Organization and, in principle, should not be refused'; and that only compelling reasons would justify a refusal.[54]

A special problem however arises if the question put to the Court is related to an inter-State dispute, and one of the States concerned in that dispute objects to the Court giving the opinion. The consent of the States parties to a dispute is the basis of the Court's jurisdiction in contentious cases; but since the Court's reply to a request for an advisory opinion has no binding force, 'it follows that no State . . . can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should undertake'.[55] The consent of any State party to a dispute underlying a request for advisory opinion is thus not necessary for the opinion to be given; but, as the Court declared in a later

[52] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, ICJ Reports 1996,* p 66.

[53] *Application for Review of Judgement No 158 of the United Nations Administrative Tribunal, Advisory Opinion, ICJ Reports 1973,* p 166.

[54] See, eg, *Western Sahara, Advisory Opinion, ICJ Reports 1975,* p 12, para 23.

[55] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, ICJ Reports 1950,* p 65 at p 71.

case, 'lack of consent might constitute a ground for declining to give the opinion requested', in the exercise of the Court's discretion, 'if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion'.[56] The Court offered as an instance of this (and probably the most compelling instance), 'when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent'.[57] In no case up to the present has the Court declined to give an opinion on this ground, or any other discretionary ground. It did not even refuse in the case of a dispute between the General Assembly and a State, in which the Assembly, unable to obtain a binding advisory opinion under the provisions of the Convention on the Privileges and Immunities of the United Nations, because of a reservation to that Convention made by the State concerned, sought and obtained a non-binding opinion of the Court on the point in dispute.[58]

A further difficulty that has arisen in connection with requests for advisory opinion in cases involving, or related to, existing international disputes is the extent to which a party, or the parties, to such a dispute should be treated as though they were parties to a contentious case, and in particular should be able to appoint a judge ad hoc. Article 68 of the Statute provides that:

> In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

The Permanent Court had recognized that in some cases States should be treated as 'parties' to the extent of appointing judges ad hoc. The Rules of Court make no direct provision for this, but Article 102(2) repeats the text of Article 68, and adds: 'For this purpose, it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States'.

Practice has shown that the implementation of these texts in specific cases in relation to the appointment of judges ad hoc is not always straightforward. In the *Namibia* case, South Africa, which had a very special interest in the proceedings, and could claim that there was a 'legal question actually pending' between itself and nearly every other State, was not permitted to appoint a judge ad hoc.[59] In the *Western Sahara* case, Morocco and Mauritania each claimed the existence of special legal ties with the territory, and contested the arguments of Spain, the former colonial power: Morocco was permitted to appoint a judge ad hoc, but Mauritania was not.[60]

[56] *Western Sahara, ICJ Reports 1975*, p 12, para 32.

[57] Ibid, para 33.

[58] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, ICJ Reports 1989*, p 177, para 38.

[59] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order of 29 January 1971, ICJ Reports 1971*, p 12, and *Advisory Opinion*, ibid, p 16, paras 35ff.

[60] *Western Sahara, Order of 22 May 1975, ICJ Reports 1975*, p 6.