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THE DEVELOPMENT OF INTERNATIONAL LAW PURSUED BY THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE

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Abstract

The development that will follow aims at understanding the extent to which the advisory activity of the International Court of Justice contributes to the development of international law. This development takes place in different forms, whether it is in the clarification of obscure points of international law, the creation of new rules of interpretation and rules of law, or again to some extent, in the participation to international dispute settlements. After determining the different forms of action of the ICJ in its advisory proceedings, the second part of the dissertation will address the question of implementation of the ICJ's advisory opinions.

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AUTHOR'S DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Marie LEPELLETIER

To Ilka

INTRODUCTION

"Wise men don't need advice. Fools won't take it."
-Benjamin Franklin

The International Court of Justice, instituted by Chapter XIV of the United Nations Charter, is the "principal judicial organ of the United Nations".[1] It is empowered with two main functions : a contentious one, that is, to settle interstate disputes by holding judgements, and an advisory function, which constitutes in answering questions put before it by organs of the United Nations entitled to do so, when they need legal clarification on obscure points of international law. While its judgments have a binding effect on the parties to the contentious proceedings, its advisory opinions, due to their advisory nature, are not binding and serve only as a guiding tool to said organs of the United Nations. Given that the advisory proceeding exists since the establishment of the Permanent Court of International Justice, it is relevant to observe the historical background of the advisory function of the ICJ, before analysing its purposes.

Historical background of the advisory function at the World Court

When the Permanent Court of International Justice ("PCIJ") was instituted, it was the first international jurisdiction to be empowered with an advisory function. This advisory power was granted in Article 14 of the League of Nations Covenant[2] and was distinct from the first function of the PCIJ, that is, the contentious one.[3] The aim of this new advisory function was to offer to the states represented in the Council and the Assembly of the League of Nations the possibility to seek collectively for legal guidance from the world court,[4] or to put a dispute or a question before it.[5] Given the huge success of this new mechanism[2], it was decided during the San Francisco Conference to reopen the discussion on the advisory proceedings, among other things to assess whether the advisory function would be compatible with the main function of the Court which is "to hear and decide disputes"[6].

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[1] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 92.
[2] League of Nations, Covenant of the League of Nations, 28 April 1919, Article 14 : « The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly".
[3] PRATAP (D.), *The Advisory Jurisdiction of the International Court* (1972), p. 2.
[4] ZIMMERMAN (A.), TAMS (C.), OELLERS-FRAHM (K.), *The Statute of the International Court of Justice*. *A Commentary* (2019), p. 1608.
[5] ROSENNE (S.), *The Law and Practice of the International Court*, vol. I, (2006), p. 274; See also POMERANCE (M.), *The Advisory Function of the International Court in the League and U.N. Eras* (1973).
[6] Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice (ILAC), Report in *AJIL* 39 (Suppl. 1945), pp.1-42, para. 65.

Several issues were raised, such as the concern of the rise of the settlement of political issues rather than exclusively legal ones[7]. Additionally, the fear of seeing the use of the advisory function to avoid a final settlement of disputes was mentioned.[8] Nevertheless, after considering these doubts, the debate was concluded on stating the numerous reasons leaning towards the adoption of the advisory function for the new world court.[9] The Committee then focused on resolving two questions : "whether the scope of the jurisdiction should remain as it is at present, or be enlarged; and what safeguards should be instituted to control it and to prevent its misuse".[10]

This is how, when the International Court of Justice ("ICJ") was instituted to take after the PCIJ, not only did the Informal Inter-Allied Committee decide to maintain the advisory function of the Court, but it went even further and decided to broaden its scope of action.[11] Therefore, it was decided to extend the faculty to form a request for an advisory opinion to other bodies rather than "to confine it to the executive organs of the future General International Organisation"[12]. Article 96 of the United Nations Charter, which is comparable to Article 14 of the League of Nations Covenant, provides the faculty to seek for an advisory opinion before the ICJ. In its second paragraph, it thus states that "[o]ther 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."[13]

Another important novelty is the existence of a discretionary power of the Court to decide whether or not to welcome a request for an advisory opinion. Under the League of Nations system, Article 14 of the Covenant seemed to indicate that the PCIJ had no choice but to give the advisory opinion[14], whereas in Article 65 of the ICJ Statute, it has been often

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[7] ZIMMERMAN (A.), TAMS (C.), OELLERS-FRAHM (K.), *The Statute of the International Court of Justice*. *A Commentary* (2019), p. 1610.

[8] *Idem* ; Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice (ILAC), *op. cit.* at 6, para. 65 : "Some of us were inclined to think at first that the Court's jurisdiction to give advisory opinions was anomalous and ought to be abolished, mainly on the ground that it was incompatible with the true function of a court of law, which was to hear and decide disputes. It was urged that the existence of this jurisdiction tended to encourage the use of the Court as an instrument for settling issues which were essentially of a political rather than of a legal character and that this was undesirable. Attention was drawn to instances of this which had occurred in the past. Subsidiary objections were that the existence of this jurisdiction might promote a tendency to avoid the final settlement of disputes by seeking opinions, and might lead to general pronouncements of law by the Court not (or not sufficiently) related to a particular issue or set of facts."

[9] *Ibid*, paras. 66-68.

[10] *Ibid*, para. 69.

[11] ZIMMERMAN (A.), TAMS (C.), OELLERS-FRAHM (K.), *The Statute of the International Court of Justice*. *A Commentary*, *op. cit.* at 7, p. 1610.

[12] *Ibid*, para. 70.

[13] United Nations, *Charter of the United Nations*, *op. cit.* at 1, Article 96, b).

[14] Article 14 has been the subject of controversies during the era of the League. The English version of the text was read as "*may give*", whereas the French version of the article used the word "*donnera"*, which means

inferred that the word "*may*" offers a chance to the Court to refrain from giving an advisory opinion, even when all conditions to the jurisdiction of the Court are met.[15] The Court repeatedly stated that the language of Article 65 is of a permissive nature.[16] It has now become almost automatic for the Court to make the following statement in its advisory opinions before addressing the issue of its discretionary power:

> "The Court has recalled many times in the past 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 (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I. C. J. Reports 1996 (I), pp. 234-2115, para. 14)".[17]

This faculty exists "so as to protect the integrity of the Court's judicial function as the principal judicial organ of the United Nations".[18] That being said, it remains that despite this discretionary power, the Court's case law demonstrates its will to welcome advisory requests. In fact, the Court will only refuse a request if there are 'compelling reasons' to do so.[19]

"shall/will give". The French version of the text was thus much less malleable than the English version and this difference created confusion with regards to the absence or existence of a potential discretionary power offered to the PCIJ to give or refuse to give an advisory opinion.

[15] ALJAGHOUB (M.), *The Advisory Function of the International Court of Justice* (2006), p. 39; ZIMMERMAN (A.), TAMS (C.), OELLERS-FRAHM (K.), *The Statute of the International Court of Justice. A Commentary*, *op. cit.* at 7, p. 1617; PRATAP (D.), *The Advisory Jurisdiction of the International Court*, *op. cit.* at 3, p. 145; ABI-SAAB (G.), "On Discretion – Reflections on the Nature of the consultative Function of the International Court of Justice", in *International Law, the International Court of Justice and Nuclear Weapons* (Boisson de Chazournes, L., ed., 1999), pp. 36-50.

[16] *Interpretation of Peace Treaties*, Advisory Opinion : I.C. J. Reports 1950, p. 72; *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 12, para. 23; *Reservations to the Convention on Genocide*, Advisory Opinion : I.C.J. Reports 1951, p . 19; *Judgments of the Administrative Tribunal the I.L.O. upon complaints made against the U.N.E.S.C.O.*, Advisory Opinion of October 23rd, 1956 : I.C.J. Reports 1956, p. 86*; Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962 : I.C.J. Reports 1962, p. 155; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1973, p. 175, para. 24; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, I.C.J. Reports 1989, p. 189 ff., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, para. 14 ; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, I.C.J. Reports 1999, p. 78, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403, para. 29; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95.

[17] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *op. cit.* at 16, p. 403; *Legal Consequences of the Construction of a Wall*, *op. cit.* at 16, para. 44; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in* 1965, *op. cit.* at 16, para. 63.

[18] *Ibid*, para. 64; See also *Legal Consequences of the Construction of a Wall*, *op .cit.* at 16, pp. 156-157, paras. 44-45; *Declaration of Independence of Kosovo* case, *op. cit.* at 16, pp. 415-416, para. 29.

[19] ALJAGHOUB (M.), *The Advisory Function of the International Court of Justice*, *op. cit.* at 15, p. 35.

However, on a third matter, the screws were tightened during the San Francisco Conference. While under the League of Nations system, advisory opinions could be sought "upon any dispute or question",[20] Article 65 of the ICJ Statute narrowed it down to "any *legal* question". The purpose of this change was to stop the Court from rendering opinions on non-legal matters, in other words, on political matters.[21]

The legal effect of ICJ advisory opinions has remained the same as during the era of its predecessor, which is that they have no binding force. Nevertheless, the impact of advisory opinions of the ICJ has been tremendous in respect with the development of international law.

The purpose of the advisory function

When the ICJ was established as the principal judicial organ of the United Nations, its advisory function, distinct from its contentious jurisdiction, was seen as underlining "the 'organic connection' between the Court and the UN and, therefore, its role and contribution as one of the Organisation's principal organs, as well as the principal judicial organ"[22]. The Court has stressed this relationship and declared that it was part of its duties to deliver advisory opinions in order to participate to the work of the United Nations.[23] This notable explains the determination of the Court to render advisory opinions as often as possible, in spite of the existence of the discretionary power to refute them, when the absence of compelling contrary reasons allow it. Therefore, the Court participates to the mission of the UN to maintaining international peace and security while using its advisory power. In numerous occasions, arguments have been raised that the Court should not give an advisory opinion to answer questions that were put before it, asserting that the question had a political character, or was disguising an intention to settle an interstate dispute. However, it is actually hoped that in situations constituting a threat to international peace and security, ICJ's advisory opinions may be "an effective instrument of preventive diplomacy" or offer "a substantial contribution to resolving an existing dispute".[24] The *Wall* case regarding the Israeli-Palestinian conflict is the archetype of how the international community hopes that the advisory function could help to restore peace in a conflicted area preoccupying the international community for a very long time.

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[20] League of Nations, Covenant of the League of Nations, *op. cit.* at 2, Article 14.
[21] ROSENNE (S.), *The Law and Practice of the International Court*, *op. cit.* at 5, pp. 285-286.
[22] ALJAGHOUB (M.), *The Advisory Function of the International Court of Justice*, *op. cit.* at 15, p. 2.
[23] *Idem.*
[24] ALJAGHOUB (M.), *The Advisory Function of the International Court of Justice*, *op. cit.* at 15, p. 6 ; See also BEDJAOUI (M.), "The Contribution of the International Court of Justice Towards Keeping and Restoring Peace", in: *Conflict Resolution: New Approaches and Methods* (2000), p. 13.

The matter of the advisory function of the ICJ, leads us to raise several questions. How does the advisory proceedings participate in the development of international law? What were the concrete contributions of advisory opinions to the development of international law? Does the lack of binding force weaken advisory opinions and their consequences ? Do advisory opinions bring a real solution in order to maintain international peace and security?

An advisory opinion was defined as "an authoritative but non-binding explanation of a question or issue"[25]. Essentially, except in case of a conventional exception, a judicial body, when exercising its advisory function, is not empowered with the authority to impose legal sanctions, duties, or obligations on any State, or on any international organisation.[26] However, some authors have considered that advisory opinions can enjoy more influence than binding judgments in contentious cases, because while they do not constitute *res judicata*, they do not have the relative effect that judgments have. They do not influence only the parties to an individual opinion but will affect the general interpretation of international law for all States.[27] Throughout the advisory caselaw of the ICJ, in answering the questions put before it, the Court came to clarify obscure points of international law, to develop new rules of the law of treaties, to acknowledge new sources of international law, and to recognize the existence of customary rules of international law. Moreover, due to its high notoriety and strong influence towards other judicial bodies of international law, the ICJ's advisory opinions acted as a manual guiding them through their reasonings and bringing them necessary tools to interpretate rules of international law. Moreover, the contemporary sphere of international law has known the multiplication of courts and tribunals of international law, whether they are permanent, arbitrary or *ad hoc*. This is unavoidably followed by the effect of the multiplication of interpretations of international law. In such a context, the ICJ, through its advisory function, comes to highlight one main interpretation of international law, to preserver judicial security and coherence of international law. Jo Pasqualucci has argued that "advisory opinions contribute to an international common law

[25] See ALJAGHOUB (M.), *The Advisory Function of the International Court of Justice*, *op. cit.* at 15, p. 12; PASQUALUCCI (J.M.), *The Practice and Procedure of the Inter-American Court of Human Rights* (2003), p. 29; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* Advisory Opinion, ICJ Rep., 1950, p. 71.

[26] HUDSON (M.), *The Permanent Court of International Justice, 1920-1942: A Treatise* (1943), p. 512.

[27] PASQUALUCCI (J.M.), *The Practice and Procedure of the Inter-American Court of Human Rights*, *op. cit.* at 25, p. 30; HEFFERNAN (L.), "The Nuclear Weapons Opinions: Reflections on the Advisory Procedure of the International Court of Justice", 28 *Stetson Law Review*, 1998, p. 133.

and to the resolutions of doctrinal differences. They also provide an alternative non-confrontational means to resolve international dispute".[28]

The following development will aim at answering the different questions set above by addressing in the detail all of these points of the functioning and the effects of the advisory proceedings. The first part will focus on the contributions made to international law by the jurisprudence of the International Court of Justice, more precisely by its advisory caselaw. After demonstrating of the strength of the advisory function, and the mission of guidance of the Court throughout this proceeding, we will then address the weaknesses of the advisory system of the ICJ. The second part will thus observe the obstacles encountered by the ICJ at different stages of the advisory process.

[28] PASQUALUCCI (J.M.), *The Practice and Procedure of the Inter-American Court of Human Rights*, *op. cit.* at 25, p. 31.

PART 1:
THE CONTRIBUTIONS MADE TO INTERNATIONAL LAW BY THE JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE

1. When international courts and tribunals have to rule a dispute, they are required to interpret international law when it happens to be obscure, in order to clarify it. Judges do not confine themselves to this interpretative role. In fact, they have progressively taken the reins of the normative power and now contribute to the establishment of rules and principles of international law. This is especially true of the judge of the International Court of Justice (ICJ). This ability comes from the strong reputation that the Court holds. A Court "*of and for the whole world […], universalist in its composition, outlook and vocation, truly representing and at the service of the international community in its entirety, and not dominated by the legal or social culture or special interests of any segment thereof*"[29]. Throughout its mission, the Court has built a corpus of rules, created new principles, modified old ones and has thus made the state of international law evolve, following "society's continuous present"[30]. Its power of guidance is so wide and broad that its contributions to international law are considered and repeated by other international arbitral tribunals, *ad hoc* tribunals, regional courts and domestic courts. This is how, by establishing strong precedents, the jurisprudence of the world court benefits other judicial bodies as a main guidance tool. They follow most often its interpretation of international law provisions and principles, and apply the principles that the Court has recognized in its jurisprudence. This judicial dialogue fosters the coherence of international law. Throughout the analyse of how the ICJ contributes to the development of international law, it appears that this function takes place via its contentious proceedings as much as via its advisory opinions. Just as well, both proceedings are considered by States and other judicial bodies when needed. In this part of our development, the first chapter will be an observation of the power of guidance that the ICJ possesses through its jurisprudence and how, in a state of proliferation of international courts and tribunals, the World Court acts as a judicial lighthouse, and strengthens the coherence of international law. On the basis of this power of guidance and this influence of the ICJ on other judicial bodies, the second chapter will then demonstrate the concrete contributions to international law that have occurred throughout the advisory activity of the Court.

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[29] ABI-SAAB (G.), "The International Court as a world court" *in* LOWE(V.), FITZMAURICE (M.) (eds.), *Fifty years of the International Court of Justice* (1996), p. 3.

[30] ALLOTT (P.), "The International Court as a world court" " *in* LOWE(V.), FITZMAURICE (M.) (eds.), *Fifty years of the International Court of Justice*, *op. cit.* at 29, p. 17.

CHAPTER 1:
THE ICJ WORKING AS A GUIDE FOR INTERNATIONAL COURTS AND TRIBUNALS, TO STRENGTHEN JUDICIAL SECURITY AND COHERENCE OF INTERNATIONAL LAW

2. This chapter will aim to establish in the first part how the advisory opinions of the ICJ fall within the definition of international jurisprudence (Section 1). On this basis, the second part will show how the jurisprudence of the ICJ is highly relevant to other international judicial bodies, to guide them in their caselaw, in order to secure the right coherence of international law (Section 2).

Section 1 : The role of advisory opinions as part of the ICJ's jurisprudence

3. In the XVIIIth century, Adam Smith broadly defined the notion of jurisprudence as "the theory of the rules by which civil governments ought to be directed"[31]. According to him, this involved four main objects: "the maintenance of justice, the provision of police, the raising of revenue and the establishment of arms"[32]. This definition has been revisited and set to a narrower scope. It is now observed as the collection of all judicial decisions, arbitral decisions, from national and international judicial bodies[33]. Moreover, the natural authority of jurisprudence as a source of law is recognized. Article 38 of the Statute of the ICJ provides that "the Court […] shall apply […] judicial decisions as subsidiary means for the determination of rules of law"[34].

4. "The World Court is not only the oldest international general court, but also tremendously influential in the development of international law and treaty interpretation"[35]. Already when the PCIJ was established, one of the foremost expectations of the international community was that it would contribute to fill the gaps in international law via the construction of a solid jurisprudence[36]. In the process of serving its main goal which is "maintaining international peace and understanding"[37], it can be required of the Court to flesh out the current state of international law while applying it to its contentious and advisory proceedings. Such purpose has been then inherited by its successor, the ICJ.

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[31] SMITH 1978/1762, p. 5; quoted in VEITCH (S.), CHRISTODOULIDIS (E. A.), GOLDONI (M.), *Jurisprudence: themes and concepts*, London, Routledge, 2018, p. 1.
[32] VEITCH (S.), CHRISTODOULIDIS (E. A.), GOLDONI (M.), *Jurisprudence: themes and concepts*, *op. cit.* at 31, p. 1.
[33] DAILLIER (P.), FORTEAU (M.), PELLET (A.), *Droit international public*, Paris, L.G.D.J., 8th ed., 2009, p. 437.
[34] Article 38 d), *Statute of the International Court of Justice*.
[35] POPA (L. E.), "The Holistic Interpretation of Treaties at the International Court of Justice", *Nordic Journal of International Law*, Vol. 87, No. 2, 2018, p. 253.
[36] KOLB (R.), *The International Court of Justice*, Oxford and Portland, Hart Publishing, 2013, p. 1139.
[37] *Idem*.

5. Among the features of what is called *jurisprudence* appears notably a normative function (*i.e.* the concrete application of abstract and general legal norm to a particular case before the Court) and the contribution to the coherence and consistency of the system. In the practice of the former, Robert Kolb raises the point that "jurisprudence creates law"[38]. He explains that :

> "the texts themselves are insufficient to provide an exhaustive indication of the state of the law in a given field, and that, to that end, one must also concern oneself with the developments that have taken place in the jurisprudence, and indeed that in some fields the jurisprudence has a tendency to be particularly important"[39].

The latter is applied through the confirmation of the principles newly established, creating thus precedents. Whether concerning binding decisions or persuasive ones, the consolidation of international law takes place mostly within the ICJ's jurisprudence, in the same way that customary law is built via its recurrent practice by States.

6. However, an uncertainty remains regarding the scope that 'jurisprudence' encompasses. Traditionally, as article 38 of the Statute states, only 'judicial' decisions, *i.e.* judgments, are part of the jurisprudence[40]. In other words, this excludes decisions held by other bodies such as the Human Rights Committee (established by the *International Covenant on Civil and Political Rights*), or the African Commission on Human and Peoples' Rights (established by the *African Charter on Human and Peoples' Rights*). This narrow definition seems also to exclude advisory opinions.

7. Yet, the ICJ has taken into account the decisions of these bodies as well as what has been said in advisory opinions, to hold judgments. In fact, in the *Ahmadou Sadio Diallo* case, the Court referred to what it even called the "*jurisprudence* of the Human Rights Committee" and the "case law of the African Commission on Human and Peoples' Rights". The Court justified it :

> "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was establish specifically to supervise the application of that treaty. The point here is *to achieve the necessary clarity and the essential consistency of international law, as well as legal security*, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled".[41](emphasis added).

8. The references made to its advisory opinions and the ones of its ancestor to support its reasoning, are even more frequent. Among others, we could cite the 1959 *Interhandel*

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[38] *Ibid*, p. 1141.
[39] *Idem*.
[40] DAILLIER (P.), FORTEAU (M.), PELLET (A.), *Droit international public*, *op. cit.* at 33, p. 437.
[41] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639, para. 66.

case where the Court based its argument on the PCIJ's advisory opinion concerning *Nationality Decrees issued in Tunis and Morocco*[42] to decide whether it possessed jurisdiction or not[43]. In the 1969 *North Sea Continental Shelf* case, the Court referred to the PCIJ's work several times, quoting its advisory opinion in the case of the *Railway Traffic between Lithuania and Poland*[44] to remind the definition of the obligation to negotiate[45]. It also quoted its own reasoning in the advisory opinion on *Judgments of the Administrative Tribunal of the I.L.O. upon Complaints Made against U.N.E.S.C.O.*[46] to justify that its reasoning was based on legal grounds[47]. In the *Barcelona Traction* case, the Court referred several times to the advisory opinion held in the *Reparations* case[48] to remind what conditions are required to bring a claim in respect of the breach of an obligation the performance of which is the subject of diplomatic protection[49]. Later on, in the 2015 case on the *Application of the Convention on the prevention and punishment of the crime of genocide*, the Court defined the origins and purpose of said Convention[50] by quoting what it said before in the 1951 advisory opinion on the question[51].

9. There are many other examples of cases where the Court's reasonings were inspired by what it declared in its advisory opinions[52]. What we can infer from these observations is

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[42] *Nationality Decrees issued in Tunis and Morocco* (P.C.I.J., Series B, No. 4).
[43] *Interhandel Case*, Judgment of March 21st, 1959, I.C.J. Reports 1959, p. 6, p. 24.
[44] *Railway Traffic between Lithuania and Poland*, (P.C.I.J., Series A/B, No. 42, 1931).
[45] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, para. 87.
[46] *Judgments of the Administrative Tribunal of the I.L.O. upon Complaints Made against U.N.E.S.C.O.*, Advisory Opinion of October 23rd, 1956, I.C.J. Reports 1956, p. 77.
[47] *North Sea Continental Shelf*, *op. cit.* 16, para 88.
[48] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C. J. Reports 1949, pp. 181-182.
[49] *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, paras. 35, 53, 82.
[50] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, paras. 87, 139.
[51] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 23.
[52] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 833, paras. 20, 75, ; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 3, para. 50; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, paras. 46, 68; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, I.C.J. Reports 2011, p. 644, para. 132; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application for Permission to Intervene, Judgment, I.C.J. Reports 2011, p. 420, para. 67; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70, paras. 30, 139, 150, 158, 159; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, paras. 89, 101, 150, 193, 273; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, I.C.J. Reports 2009, p. 3, para. 8;
Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 832, para. 138; *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, para. 64, 66, 90; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, p. 168, paras. 172, 213, 216; *Land and Maritime Boundary between Cameroon*

that the ICJ judges seem to include these advisory decisions (as well as the ones held from other independent bodies) as precedents falling under the scope of jurisprudence and thus, they carry as much weight as the judicial decisions in Article 38 of its Statute. In fact, in the case regarding *Certain Property*, the Court itself used the words "*according to the consistent jurisprudence of the Court and the Permanent Court of International Justice*" and listed this jurisprudence mixing together its judgments and advisory opinions[53]. Following the same idea, we can observe that the references made by the Court to its own precedents usually offer a comingling of its binding and persuasive rulings.

10. It is notable that these references are not only made to support the implementation of conventional and customary international law and to show that new judgments are in line with the precedents. The Court also refers to advisory opinions to justify its reasoning, basing it on principles that were laid down in them. For instance, in the more recent case on the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia*, the Court held that :

> "As the Permanent Court of International Justice *recognized* in its Advisory Opinion of 16 May 1925 on the Polish Postal Service in Danzig, "all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion" (P.C.I.J., Series B, No. 11, p. 30)"[54] (emphasis added).

This highlights the creative power of advisory opinions, their contribution to filling the gaps of international law as much as judicial cases do.

11. On the basis of this definition of ICJ's jurisprudence which encompasses both advisory opinions and judgements, the second part of this development will focus on

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and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p. 303, para. 205; *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 466, para. 77; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, 1. C. J. Reports 2001, p. 40, para. 113; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1045, paras. 50, 69; *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, paras. 46, 47, 109, 112; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595, paras. 22, 29, 33; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 6, para. 47; *Arbitral Award of 31 July 1989*, Judgment, I.C.J. Reports 1991, p. 53, paras. 48, 50; *Aegean Sea Continental Shelf*, Judgment, I.C.J. Reports 1978, p. 3, paras. 59, 60; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, para. 58; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1973, p. 49, para. 18; Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 3, para. 17; *South West Africa, Second Phase*, Judgment, I.C.J. Reports 1966, p. 6, para. 36.

[53] *Certain Property, (Liechtenstein v. Germany)*, Preliminary Objections, Judgment, I.C.J. Reports 2005, p. 6, para. 24; See also *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, paras. 22-29.

[54] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 100, para. 75.

demonstrating to which extent, the ICJ, throughout its caselaw, acts a guide towards other international courts and tribunals.

Section 2 : The ICJ acting like a lighthouse within the fragmented universe of international jurisdictions

A. The loss of one sole interpretation due to the fragmentation of international law

12. During the past century, the field of international law has been the object of a multiple faces' fragmentation. A study group within the International Law Commission has been created and lead by Martti Koskenniemi to analyse this phenomenon[55]. This fragmentation takes place mostly in two ways : first it is related to the high increase of multilateral treaty activity in the past sixty years[56] that inevitably enhanced the various *lex specialis*. Second, it is due to what Laurence Burgorgue-Larsen calls a *judicial burgeoning*[57] entering the field of international law, in other words the proliferation of new courts and tribunals. Each of these jurisdictional institutions has a power of free interpretation and is not legally bound by the interpretation of other courts, which is what H.E. Judge Gilbert Guillaume considered as rising a serious risk of conflicting jurisprudence[58].

13. One of the most famous examples of interpretation division is the one made of the control of a State on a person, or a group of persons, mentioned at article 8 of the *Articles on Responsibility of States for Internationally Wrongful Acts*.[59] In the case regarding *Military and Paramilitary Activities in and against Nicaragua* in 1986, the ICJ's interpretation of this control mentioned at article 8 was that it had to be *effective* to give rise to legal responsibility of the United States and came to the conclusion that such effective control on the *contras*

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[55] ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, 13 April 2006.

[56] *Ibid*, p. 10. Citing the work of Charlotte Ku, the ILC Report notes that "in the twentieth century, about 6,000 multilateral treaties were concluded of which around 30 per cent were general treaties, open for all States to participate".

[57] Our translation, from BURGORGUE-LARSEN (L.), "De l'internationalisation du dialogue des juges. Missive doctrinale à l'attention de Bruno Genevois" *in Le dialogue des juges : mélanges en l'honneur du Président Bruno Genevois*, Paris, Dalloz, 2009, p. 98 : « le droit international a été saisi par un bourgeonnement juridictionnel de taille ».

[58] *Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice to the UN General Assembly*, 26 October 2000, p. 5.

[59] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), Article 8: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".

was lacking[60]. However, later in the 1995 *Tadić* case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), whilst examining the notion of control of a State, came to a different interpretation of Article 8 and considered that the degree of control required was an *overall control* and therefore chose a different approach than the one of the ICJ.[61] This disapproval of the ICJ's reasoning remains partial and the Chamber explains that "[t]he degree of control may, however, vary according to the factual circumstances of each case"[62]. The reasoning of the ICTY could thus be seen as an adjustment of the state of law towards a fairer handling of each case. Yet, it creates an unsettling situation in the state of law and contributes to the dangerous disappearance of judicial security.

B. The lighthouse of the ICJ in its role of interpretation

14. The philosopher Montesquieu said in the 18th century that judges are "no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour"[63]. Nevertheless, the balance has reversed since then and nowadays it is appropriate to say that judges whilst pronouncing the words of the law, also create the law[64] in particular through their power of interpretation. This is especially true for the ICJ which, through its proceedings, clarified international law, recognised the existence of customary rules, and even established new principles of international law. This is how, guiding other international courts and subjects of international law, *i.e.* states and international organisations, in their application and interpretation of international law, the ICJ acts as a lighthouse and thus helps to secure the global "coherence and unity" of the legal field.[65] Mads Adenas highlights that it is in fact the main business of the ICJ to provide tools for international courts and other bodies for applying international law.[66]

15. Following the same idea, it is noticeable that plenty of references have been made to the ICJ's jurisprudence by other courts and tribunals. The Inter-American Court of Human Rights (IACtHR) for instance refers to ICJ's cases extremely often since its very first

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[60] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 65, para 115-116.
[61] *Prosecutor v. Duško Tadić,* International Tribunal for the Former Yugoslavia, Case IT-94-1-A (1999), ILM, vol. 38, No. 6 (November 1999), p. 1546, para 145.
[62] *Ibid*, para. 117.
[63] MONTESQUIEU (C.), *Spirit of the Laws,* Amsterdam, Chatelain, 1749, vol. 4, p. 12.
[64] See ALLARD (J.), VAN WAEYENBERGE (A.), "De la bouche à l'oreille ? Quelques réflexions autour du dialogue des juges et de la montée en puissance de la fonction de juger », *Revue Interdisciplinaire d'Etudes Juridiques,* 2008, vol. 61, n°2, pp. 109-129.
[65] POPA (L. E.), "The Holistic Interpretation of Treaties at the International Court of Justice", *op. cit.* at 35, p. 253; ANDENAS (M.), "Reassertion and transformation: from fragmentation to convergence in international law", *Georgetown Journal of International Law*, vol. 42, Issue 3, 2015, p. 691.
[66] *Ibid*, p. 734;

decision in the *Velasquez Rodriguez* case[67]. Among all references made by the Inter-American Court, the most quoted ICJ's case is in fact an advisory opinion; the 1949 case regarding *Reparation for injuries suffered in the service of the United Nations*.[68] In her study on the judicial dialogue between the ICJ and the IACtHR, Paula Wojcikiewicz Almeida points out that 25 references to this case have been made by the IACtHR from 1989 to 2016.[69] The second most cited case is the *Military and paramilitary activities in and against Nicaragua* judgment[70]. Therefore, it is noteworthy that the Inter-American Court does not hesitate to look at the ICJ jurisprudence, including both advisory and contentious proceedings to support its reasonings. Both are equally looked at by ICTs and serve as a guidance to them, alleviating the risks of judicial insecurity due to the judicial proliferation.

16. The International Tribunal for the Law of the Sea (ITLOS) also referred to the ICJ and used its interpretations several times. To decide whether the tribunal had jurisdiction to give an advisory opinion requested by the Sub-Regional Fisheries Commission, it quoted the ICJ's advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict.*[71] Likewise, in the advisory opinion held by the Seabed Dispute Chamber of ITLOS in respect with *Responsibilities and obligations of States with Respect to activities in the Area*, the Chamber quoted the ICJ judgment in *Pulp Mills on the River Uruguay* to base its interpretation on it regarding the precautionary approach in international law[72]. In the same case, the Chamber reminded the principle of full compensation (*restitutio in integrum*) consecrated by the ancestor of the ICJ, that is the Permanent Court of International Justice, in the *Factory at Chorzów* case on merits[73]. This PCIJ case has also been quoted by ITLOS in the *M/V Saïga (No. 2)* to remember the obligation of reparation. Still in the advisory opinion rendered by the Seabed Dispute Chamber, the ICJ's advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* was quoted to support the reasoning of the Chamber[74]. Finally on the question of the ways

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[67] *Velasquez Rodriguez v. Honduras*, Judgment (Merits) (IACtHR, Jul. 29, 1988).
[68] *Reparation for injurie suffered in the service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 174
[69] ALMEIDA (P. W.), "The Asymmetric Judicial Dialogue Between the ICJ and the IACtHR: An Empiricial Analysis", *Journal of International Dispute Settlement*, 2019, p. 13; At footnote 77, Paula Wojcikiewicz Almeida cites the exhaustive list of the IACtHR cases in which references to the ICJ were made.
[70] *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986, p. 14.
[71] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 24, para. 68.
[72] *Responsibilities and obligations of States with Respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber),* Advisory Opinion, ITLOS Reports 2011, p. 47, para. 135.
[73] *Ibid*, para. 194.
[74] *Ibid*, paras. 59 and 60.

of interpretation that the Tribunal may use, the Chamber remembered many cases of the ICJ amongst others to expressly show that its approach was similar[75].

17. The great amount of decisions given by the Court has thus built a *corpus* of jurisprudence. They "converge on the importance of the Court's institutional function as the chief jurisdiction of the specific legal system that is 'public international law'"[76]. As Robert Kolb underlines it, this jurisprudence "contributes to the coherence and consistency of the system"[77]. In the same purpose of coherence and security of public international law, this guidance of ICJ could be expanded to a preliminary phase: the one that constitutes a request for an advisory opinion.

18. Mahasen M. Aljaghoub states that most of advisory opinions requested so far have been initiated by organs and agencies of the United Nations and that "the reception of advisory opinions by the requesting organs provides ample evidence that the requests were motivated by the need for guidance in the UN's work"[78]. In the case on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 267(1970)*, the Security Council considered that an advisory opinion from the ICJ "would be useful for the Security Council in its further consideration of the question of Namibia and in furtherance of the objectives the Council is seeking."[79] In the *Kosovo* advisory opinion, Serbia, which was the sole sponsor to the resolution by which the General Assembly addressed its request for an advisory opinion to the Court, stated that "the Court's advisory opinion would provide politically neutral, yet judicially authoritative, guidance to many countries still deliberating how to approach unilateral declarations of independence in line with international law"[80]. In the *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal* case, the Committee on Applications for Review of Administrative Tribunal Judgements made a request to the Court for an advisory opinion and sought for its guidance on the "legal question really in issue".[81] In the case on *Certain expanses of the United Nations*, the General Assembly recognized its "need for authoritative legal guidance as to

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[75] *Ibid*, para. 57.
[76] KOLB (R.), *The International Court of Justice*, *op. cit.* at 36, p. 1140.
[77] *Ibid*, p. 1141.
[78] ALJAGHOUB (M.), *The Advisory Function of the International Court of Justice*, *op. cit.* at 15, p. 225.
[79] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution 267(1970)*, Advisory Opinion, ICJ Rep., 1971, p. 24.
[80] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403, para. 32.
[81] *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal*, Advisory Opinion, I.C.J. Reports 1987, p. 18, para. 45.

obligations of Member States"[82]. In fact, the ICJ further reminded the statement it made in the advisory opinion it held about the *Conditions of Admission of a State to Membership in the United Nations:*

> "In its Opinion of 28 May 1948, the Court made it clear that as 'the principal judicial organ of the United Nations', it was entitled to exercise in regard to an article of the Charter, 'a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers'."[83]

19. The idea of expanding access to the advisory function of the ICJ to other judicial bodies, as to guide them as well, was raised by some authors. H.E. Judge Gilbert Guillaume, former president of the ICJ, whilst reminding the crucial importance of a dialogue amongst international courts to avoid a dangerous fragmentation of international law, even suggested to broaden the possibility for regional and international courts and tribunals to seek an advisory opinion before the Court in that order, and thus to spread the interpretation of international law made by the World Court :

> " In order to reduce the risk of differing interpretations of international law, would it not be appropriate to encourage the various courts to seek advisory opinions in some cases from the Court, by way of the Security Council or the General Assembly?
>
> This procedure could be adopted even for those international courts that are not organs of the United Nations, such as the International Tribunal for the Law of the Sea and the future International Criminal Court. The Council of the League of Nations made requests for advisory opinions on behalf of other international organizations and it is difficult to see why the General Assembly could not do the same. Perhaps it could, by means of an appropriate resolution, urge not only the courts it has established but also those outside the United Nations system to turn to the Court through the General Assembly."[84]

It is not surprising to read such statement coming from a member of the Court. For a very long time, whilst other international courts and tribunals (ICTs) would often make references to the ICJ's jurisprudence, the latter would remain impervious to the judgments held by other ICTs in its own reasonings. It is only in the 2010 *Ahmadou Sadio Diallo* case, that the Court made an express reference to both Inter-American Court of Human Rights and European Court of Human Rights' jurisprudence as well as what it called "the jurisprudence of the Human Rights Committee" to support its reasoning[85].

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[82] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962 : I.C.J. Reports 1962, pp. 155-156.
[83] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, I.C.J. Reports 1947-1948, p. 61.
[84] *Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice to the UN General Assembly*, 26 October 2000, p. 6.
[85] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 663, paras 65-68; ALMEIDA (P. W.), "The Asymmetric Judicial Dialogue Between the ICJ and the IACtHR: An Empiricial Analysis", *op. cit.* at 69, pp. 4-5.

20. In front of such judicial one-way dialogue that could be characterized as 'monologue', the Court has been accused of wallowing in a *jurisprudential narcissism*[86]. Yet, this is not surprising either. The multiple purposes of references made to another court's jurisprudence are "to help fill in gaps; to confirm the Court's decision; and search for guidance or inspiration, among others"[87]. It is a way of reinforcing an argument, to legitimate a reasoning whilst searching for guidance and inspiration[88]. This pursuit of legitimacy explains the turning point that took place in the IACtHR case law. Until 2001 *Constitutional Court* case, the Court referred to the ICJ by mentioning its precedents in the core text of its judgements to support its reasoning, while starting 2001, it only reminded the ICJ's case law in footnotes[89]. This change of attitude can be explained by the fact that throughout its caselaw, the Inter-American Court grew in reputation and needed less and less external support to reinforce its reasonings. The presence of simple footnotes would thus be sufficient to show the continuity of international law jurisprudence and the judicial coherence of the IACtHR case law with the one of the ICJ.

21. Due to its high reputation, the ICJ does not need to make such references to support its decisions. The judges know that the World Court is the one that will have this role of guidance and inspiration for the other international courts and tribunals and even for domestic courts.

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[86] KAMTO (M.), « Les interactions des jurisprudences internationales et des jurisprudences nationales », in *La juridictionnalisation du droit international*, Pedone, 2003, p. 393-460.

[87] ALMEIDA (P. W.), "The Asymmetric Judicial Dialogue Between the ICJ and the IACtHR: An Empiricial Analysis", *op. cit.* at 69, p. 2; Harold Hongju Koh, 'International Law as Part of Our Law' [2004] 98 American Journal of International Law 43.

[88] ALMEIDA (P. W.), "The Asymmetric Judicial Dialogue Between the ICJ and the IACtHR: An Empiricial Analysis", *op. cit.* at 69, p. 3; David S Law and Wen-Chen Chang, 'The Limits of Global Judicial Dialogue' [2011] 86 Washington Law Review 3, 571.

[89] ALMEIDA (P. W.), "The Asymmetric Judicial Dialogue Between the ICJ and the IACtHR: An Empiricial Analysis", *op. cit.* at 69, p. 13.

CONCLUSION OF THE CHAPTER

The caselaw of the International Court of Justice of both contentious and advisory proceedings constitutes a strong jurisprudence which, throughout the decades, has been quoted and repeated by other courts to strengthen and justify their reasonings. In that sense, the World Court possesses a strong power of influence.

Moreover, an interjurisdictional dialogue was set up, and while the jurisprudence of the ICJ is very often cited by other courts, the ICJ happened, though much less frequently, to do the same. This dialogue is essential to maintain a certain coherence of the field of international law in the contemporary world subject to the multiplication of jurisdictional bodies of international law. Even if other courts and tribunals are not bound to apply the reasoning of the ICJ's judgments and advisory opinions, the fact that they do so enables to foster judicial security in international law. It is vital for the good functioning of rules of international law, and therefore for the maintaining of pacific relationships between states that the entirety of the international community knows where to stand regarding the rules that apply to the subjects of international law.

To that extent, the advisory proceedings are paramount, as their very wide scope of influence and main role of guidance allows them to play a primordial part in this mission of unification of the rules of international law.

CHAPTER 2 :
THE CONCRETE CONTRIBUTIONS TO THE DEVELOPMENT OF INTERNATIONAL LAW CARRIED BY THE ICJ'S ADVISORY OPINIONS

22. As the judicial arm of the United Nations, the ICJ has been a major actor in developing the rules of international law through its contentious and advisory proceedings[90]. This Chapter will demonstrate the development of international law that took place throughout advisory proceedings in three axes. First, we will establish their contribution to the construction of a normative supply in general international law (Section 1). The second part of this chapter will focus on the input of advisory opinions to the development of the law of the United Nations (Section 2). The last part will aim to assess the contributions made to the sources of international law, through the work of interpretation of the ICJ during its advisory proceedings (Section 3).

Section 1: The construction of a normative supply

23. Four periods can be observed in the ICJ's jurisprudence. During each of them, the Court adopted a different approach in its decisions. During the post-war period, the Court showed itself strongly dynamic before moving aside to some extent in the 1960s. It is then from the 1986 *Nicaragua* case that the Court came roaring back, with a heavy workload of cases to take care of[91].

24. When it first came to replace the PCIJ in the aftermath of the League of Nations decline, it was generally agreed amongst the international community that a new international order was needed to be put in place in order to end the chaos of the war years, and the great majority of States wanted this to happen with the ICJ's judicial policy. Therefore, this "conquering 'internationalist' approach made itself felt in the Court's contentious cases, but even more strongly in its advisory opinions"[92].

25. In its contentious cases, the Court came as a "normative supply"[93], developing rules of international law or extending the applications of the already existing ones. In the *Corfu Channel* case, the Court went beyond its Statute to give itself jurisdiction over the case. Indeed, article 36 provides that jurisdiction to the Court can be given through an official optional declaration of acceptance of its obligatory jurisdiction. However, prior to the

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[90] ALJAGHOUB (M.), "The Absence of State Consent to Advisory Opinions of the International Court of Justice: Judicial and Political Restraints", *Arab Law Quarterly*, Vol. 24, No. 2 (2010), p. 193; Lissitzyn, Oliver J., The International Court of Justice: Its Role in the Maintenance of International Peace and Security (New York: Carnegie Endowment for International Peace, 1951) p. 18

[91] KOLB (R.), *The International Court of Justice*, *op. cit.* at 36, p. 1147.

[92] KOLB (R.), *The International Court of Justice*, *op. cit.* at 36, p. 1149.

[93] ROS (N.), "La Cour internationale de Justice comme instrument de paix par le droit », *Etudes internationales*, Vol. 25, n° 2, p. 282.

decision, a letter was sent by Albania to the Court rejecting the substantive claims of the UK and asserting that the unilateral seizing was irregular. In its judgment on preliminary objection, the Court recognised this letter, albeit informal, as full acceptance of its jurisdiction basing its reasoning on the formulations of the Albanian Government in that letter[94].

26. In the field of the law of the sea, the Court also initiated some developments regarding maritime boundaries and the way to establish them. An avalanche of decisions took place in that matter which started with the *Norwegian fisheries* case in 1951 when the Court allowed the use of straight baselines to start the measurement of complex maritime areas, affirming in doing so that "all that the Court can see therein is the application of general international law to a specific case". This case then guided the States during the *travaux préparatoires* for the Geneva Convention on the Territorial Sea and Contiguous Zone[95].

27. The Court then brought a new evolution of the regime of maritime delimitation in the *North Sea Continental Shelf* case and doing so showed its power to recognise a certain practice of international law as part of customary law. In this case, the Court considered that when it comes to maritime delimitation, equitable principles have to be applied because it is a rule of customary law validated by the *opinio juris* and therefore binds all States. In the words of the Court, "*it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles*"[96].

28. The story does not end here and after the ratification of the UN Convention on the Law of the Sea repeating the rule of equitable principles[97], the ICJ's jurisprudence evolved again, in 2007, with the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*. If at first sight, it seems that the Court strictly applied the Montego Bay Convention, in fact the Court came up with an addendum to this method of delimitation and considered that relevant circumstances must also be taken into account in order to avoid disproportionality between two coastal States. This method of equidistance/relevant circumstances was already known and often applied but in 2007, it became the new general rule[98].

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[94] *Corfu Channel case* (United Kingdom v. Albania), Judgment on Preliminary Objection, ICJ, Reports 1948, pp. 26-27.
[95] United Nations Conference on the Law of the Sea, vol III., Geneva, 24th February-27 April 1958, available at https://legal.un.org/diplomaticconferences/1958_los/vol3.shtml consulted on February 19th, 2020.
[96] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, para. 85.
[97] *United Nations Convention on the Law of the Sea*, signed in Montego Bay on December 10th, 1982, entry in force on November 16th, 1994, *UNTC*, vol. 1834, n° 31363, p. 3, Articles 74 and 86.
[98] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicaragua v.

29. The ICJ has also been a pioneer in the context of the use of force in international law. Before 1986 and the *Nicaragua* case[99], no international court or tribunal ever took a clear position on the question of the use of force[100]. In this case, the Court clarified the views on this concept, not fearing to frustrate the superpower that is the United States and followed the majority by adopting a more restrictive interpretation on allowed use of force. The idea of the Court was to follow the goals and beliefs of the 1945 San Francisco Conference[101]. Its interpretation was therefore based on the words of Article 51 of the UN Charter as well as customary law to consider that the US use of force didn't constitute an act of self-defence enabling the use of force.

30. In the context of the right of peoples to self-determination, the Court held several advisory opinions and a judgment that brought the opportunity "to clarify important matters, spell out loose principles, and set out notions that were previously hidden in the interstices of the existing body of international resolutions and other manifestations of so-called soft law"[102].

31. First in 1971, the Court held an advisory opinion commonly called the *Namibia case*[103]. In this opinion, the Court had to answer the question of the 'legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)' which declared South African control over Namibia illegal. To do so, the Court wondered about the functioning of the C mandate given to the Republic of South Africa in the aftermath of World War I. The judge came to "enunciate an exceedingly important legal principle of intertemporal law"[104] which is that, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"[105]. So, in the words of the Court :

> "viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law […] In the domain to which the present proceedings relate, the last fifty

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Honduras), Judgment, I.C.J. Reports 2007, p. 659, para. 281. The Court repeated this statement thereafter in subsequent cases (i.e. *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 61, §§116-122; *Maritime Dispute* (Peru v. Chile), Judgment, I.C.J. Reports 2014, p. 3, § 180.

[99] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986, p. 14.

[100] KOLB (R.), *The International Court of Justice*, *op. cit.* at 36, p. 1156.

[101] *Idem*.

[102] CASSESE (A.), "The International Court of Justice and the right of peoples to self-determination" *in* LOWE (V.), FITZMAURICE (M.), *Fifty Years of the International Court of Justice*, *op. cit.* at 29, p. 353.

[103] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16.

[104] CASSESE (A.), "The International Court of Justice and the right of peoples to self-determination", *op. cit*. at 102, p. 353.

[105] *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *op. cit.* at 103, para. 53.

> years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain; as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore"[106].

Therefore, the Court considered that, even absent of the international legal framework following the First World War, self-determination became a paramount principle in the aftermath of the Second World War and thus necessarily had to be applied to pre-existing legal institutions too.

32. Secondly in the same advisory opinion, the ICJ clarified and confirmed a point of international law that was first developed in 1945. In the paragraph 52 of its opinion, the Court made it clear that :

> "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them"[107].

33. Emphasizing this statement on non-self-governing territories, the Court settles once and for all the ambiguity between the 1945 suggestion of allowing external self-determination only for territories falling within the international trusteeship system. Thereby excluding non-self-governing territories and both international practice and the prevailing views of states which clearly seemed to encourage the possibility of the right to self-determination to all dependent territories whatever their legal status is.

34. Furthermore, the way of interpretation that the Court used to read article 80 paragraph 1 of the UN Charter broadened the notion of 'peoples' farther and in the opposite direction than the one some commentators viewed it[108]:

> "A striking feature of this provision is the stipulation in favour of the preservation of the rights of "any peoples", thus clearly including the inhabitants of the mandated territories and, in particular, their indigenous populations. These rights were thus confirmed to have an existence independent of that of the League of Nations"[109].

35. The Court repeated its statement according which the principle of self-determination was applicable to all dependent people in its following *Western Sahara* case in 1975, thus enforcing its former reasoning as a precedent of international law[110]. Moreover, as Antonio Cassese highlights it, "the authoritative nature of such pronouncements irrefutably

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[106] *Idem.*
[107] *Ibid*, para. 52.
[108] CASSESE (A.), "The International Court of Justice and the right of peoples to self-determination", *op. cit*. at 102, p. 355.
[109] *Legal Consequences for States of the Continued Presence of South Africa in Namibia, op. cit.* at 103, para 59.
[110] *Western Sahara*, Advisory Opinion, I.C.J. Reports 1975, p. 31, para 54.

establishes that the granting of such a right to all non-self-governing territories has become part of customary law" and "the Court's contribution has been of the utmost importance" on the matter[111].

36. The Court also brought an important new development in this case, settling once and for all the uncertain question of the need for the will of dependent populations to the right of self-determination to be free and genuine. Indeed, as can be seen from reading the General Assembly's resolutions, it was unclear up until this opinion whether the free expression of popular will was required; the Resolution 1514 (XV) of 14 December 1960 did talk about according independence to the people of these territories "in accordance with their freely expressed will and desire"[112]. However, the Resolution 1541 (XV) adopted on the next day seemed to privilege the cases of free association or integration with an independent state. These required the free expression of the will of the population concerned (this condition is expressly mentioned in the Principles VII and IX of the Resolution). Regarding the cases of accession of colonial peoples to political independence, the Resolution remains mute, creating this unsettling situation[113]. The Court ended this unclear situation by advising a "free and genuine expression of the will of the population concerned in any instance of exercise of self-determination by a colonial people"[114]. It also stated that two exceptions were remaining: when "a certain population did not constitute a "people" entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances"[115]. However, not defining these two exceptions, a blur is still present on the subject.

37. In humanitarian law, the advisory opinion on the legality of the use or threat of nuclear weapons constituted the first time that the Court was requested to analyse and interpret rules of international humanitarian law[116]. The General Assembly was asking the Court the following question : "is the threat or use of nuclear weapons in any circumstance permitted under international law ?"[117]. Over the course of its reasoning, the Court came to

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[111] CASSESE (A.), "The International Court of Justice and the right of peoples to self-determination", *op. cit*. at 102, pp. 357-358.
[112] *Declaration on the granting of independence to colonial countries and peoples*, Resolution 1514 (XV) adopted on December 15th, 1960, by the General Assembly of the United Nations, para. 5.
[113] *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e) of the Charter*, Resolution 1541 (XV) adopted on December 16th, 1960, by the General Assembly of the United Nations.
[114] CASSESE (A.), "The International Court of Justice and the right of peoples to self-determination", *op. cit*. at 102, p. 359.
[115] *Western Sahara* case, *op. cit*. at 110, para. 59.
[116] DOSWALD-BECK (L.), "International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", *International Review of the Red Cross*, vol. 37, n° 316, 1997, p. 35.
[117] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I. C.J. Reports 1996, p. 226, para. 1.

wonder whether the principles and rules of humanitarian law established by the Geneva Conventions are applicable to this peculiar type of weapons[118]. The answer to this interrogation is positive :

> "nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However. it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. In this respect it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings. On the contrary, the newness of nuclear weapons has been expressly rejected as an argument against the application to them of international humanitarian law"[119].

38. This development of international law under the auspices of the ICJ does not limit itself to the varied fields of general international law implemented by States. In fact, where the advisory opinions have had the utmost creative power is regarding the edification of a set of rules governing the United Nations law.

Section 2: The contribution of the ICJ's jurisprudence to the development of United Nations law

39. Several advisory cases are to point out in the history of the development of UN law and the law of international organisations in general. These cases recognized for instance the legal international personality to international organisations (A) as well as the acknowledgement of implied powers (B).

A. The recognition of a legal international personality to international organisations

40. One of the fundamental rules governing the regime of the United Nations Organisation has been brought by the Court during the 1949 *Bernadote* case[120]. The General Assembly requested an advisory opinion after the assassination of the UN mediator in Palestine, Folke Bernadotte, by paramilitary Zionists under the *de facto* control of the Israel armed forces. The UNGA asked the following question to the Court:

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[118] *Ibid*, paras. 85-87.
[119] *Ibid*, para. 86.
[120] *Reparation for injuries suffered in the service of the United Nations*, *op. cit.* at 48, p. 174.

> "In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organization, the capacity to bring an international claim against the responsible *de jure* or *de facto* government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him ?"[121]

In its approach, the Court came to answer the question of whether the Organisation possessed an international personality[122]. Enumerating the roles and functions of the UN Organisation and connecting them to the purposes and principles provided by Article 1 of the Charter, the ICJ came to the conclusion that "to achieve these ends the attribution of international personality is indispensable"[123], and in its opinion, "the 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 of the possession of a large measure of international personality and the capacity to operate upon an international plane"[124]. However, tempering its statements, the Court also highlighted that this legal personality and the rights and duties of the Organisation remain different from the ones a State possesses. The Court summed up by saying:

> "What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims"[125].

41. The Court dug the question further by wondering if this personality was subjective (*i.e.* the recognition of the UN's personality only binds UN Member States) or objective (*i.e.* binding also non-Member States)[126]. The Court considered then that "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing *objective international personality*, and not merely personality recognized by them alone, together with capacity to bring international claims"[127].

42. To conclude on this question, in the words of Mahasen Aljaghoub, "the Advisory Opinion in the *Reparations* Case has put an end to all controversies over whether international organisations can have legal personality, provided they satisfy certain recognised criteria, and thereby contributed to the establishment and the crystallisation of the concept of the international personality of international organisations"[128].

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[121] *Ibid*, p. 175.
[122] *Ibid*, p. 178.
[123] *Idem*.
[124] *Ibid*, p. 179.
[125] *Idem*.
[126] ALJAGHOUB (M.), *The Advisory Function of the International Court of Justice*, *op. cit.* at 15, p. 158.
[127] *Reparation for injuries suffered in the service of the United Nations*, *op. cit.* at 48, p. 185 (emphasis added).
[128] ALJAGHOUB (M.), *The Advisory Function of the International Court of Justice*, *op. cit.* at 15, p. 158.

43. In addition, this advisory opinion contributed to international law on another note by recognizing for the first time the existence of implied powers to international organisations.

B. The acknowledgement of the implied powers principle

44. While Article 34 of the Statute gives only States the capacity to be parties in a case, the Court wondered if the UN's legal personality allowed it to do the same in spite of the silence of the Charter on that matter. The Court wondered, even if the Charter does not expressly confer such a right upon the Organization, "whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions, *imply* for the Organization power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances"[129]. Basing its reasoning on the precedent of the PCIJ in the 1926 advisory opinion on the *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer* where in this case the PCIJ recognised implied powers to the International Labour Organization[130], and deciding to do the same regarding the United Nations Organisation, the Court concluded:

> "Under international law, the Organization 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*"[131].

45. Therefore, Jerzy Makarczyk considers this advisory opinion as "the initial legal and theoretical foundation for implied powers of international organizations"[132]. Indeed, subsequently to this case, the Court repeated this precedent and applied the theory of implied powers in several advisory opinions. In the aforementioned 1950 *International Status of South West Africa* Case, the Court recognised an implied power to the General Assembly to "exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory", facing the lack of express provisions in the Charter to provide such capacity[133]. The Court came to this conclusion considering that such power was "derived from the provisions of Article 10 of the Charter"[134].

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[129] *Reparation for injuries suffered in the service of the United Nations*, *op. cit.* at 48, p.182 (emphasis added).
[130] *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer*, Advisory Opinion of July 23rd, 1926 (P.C.I.J., Series B., No. 13), p. 18.
[131] *Idem* (emphasis added).
[132] MAKARCZYK (J.), "The International Court of Justice on the Implied Powers of International Organizations" *in* MAKARCZYK (J.) (ed.), *Essays in International Law in Honour of Judge Manfred Lachs*, The Hague and Boston, Martinus Nmijhoff Publishers, 1984, p. 506; quoted by ALJAGHOUB (M.), *The Advisory Function of the International Court of Justice*, *op. cit.* at 15, p. 159.
[133] *International status of South-West Africa*, Advisory Opinion, I.C.J. Reports 1950, p. 137.
[134] *Idem.*

46. Furthermore, in the 1954 case about the *Effect of Awards of Compensation made by the UN Administrative Tribunal*, the ICJ faced the arguments of States which considered that the General Assembly had no power to establish a judicial organ with a legal power to render judgments binding upon the Organization and its staff members. The Court observed that no provision of the Charter could authorise any of the UN principle organs to adjudicate upon disputes arising between the Organization and staff members. Nevertheless, it considered this power to be implied as it would "hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them"[135].

Section 3: The mission of interpretation of the ICJ and its contributions to the sources of international law

47. According to Article 38 paragraph 1 of the ICJ Statute, whilst holding judgments or advisory opinions, the Court must apply *inter alia* international conventions that the contesting states agreed to, international custom and the general principles of law. Doing so, the ICJ came up with rules of interpretation for international conventions that complete the law of treaties. The Court also showed itself to be a pioneer in the creation of customary law. Furthermore, it appears in the case law of the ICJ that it "tends to spill over the boundary of the formal 'sources' of international law as laid out in article 38 paragraph 1"[136] and seems to be "fashioning a concept of soft law"[137] as another source of international law. The current section will therefore focus on the observation of the contributions made by the ICJ to the sources of international law within its mission of interpretation.

A. The contributions made by the Court to the law of treaties

48. The point of reference in international law for the rules on treaty interpretation is the 1969 Vienna Convention. Nevertheless, within its mission of ascertaining international law, the ICJ started this work of building the law of treaties prior to the Vienna Convention. It also came to specify a few more rules afterwards, that fill in gaps when it comes to interpret international treaties and conventions. ICJ rulings cannot be looked at without paying

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[135] *Effect of awards of compensation made by the U.N. Administrative Tribunal*, Advisory Opinion of July 13th, I954: I.C. J. Reports 1954, p. 57.
[136] FRANCIONI (F.), "International 'soft law': a contemporary assessment" *in* LOWE (V.), FITZMAURICE (M.), op. cit. at 29.
[137] *Idem.*

attention to the Vienna Convention; the fact that the Court referred to said Convention whenever it found it appropriate "may be an indication that in its view the instrument has – in large part at least – been received in the whole of general international law"[138]. Due to the numerous pronouncements by the ICJ on questions related to the law of treaties it is impossible to review them all in this confine section. We will therefore focus on the most significant contributions to the law of treaties that have taken place throughout advisory opinions. The point of departure of our assessment will be the Advisory Opinion on *Reservations to the Genocide Convention* of 28 May 1951 which stands out in many ways.

1) A modern and flexible regime for reservations to multilateral conventions

49. Firstly, the advisory opinion on the *Reservations to the Genocide Convention* has been a cornerstone in the development of rules governing the system of reservations to multilateral conventions. Even though the Court limited itself to handle the issue of reservations to the Genocide Convention only, its opinion guided the International Law Commission in its draft articles on reservations. The three questions asked by the General Assembly to the Court sought for several clarifications. First, the General Assembly meant to understand the effect of an objection to a reservation formulated by one of the state parties. Second, it asked to the Court about the effects of such reservation between the reserving state and the parties which object to it as well as those which accept it. Finally, the Assembly wondered about the effect of a reservation made by a state which either signed the convention but has not ratified it yet, or has not signed nor ratified the Convention yet but is entitled to do so.[139]

50. The Court started with the reminder of the traditional and undeniable principle "that no reservation was valid unless it was accepted by all the contracting parties without exception".[140] The Court links this principle to the well-established fact that "in its treaty relations a state cannot be bound without its consent, and that consequently no reservation can be effective against any state without its agreement thereto".[141]

51. However, the Court considers then that this principle can be applied in a more flexible way in respect with the Genocide Convention. To find out the object and purpose of the Convention, the judges observed its *travaux preparatoires*. In conclusion, the Court stated

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[138] VIERDAG (E. W.), "The International Court of Justice and the law of treaties" *in* LOWE (V.), FITZMAURICE (M.), *Fifty years of the International Court of Justice*, *op. cit.* at 29, p. 146.
[139] *Reservations to the Convention on Genocide*, *op. cit.* at 51, p. 16.
[140] *Ibid*, p. 21.
[141] *Idem.*

the following point, which nowadays guides the conduct of all States in making reservations to any international convention:

> "It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation".[142]

52. As regards the issue whether the reservation of a state should be expressly or tacitly accepted by the other states parties or if it should be expressly rejected, the Court does not find a universal answer[143]. It concludes by stating that "[t]he appraisal of a reservation and the effect of objections that might be made to it depend upon the particular circumstances of each individual case".[144]

53. The second question asked by the General Assembly to the ICJ was formulated in these words: "If the answer to Question 1 is in the affirmative, what is the effect of the reservation as between the reserving state and: (a) The parties which object to the reservation? (b) Those which accept it?". In its answer, the Court presented a flexible and circumstantial system and considered:

> "(a) That if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;
> (b) That if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention".[145]

54. This modern and creative methodology was qualified of "inspired by the pre-war Pan-American practice" by Alain Pellet.[146] According to him, the "flexible regime adopted [in the Vienna Conventions] has its (at least immediate) origin in the 1951 Advisory Opinion of the ICJ"[147]. Indeed, Article 24 of the 1969 Convention on the Law of Treaties, entitled 'Acceptance of and objection to reservations', offers a regime that is quite adjustable according to the circumstances. So, based on the reading of Article 24, if a state accepts the

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[142] *Ibid*, p. 24.
[143] Thereafter, the Vienna Convention on the Law of Treaties clarified this situation and established the principle of tacit acceptation as a guideline : " For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a *reservation is considered to have been accepted by a State if it shall have raised no objection* to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later." (Article 20, para. 5) (emphasis added).
[144] *Reservations to the Convention on Genocide*, *op. cit.*at 51, p. 26.
[145] *Ibid*, p. 29.
[146] PELLET (A.), "The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur", *EJIL*, 2013, Vol. 24, No. 4, p. 1065.
[147] *Ibid*, p. 1077.

reservation of another state, the reserving state is then party to the treaty in relation to the accepting state[148].

55. By contrary, if a state objects to a reservation from another state, it can occur that the reserving state is not a party to the treaty in relation to the objecting state if this intention "is definitely expressed by the objecting state". The drafters of the Vienna Convention clearly took a step forward given that, without any express objection to the entry into force of the convention between the objecting and the reserving state, such objection to a reservation "does not preclude the entry into force of the treaty" between the two of them. It is therefore notable that the drafters were inspired by the ICJ's method of flexibility and brought it further.

56. This "flexible principle" was also adopted by the ILC, first in its *Draft Articles on the Law of Treaties* in 1966[149], and second in its final *Guide to Practice on Reservations to Treaties* in 2011. In fact, the ILC detailed the solution of the ICJ's advisory opinion in the commentary of the 1966 Draft Articles[150]. It is worth noting that the Commission emphasized that even though the solution of the Court concerned mostly only the Genocide Convention, this flexible regime could be implemented at a wider scale due to the international practice:

> "Nevertheless, extensive participation in conventions of the type of the Genocide Convention has already given rise to greater flexibility in the international practice concerning multilateral conventions, as manifested by the more general resort to reservations, the very great allowance made for tacit assent to reservations and the existence of practices which, despite the fact that a reservation has been rejected by certain States, go so far as to admit the reserving State as a party to the Convention vis-a-vis those States which have accepted it"[151].

We can conclude that the 1951 advisory opinion was the starting point of the new legal regime of reservations to multilateral conventions.

2) A highlight on the concept of 'signatory states'

57. The reasoning of the answer to the third question deserves our attention as well. The Assembly asked "what would be the legal effect […] if an objection to a reservation is made: (a) By a signatory state which has not yet ratified? (b) By a State entitled to sign or accede but which has not yet done so?" In its development, not only did the Court confirmed

[148] *Vienna Convention on the Law of Treaties*, adopted at Vienna on 23 May 1969, entered into force on 27 January 1980, *UNTS*, vol. 1155, p. 331, Article 20, 4. (a)
[149] *Draft Articles on the Law of Treaties*, *YbILC*, 1966, vol. II.
[150] *Ibid*, Paragraph 3 of the Commentary of Article 17.
[151] *Ibid*, Paragraph 4 (c) of the Commentary of Article 17.

without a doubt that the ratification is the decisive step that makes a state a party to a Convention, but more interestingly, it clarified the meaning of 'signatory state'[152]. According to the Court, given that the signature of a Convention "constitutes a first step to participation in the Convention", it provides the signatory state with a "provisional status". This status "would justify more favourable treatment being meted out to signatory States in respect of objections than to States which have neither signed nor acceded"[153]. However, the Court emphasizes that this favourable status would disappear if it were not followed by the ratification of the Convention[154].

58. Nevertheless, unlike the flexibility on reservations, the concept of 'signatory state' as elucidated in the opinion was not followed in the Vienna Convention. Even though the difference between a signatory state and a negotiating state was drawn by the Court in respect with objections to reservations, Article 24 of the Vienna Convention only mentions contracting States and 'other States entitled to become parties to the treaty'. E.W. Vierdag also notes the regrettable use of the term 'negotiating States' instead of 'signatory States' in article 25 regarding the provisional application of treaties. Indeed, the constant and uniform international practice shows that such provisional application is usually agreed upon after signature of a treaty. He concludes therefore that it would "have been in line with the customary rules if in article 25 reference had been made to agreement among the signatory states, not among negotiating States, which do not as yet have a legal relation with the treaty"[155]. It is all the more regrettable that this provisional status is not offered to the signatory states when it appears that they are already under the 'obligation not to defeat the object and purpose of a treaty prior to its entry into force'[156].

59. To conclude on this part of our development, it is undeniable that the ICJ's reasoning in the advisory opinion on *Reservations to the Genocide Convention* influenced the development of the law of treaties to some extent. On other occasions, the Court also participated in the development of sources of international law, building on soft law.

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[152] VIERDAG (E. W.), "The International Court of Justice and the law of treaties", *op. cit.*, at 138, p. 149.
[153] *Reservations to the Convention on Genocide*, *op. cit.* at 51, p. 28.
[154] *Idem.*
[155] VIERDAG (E. W.), "The International Court of Justice and the law of treaties", *op. cit.*, at 138, p. 150.
[156] *Vienna Convention on the Law of Treaties*, op. cit. at 148, Article 18, (a).

B. A freshly fashioned concept of soft law

60. Article 38 paragraph 1 indicates that the Court shall apply formal sources of international law *i.e.* 'hard law'. That intends international conventions, international customary law and general principles of law. The final subparagraph also provides that judges can be guided by 'subsidiary means for the determinations of rules of law' such as judicial decisions or legal doctrine. However, a substantial part of the ICJ's jurisprudence looks at normative sources of international law that would rather fall under the scope of soft law when no answer can be found in the more 'traditional' sources of international law. Instruments of soft law all share "a certain proximity to law and a certain legal relevance, and yet they are not legally binding *per se* as a matter of law"[157]. The question of the scope of soft law has been abundantly discussed, but it is generally admitted that they describe principles, rules and standards governing international relations. It includes thus usually "a body standards, commitments, joint statements, or declarations of policy or intention […], resolutions adopted by the UN GA or other multilateral bodies, etc".[158] However, these principles are not viewed as "stemming from a source of international law in the sense mentioned in article 38".[159]

This subsection aims to identify in what way the Court "tends to spill over the boundary of the formal 'sources' of international law as laid out in article 38, paragraph 1 of the Statute"[160] in its advisory proceedings and to discuss on this modern use of soft law.

61. It was first observed, early in the activity of the Court[161], that it deduced principles of soft law from the context of the UN Charter[162]. Then, the subsequent advisory opinion on *Namibia* showed in two points further developments in the process of recognising legal effects of soft law[163].

62. First, it asserted with audacity the strength and legal significance of the General Assembly resolutions:

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[157] THÜRER (D.), 'Soft Law' *in* BERNARD (R.) (ed.), *Encyclopedia of Public International Law*, Volume IV, 2000, p. 453.
[158] CASSESE (A.), *International Law*, Oxford University Press, 2nd ed., 2005, p. 196.
[159] *Idem.*
[160] FRANCIONI (F.), "International 'soft law'", *op. cit.*, at 136, p. 168-169.
[161] *Reparation for injuries suffered in the service of the United Nations*, *op. cit.* at 48, p. 174.
[162] See above Chapter 1; FRANCIONI (F.), "International 'soft law'", *op. cit.*, at 136, p. 169: in this advisory opinion, the Court based itself on "the very 'soft' foundation of the general object and purpose of the Charter" and proclaimed a right to the United Nations to intervene against an offending State.
[163] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16.

> "[I]t would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design"[164].

The Court confirmed this point of view a few years later in the 1975 advisory opinion on *Western Sahara*[165]. Whilst it recalled several passages of the *Namibia* opinion, the Court confirmed the legal effects which follow the *instrumentum* that are the General Assembly resolutions. In that respect the Court considers said resolutions as "acts that *per se* do not possess obligatory force but that in the specific case were deemed to acquire such force by virtue of their being a specification of the general Charter principle on self-determination (article 1, para. 2)"[166].

63. The second step forward in the *Namibia* case concerns the reasoning of the Court in declaring the apartheid of South Africa to be in violation with international human rights[167]. Indeed, it concluded that the measures taken constituted a "flagrant violation of the purposes and principles of the Charter" despite the lack of specific content on human rights provisions in the Charter and the absence of relevant human rights treaties binding upon South Africa. It relied thus upon the *corpus* of soft human rights law developed by the United Nations (that is the 1948 Universal Declaration on Human Rights and subsequent resolutions on self-determination and on the elimination of racial discrimination) to come to this conclusion[168].

64. This recourse to instruments of soft law is all the more relevant because of the strength of legal effect that the Court recognises in a concept that is controversial and confusing in many respects[169]. The question was raised whether to add soft law as an actual source to the traditional sources of international law. It is fair to admit that despite its lack of binding effect, soft law demonstrates a capacity to produce certain legal effects. However, such addendum to the list enumerated in Article 38 paragraph 1 of the Statute would consequently erase a line that is already thin between law and non-law. Indeed, on the one hand, taking account of 'soft law' makes of international law a concept very relative and broad. More than anything, "a norm is either binding or it is not. There is nothing in between: it cannot be more or less binding. Thus, the term 'soft law' does not – legally speaking – make any sense, because a norm is either a postulate or it is a hard law in its strict sense"[170]. On the other hand, adding a binding effect to norms of soft law may violate the original

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[164] *Ibid*, para. 105.
[165] *Western Sahara* case, *op. cit.* at 110, p. 12.
[166] FRANCIONI (F.), "International 'soft law'", *op. cit.*, at 136, p. 171; *Western Sahara*, Advisory Opinion, *op. cit.* at 110, paras. 52-56.
[167] *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *op. cit.* at 163, paras. 128-131.
[168] FRANCIONI (F.), "International 'soft law'", *op. cit.* at 136, p. 170.
[169] KLABBERS (J.) "The Redundancy of Soft Law", *Nordic Journal of International Law*, Vol. 65, 1996, p. 168.
[170] THÜRER (D.), 'Soft Law', *op. cit.* at 157, p. 456.

intention of parties to theses soft instruments. Because it is a fact that the non-binding character of rules is often emphasized by their authors. Their intention, when drafting a non-binding document, is usually to "create a *modus vivendi* to guide their international behaviour in a flexible way or to ensure for themselves a way of escaping from commitment".[171] Therefore, considering a rule to be binding on the simple basis of its source of soft law would be in violation with the intention of States.[172]

65. Nevertheless, it would be mistaken to affirm that soft law does not or should not have any effect on international law. Indeed, the development of international law often intervenes on the basis of soft law instruments. First, they influence actors of international law to take a step further towards the adoption of legally binding agreements. For example, the 1966 Human Rights Covenant, as well as other legal binding human rights treaties are inspired of the Universal Declaration of Human Rights. Likewise, after the UN General Assembly adopted the Declaration of Outer Space in 1963, States adopted the Treaty on Principles Governing the Activities of States in The Exploration and Use of Outer Space, which entered into force in 1967. Second, sources of soft law may participate in the construction of international customary law. In this way, Professor Rene-Jean Dupuy, who was the arbitrator in the *Texaco-Calasiatic* case, considered in this award that the provisions of the *Declaration on Permanent Sovereignty over Natural Resources* were part of international customary law.[173]

66. Similarly, in the *Nicaragua* case, the ICJ relied upon General Assembly resolutions and acknowledged the existence of an *opinio juris* from this attitude of states toward the content of this resolutions, especially resolution 2625(XXV). So, it can be concluded that on this matter, the Court did not simply apply an *instrumentum* of soft law as the basis of its reasoning. It used these resolutions in combination of other points of argument to acknowledge the customary character of the use of force[174]. The mission of creation of customary law will be more developed in the next subpart.

67. Authors of a soft law instrument may have chosen to keep it non-binding on the grounds of the "uncertainty about the future development of technical knowledge, including economic, ecological, scientific"[175], etc. Here comes into play another role for soft law. In the context of an international society subject to constant evolutions, this body of rules may

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[171] *Ibid*, p. 453.
[172] CASSESE (A.), *International Law*, *op. cit.* p. 196.
[173] *Texaco Overseas Petroleum Co. and California Asiatic Oil Company v. Libya*, Award, 19 January 1977, paras. 86-87, Text in *53 ILR*, 420-511.
[174] *Military and Paramilitary Activities in und against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14, paras. 187-190.
[175] THÜRER (D.), 'Soft Law', *op. cit.* at 157, p. 453.

"pave the way to the adoption of hard law in the form of multilateral treaties with a vocation to universality"[176]. In fact, Hugh Thirlway considers it to be a "vital intermediate stage towards a more rigourously binding system".[177]While many fields of international law have now been concretized in multilateral treaties, some others concern moderner issues and remain with a lack of strong legal body, such as environmental protection, cyberwarfare, nuclear proliferation, prevention of international terrorism, amongst others. In that context, the use of soft law can foster uniform standards to improve a worldwide cooperation.

68. To conclude on this part, the handling of soft law made by the ICJ, especially in the *Namibia* opinion is therefore significant and may be questionable. May be that as it may, this demonstrates the contributions of the ICJ to international law based on soft law. The next and final subpart of this section will now address the contribution to the body of international customary law made by the ICJ in its advisory opinions.

C. The creation of customary law

69. Many rules of international law have been recognized as customary before the ICJ and its predecessor, the PCIJ[178]. The common way of determining the customary character of an international law rule is, in accordance with Article 38 (1) (b) of the Statute, by seeking two elements – the constant States practice and the *opinio juris* ("evidence of a general practice accepted as law"[179]). Nevertheless, in the light of the *travaux préparatoires* of the ICJ Statute, it appears that Article 38 paragraph 2 "does not prescribe a predetermined method for 'discovering' customary rules"[180]. Therefore, the ICJ has also used other methods of determination of custom. As Alain Pellet indicated, when the Court "seeks a customary rule, it does so in relation to a particular case"[181]; the choice of methodology adopted to determine the existence of a customary rule depends thus upon the context and/or on the subject area[182].

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[176] FRANCIONI (F.), "International 'soft law'", *op. cit.* at 136, p. 175.
[177] THIRLWAY (H.), *The Sources of International Law*, Oxford University Press, 2019, p. 186.
[178] MENDELSON (M.), "The International Court of Justice and the sources of international Law", *in* LOWE (V.), FITZMAURICE (M.), *op. cit.* at 29, p. 67; ALVAREZ-JIMENEZ (A.), "Methods for the Identification of Customary International Law in the International Court of Justices Jurisprudence: 2000-2009", *ICLQ*, Vol. 60, No. 3, 2011, p. 685; SCHLÜTTER (B.), *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International Ad Hoc Criminal Tribunals for Rwanda and Yugoslavia*, Martinus Nijhoff Publishers, 2010, p. 370; HAGGENMACHER (P.), "La doctrine du droit coutumier dans la pratique de la Cour internationale", *RGDIP*, Vol. 90, No. 1, 1986, pp. 5-126.
[179] Article 38 (1) (b) Statute of the International Court of Justice.
[180] PELLET (A.), 'Art. 38' in ZIMMERMANN (A.), TOMUSCHAT (C.), OELLERS-FRAHM (K.) TAMS (C. J.), *The Statute of the International Court of Justice*. A Commentary, 2nd edition, Oxford University Press, 2012, p.813, para.212.
[181] *Ibid*, para. 236.
[182] SCHLÜTTER (B.), *Developments in Customary International Law*, *op. cit.* at 178, p. 122.

1) *The two-elements approach in the advisory opinion on the Legality of the Threat or Use of Nuclear Weapons*

70. The *Nuclear weapons* case is the first advisory opinion in which the ICJ follows for the first time the 'traditional' two-fold approach to establish a customary rule. The opinion was requested on behalf of the UNGA which addressed the following question to the Court: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"[183]

71. To answer the question, the Court proceeded to the examination of customary law to see whether it allowed or prohibited the use of nuclear weapons. Doing so, it reminded first the methodology adopted in the *Continental Shelf* judgment. In this case, the Court stated that the substance of international customary law has to be "looked for primarily in the actual practice and *opinio juris* of States"[184]. The object of this double assessment was a series of General Assembly resolutions beginning with resolution 1653 (XVI) prohibiting recourse to nuclear weapons[185]. The Court eliminated quite quickly the issue of the state practice – "known as the 'policy of deterrence'"[186] – by simply asserting that "it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it"[187].

72. It focused then longer on the main issue of looking for an *opinio juris* accompanying this practice. On the one hand some States were of the opinion that these resolutions "signify the existence of a rule of international customary law"[188]. Their point of view was based on the consistent and regular affirmation of the illegality of nuclear weapons included in said resolutions. Some other states, on the other hand, recalled the context in which the resolutions were adopted. Not only were they not approved by all of the nuclear-weapon States, but they did not meet the consent of many other States either[189]. So, they

[183] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, para.1.
[184] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 29, para. 27, cited in *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* para. 64.
[185] A/RES/1653(XVI), *Declaration on the prohibition of the use of nuclear and thermonuclear weapons*, 1962.
[186] *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* at 183, para. 67.
[187] *Idem.*
[188] *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* at 183, para. 68; See also *Legality of the Threat of Nuclear Weapons*, Oral Submissions, 2 November 1995, 'Statement of Mexico', 52; Oral Submissions 9 November 1995, Statement of New Zealand, 41; Written Pleadings, United Kingdom, 'Written Statement of 16 June 1996', para. 3.114
[189] *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* at 183, para. 68.

concluded by affirming the lack of binding force of these resolutions which "are not declaratory of any customary rule of prohibition of nuclear weapons"[190].

Eventually, the Court made the following statement, which seems to indicate that its position is leaning more towards a positive answer to the customary character of the prohibition of nuclear weapons.

> "The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."[191]

73. Nevertheless, despite the adoption, every year, by a large majority at the General Assembly, of resolutions recalling the content of resolution 1653 (XVI), that "reveals the desire of a very large section of the international community to take […] a significant step forward along the road to complete nuclear disarmament"[192], the Court leaves open the question by concluding with the following:

> "The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent opinio juris on the one hand, and the still strong adherence to the practice of deterrence on the other."[193]

Even though it did not conclude by finding the existence of a customary rule of international law, this point of the advisory opinion was strongly criticised by dissenting judges who considered "the findings on the evidentiary character of UNGA resolutions too far reaching a conclusion of the Court"[194]. H.E. Judge Gilbert Guillaume considered that the Court, whatever it may say, did not take into account the practice and *opinio juris* of States:

> "[L]a Cour […] s'est trop souvent laissée guider par des considérations qui relèvent plus du droit naturel que du droit positif, de la *lex ferenda* que de la *lex lata.* Elle a en outre accordé une portée excessive aux résolutions de l'Assemblée générale des Nations Unies. "[195]

Judge Schwebel also infirmed this excessive power granted to UNGA resolutions in building international law. He maintained that *opinio juris* could be found in these resolutions only if

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[190] *Idem*; See also *Legality of the Threat of Nuclear Weapons*, Written Submissions, 'Statement of Russia of 19 June 1995', 16; *Ibid*, 'Letter of the US to the Court', 8, 18; *Ibid*, 'Letter of the United Kingdom', 16 June 1995, para. 3.27; *Ibid*, 'UK Oral Submissions', 15 November 1995, 45–47, 63; *Legality of the Threat of Nuclear Weapons*, France (20.06.1995), para. 23; *Ibid*, 'Oral Submissions', 2 November 1995, para. 48.
[191] *Ibid*, para. 70.
[192] *Ibid*, para. 73.
[193] *Idem.*
[194] SCHLÜTTER (B.) *Developments in Customary International Law, op. cit.* at 178, p. 139.
[195] *Legality of the Threat of Nuclear Weapons*, separate opinion of Judge Guillaume, para. 1.

they mirror the actual States practice and are adopted unanimously or by consensus and then only then, they "may be declaratory of international law"[196]. It is worthy of noting that he also considered that the States practice of non-use of nuclear weapons is actually due to the threat of nuclear weapon. "In the very doctrine and practice of deterrence, the threat of the possible use of nuclear weapons inheres"[197].

74. Albeit criticised this advisory opinion still reflects the two-steps reasoning of the ICJ in the search for customary rules of international law. However, as we mentioned above, according to the background of every case, the Court may also adopt a deductive method of reasoning occasionally.

2) *The deductive reasoning in the Advisory Opinion on the Reservations on the United Nations Convention on the Prevention and Prohibition of the Crime of Genocide*

75. In some particular fields of international law that concern "new and important moral values and global challenges, such as peace, human rights and the environment"[198], a moderner method of determination of custom took shape, most likely because in these fields "the actual practice of states has been characterized by too many violations to serve as a sound basis for induction"[199] of a custom based on the two-fold method.

This modern method consists of a deductive process that starts with general statements instead of the observation of States' practice. In the words of Anthea Roberts, "[t]his approach emphasizes *opinio juris* rather than state practice because it relies primarily on statements rather than actions"[200]. Such approach was used by the Court in the advisory opinion on the *Reservations to the Genocide Convention* in a case where the Court actually did not have to position itself on the customary nature of genocide. To answer the questions asked by the General Assembly and previously discussed in this chapter[201], the Court highlighted the Convention's special features and concluded:

> "The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results

[196] *Legality of the Threat of Nuclear Weapons*, dissenting opinion of Vice-President Schwebel, p. 97.
[197] *Ibid*, p. 90.
[198] TALMON (S.), "Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion", *EJIL*, Vol. 26, No. 2, 2015, p. 429.
[199] *Idem.*
[200] ROBERTS (A.), "Traditional and Modern Approaches to Customary International Law: A Reconciliation", *American Journal of International Law*, Vol. 95, No. 4, p. 758.
[201] See above.

> in great losses to humanity, and *which is contrary to moral law* and to the spirit and aims of the United Nations"

The assessment of the high gravity of the crime of genocide, qualified by the Court as an "odious scourge"[202] sufficed for it to affirm the "universal character"[203] of the duty to prevent and punish this crime, and that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation"[204].

76. It is worthy to note that the court emphasized that one of the objects of the Convention is to "confirm and endorse the most *elementary principles of morality*"[205]. A saying that strongly resembles the "elementary considerations of humanity" found in the *Corfu Channel* case as the source of the obligation in international law to notify the laying in minefields[206]. In the latter case, as Birgit Schlütter underlines, this "methodological approach chosen by the Court to establish that a rule exists under international law […] is clearly a deductive one; the Court tried to deduce a prohibition from a greater legal principle, namely elementary considerations of humanity"[207].

77. Even though the Court did not go further on deciding of the customary nature of the prohibition of genocide since it was not so much the agenda item, it still appears clear from its statements that the Court went with a new and different approach to the attribution of customary status than the methodology it used in its previous holdings. Therefore, this advisory opinion is interesting in two ways in respect with international customary law. On the one hand, for the substantial finding of the customary feature of the prohibition of genocide confirmed later in the *Barcelona Traction* case[208]; on the other hand, for the emergence of a new methodology of determination of customary law, *i.e.* the deductive

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[202] *Genocide Convention* Advisory Opinion, ICJ Reports 1951, at 23.
[203] *Idem.*
[204] *Idem.*
[205] *Idem.*
[206] *Corfu Channel case*, Judgment of April 9th, 1949: I.C. J. Reports 1949, p. 22: "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VTII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war ; the principle of the freedom of maritime communication ; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"
[207] SCHLÜTTER (B.), *Developments in Customary International Law, op. cit.* at 178, p. 141.
[208] *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, para. 34. It should be noted here that this paragraph mentions more exactly *erga omnes* obligations. However, the Court also cited the advisory opinion on the Genocide Convention when it mentioned the "rights of protection [which] have entered into the body of *general international law*"(emphasis added).

approach, which has influenced later decisions of the Court, such as the *Nicaragua* case, or the *Yerodia* case.

3) *The importance of 'elementary considerations of humanity' for the deduction of rules of customary international law*

78. On some occasions, the Court's deduction to determine a customary rule was made in light of the concept of 'elementary considerations of humanity'. Firstly, the advisory opinion on *Nuclear Weapons* mentioned the *Corfu Channel* case, where the Court mentioned elementary considerations of humanity for the first time. The Court then considered that "many rules of humanitarian law are […] fundamental to the respect of the human person and 'elementary considerations of humanity'". It continued by affirming that "these fundamental rules are to be observed by all States whether are not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law". It seems that in this case, the causal link between 'elementary considerations of humanity' and the customary nature of the rules in question is not expressly affirmed and remains thus questionable. However, in the later advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[209], the Court cited again this passage of the Nuclear Weapons case and makes clearly the correlation:

> "With regard to international humanitarian law, the Court recalls that in its Advisory Opinion on the *LegaIity of the Threat or Use of Nuclear Weapons* it stated 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' . . .", that they are "to be observed by al1 States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (*I. C. J. Reports 1996 (I),* p. 257, para. 79). […]"[210]

79. Furthermore, the Court added that in its view "these rules incorporate obligations which are essentially of an *erga omnes* character"[211]. The Court departed from this to recognise the customary nature of the provisions of the Geneva Convention IV[212]. Concretely in the case, it also concluded that due to the character and the importance of the rights and obligations involved, all states were "under an obligation not to recognize the

[209] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136.
[210] *Ibid*, para. 157.
[211] *Idem.*
[212] SCHLÜTTER (B.) *Developments in Customary International Law, op. cit.* at 178, p. 166.

illegal situation resulting from the construction of the wall"[213] and under the obligation "not to render aid or assistance in maintaining the situation created by such construction"[214].

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CONCLUSION OF PART I

Since the establishment of the ICJ and even from the era of its ancestor, a strong, guiding jurisprudence was progressively built from the rulings of contentious and advisory proceedings within the world court. Through this jurisprudence, the court came as a normative supplier, filling the gaps of various fields of international law. It also brought clarity to the regime of international organisations, finding them to have a legal international personality and guiding them to elaborate upon their range of powers. Finally, the Court came to clarify sources of international law. Through its work of interpretation, it contributed to the law of treaties. By applying soft law to its reasonings, the court constructed a new concept of soft law as one of the sources of international law according to Article 38 of its Statute. Ultimately, the Court determined many rules of customary law through its advisory proceedings, thus constantly contributing to the development of international law.

The addendums to and evolutions of international law made by these advisory opinions, notwithstanding their lack of binding force, play a strong part in the jurisprudence of the Court and will be repeated, referred to and quoted, to justify subsequent reasonings from the same Court as much as from other tribunals, regional and domestic courts. Indeed, within the fragmented universe of international jurisdictions, throughout its jurisprudence, the ICJ plays the role of a lighthouse of international law for other judicial bodies. Endorsing the role of a guide, the Court contributes to strengthen the coherence of international law, and therefore, judicial security.

[213] *Ibid*, para. 159.
[214] *Ibid*, para. 146.

PART II:

THE OBSTACLES ENCOUNTERED BY THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE

80. From what we observed in the first part of our development, the advisory proceedings proved to be of a great utility for the development of international law. However, the utility of the advisory goes further and closer to a dispute settlement tool. It has frequently happened that states were directly concerned by the rendering of an advisory opinion, such as in the *Kosovo* case, the *Wall* case, or again the more recent *Chagos Archipelago* case. Indeed, at many occasions, the request for an advisory opinion sought to settle a conflicted situation at an international level. Therefore, more than just contributing to develop and clarify international law, the advisory proceedings of the Court would in these cases be an *ersatz* to the contentious proceedings and endorse the role of a dispute settlement body. In fact, in many instances, states concerned in the matter of a request opposed themselves to the request and argued that the Court could not welcome it due to the existence of compelling reasons. It has thus been often invoked that the existence of political features to the question would prevent the Court from rendering an opinion, or that without the consent of the states concerned by the question, the Court should not accept the request.

81. In addition to these arguments, the advisory function of the Court gets limited at a further stage of the proceedings, that is, once the advisory opinion was given, at the reception and implementation step of said opinion. As we repeatedly reminded it, ICJ's advisory opinion do not possess any binding force. Therefore, it is only logical that, if states concerned by a request for an advisory opinion were opposed to said request, they will be also opposed to implement it afterwards.

82. This chapter aims to analyse if the behaviour of the subjects of international law can lower the strength of the ICJ advisory tool. The first chapter will address the issue of arguments raising compelling reasons that states sometimes invoke to stop the Court from giving advisory opinions and how the Court deals with such arguments. The second chapter will focus on the later stage of the advisory proceedings, in order to make an assessment of the reception of the advisory opinions by the requesting organs and by the concerned states.

CHAPTER 1:
THE COMPELLING REASONS OFTEN INVOKED TO PREVENT THE COURT FROM RENDERING ADVISORY OPINIONS

83. As it was briefly invoked in the introduction of our development, one of the novelties of the advisory proceedings within the ICJ system is the discretionary power offered to the Court. This means that even when its jurisdiction is asserted, the Court always has the possibility to refuse any request for an advisory opinion. In order to clarify the distinction between jurisdiction and discretion, the jurisdiction of the Court to render an advisory opinion will be briefly addressed here, but the main part of the following sections will focus on the compelling reasons that, according to some states, should be taken into account when it uses its discretionary power.

84. There are three main conditions to be met before requesting an advisory opinion.[215] The request must emanate from the bodies that are authorised so in accordance with Article 96 of the United Nations Charter;[216] the request for an advisory opinion must relate to a 'legal question';[217] and the question must arise "within [the] scope of activities" of the authorised organ[218]. If either of these two conditions is missing, the Court would not have jurisdiction and would have to decline to render an advisory opinion.

85. The discretionary power of the Court means that even when the aforementioned conditions are met, the Court may refrain from giving the opinion. However, in accordance with its mission to help the United Nations in maintaining international peace and security, the Court sees it as its duty to welcome requests for advisory opinions and therefore, it never uses its discretionary power to refuse advisory requests.

86. The only time that the Court rejected a request for an advisory opinion was when the World Health Organisation ("WHO") requested an advisory opinion on the legality of nuclear weapons. The questions asked by the WHO was : "[i]n view of the health and

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[215] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I. C. J. Reports 1996, p. 71.

[216] This condition has been frequently repeated by the ICJ in its advisory opinions. In the case regarding the Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal, the Court held that it is a "precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ" (ICJ Rep., 1982, para. 21, pp. 333-334). This paragraph was cited again in the *Wall case*. Subsequently, in the *Nuclear Weapons case*, the Court said that "For the Court to be competent to give an advisory opinion, it is thus necessary at the outset for the body requesting the opinion to be "authorized by or in accordance with the Charter of the United Nations to make such a request." The Charter provides in Article 96, paragraph 1, that: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question " (ICJ Rep., 1996, para. 11, p. 232)

[217] See *infra*, Section 2.

[218] Charter of the United Nations, *op. cit.* at 1, Article 96 para 2.

environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO constitution?". [219] The Court considered there that "the request for an advisory opinion submitted by the WHO [did] not relate to a question which arises "within the scope of [the] activities" of that Organization in accordance with Article 96, paragraph 2, of the Charter". Having come to this conclusion, the Court affirmed the absence of "an essential condition of founding its jurisdiction " and that it could not, accordingly, give the opinion requested.[220] Therefore, this refusal to render the advisory opinion was due to a lack of jurisdiction, since all of the legal conditions were not met.

87. Now that the distinction between jurisdiction and discretion is made, the following sections will focus and the diverse 'compelling reasons' invoked by arguing states to prevent the Court from rendering advisory opinions. The first reason that is frequently invoked is the lack of state consent to advisory opinions (Section 1). The second reason is the presence of a political feature in the question asked to the Court (Section 2).

Section 1: The absence of state consent to advisory opinions

88. While the consent of states parties to a conflict is a primordial condition for the jurisdiction of the ICJ over a contentious case[221], such consent is not required in the exercise of its advisory function. Indeed, requests for an advisory opinion are not formed by states but shall come from the General Assembly or the Security Council of the UN, or any "other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly"[222]. However, disagreements have always existed as to whether the ICJ can comply with the request for an advisory opinion that concerns a pending dispute between states if the concerned parties did not consent to said advisory opinion.[223] Shabtai Rosenne has noted that, on the basis of the principle *audiatur et altera pars* ("may the other side also be heard"), when a request for an advisory opinion raises the subject of a legal dispute between two states, the Court would need the consent of the States parties to the dispute before giving the opinion[224]. On the other hand, some scholars advocate the lack

[219] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I. C. J. Reports 1996, p. 68.
[220] *Ibid*, p. 84.
[221] *Western Sahara*, *op. cit.* at 110, paras. 32-33; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion, I.C.J. Reports 1950, p. 71.
[222] United Nations Charter, *op. cit.* at 1, Article 96.
[223] ALJAGHOUB (M.), "The Absence of State Consent to Advisory Opinions of the International Court of Justice: Judicial and Political Restraints", *op. cit.* at 90, p. 199.
[224] ROSENNE (S.), *The Law and Practice of the International Court*, *op. cit.* at 5, p. 1028. See also, ODA (S.), "The International Court of Justice Viewed from the Bench (1976-1993)", 244 *RCADI* (1993), p. 92.

of necessity to obtain the consent of states in such a situation. For instance, Sir Hersch Lauterpacht considers that :

> "There seems to be no decisive reason why the sovereignty of States should be protected from a procedure, to which they have consented in advance as Members of the United Nations, of ascertaining the law through a pronouncement which, notwithstanding its authority, is not binding upon them."[225]

Benedetto Conforti shares a similar point of view and observes that a question posed for an advisory opinion can absolutely be the object of a dispute between states. He adds that nothing prevents "the General Assembly or the Security Council from asking the ICJ, even against the will of one or more of the parties, to indicate which is the correct legal solution of a given dispute submitted to them."[226]

89. Beyond the point of view of academics, the jurisprudence of the Court clearly shows that the lack of consent by a State does not prevent the ICJ from rendering an advisory opinion. That being said, the Court has also confirmed in many cases that "the lack of consent may be a factor to be taken into account when it comes to the issue of judicial propriety to give an advisory opinion".[227]

In the *Wall Opinion*, Israel argued that, in the exercise of its discretion, the Court should not comply with the request for an advisory opinion because it did not consent to that request which was "an integral part of the wider Israeli-Palestinian dispute"[228]. Israel thus stated the following:

> " Israel has emphasized that has never consented to the settlement of this wider dispute by the Court or by any other means of compulsory adjudication; on the contrary, it contends that the parties repeatedly agreed that these issues are to be settled by negotiation, with the possibility of an agreement that recourse could be had to arbitration.
>
> It is known that in a contentious matter, the ICJ may only adjudicate cases between consenting states. However, in this case, a truly contentious proceeding was not possible because Palestine is incapable of consenting to contentious jurisdiction because it is not a member of the UN, and Israel has steadfastly refused to offer its consent."[229]

90. In other advisory cases where states were concerned about the existence of a pending dispute related to the request submitted to the Court, these states referred to the

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[225] LAUTERPACHT (H.), *The Development of International Law by the International Court*, London: Stevens and Sons Ltd, 1958, p. 358.
[226] CONFORTI (B.), "Observations on the Advisory Function of the International Court of Justice" in: CASSESE (A.) (Ed.), *UN Law/Fundamental Rights: Two Topics in International Law*, Alphen aan den Rijn: Sijthoffand Noordhoff, 1979, p. 86.
[227] *Statute of the International Court of Justice.*
[228] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 46.
[229] *Idem.*

PCIJ's observations in the *Eastern Carelia Opinion*[230]. To this day, it is the only case in which the PCIJ refused to deal with a request for an advisory opinion. The Court recalled the fundamental principle "well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement"[231]. It further stated that :

> "[the] Court is aware of the fact that it is not requested to decide a dispute, but to give an advisory opinion. This circumstance, however, does not essentially modify the above considerations. The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia, and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."[232]

91. Nevertheless, the case law of the ICJ shows that it has rejected such arguments. In the *Wall Case* as well as in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons,* the Court explained that the decision of its predecessor was due to "the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way"[233].

92. From what we can observe in the ICJ jurisprudence, it is never clear when a concrete case is brushing the issue of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent, and under what circumstances this argument would prevent the Court from rendering the opinion.[234]

In the *Western Sahara* opinion for instance, Spain did not consent to the Court's jurisdiction and raised again the principle established in the *Eastern Carelia* case. From Spain's point of view, Morocco was using the advisory way "as an alternative after the failure of an attempt to make use of the contentious jurisdiction with regard to the same question"[235]. Therefore, it considered that a reply to this request would be "to allow the advisory procedure to be used as a means of bypassing the consent of a State, which constitutes the basis of the Court's

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[230] *Status of Eastern Carelia*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5
[231] *Ibid*, p. 27.
[232] *Ibid*, pp. 28-29.
[233] *Legality of the Threat or Use of Nuclear Weapons*, I. C. J. Reports 1996 (I), pp. 235-236, para. 14, cited in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 44.
[234] ZIMMERMAN (A.), TAMS (C.), OELLERS-FRAHM (K.), *The Statute of the International Court of Justice. A Commentary, op. cit.* at 7, p. 1618.
[235] *Western Sahara*, *op. cit.* at 110, para. 27.

jurisdiction".[236] The Court answered to this objection by strongly distinguishing Spain and Morocco's situation from the *Eastern Carelia case*:

> "In the present case, Spain is a Member of the United Nations and has accepted the provisions of the Charter and Statute; it has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction. It has not objected, and could not validly object, to the General Assembly's exercise of its powers to deal with the decolonization of a non-self-governing territory and to seek an opinion on questions relevant to the exercise of those powers".[237]

93. In front of such opposition to the ICJ's exercise of its advisory function, the Court has often reminded the well-established principle that "the lack of consent to the Court's contentious jurisdiction by interested States has no bearing on the Court's jurisdiction to give an advisory opinion".[238] In the 1950 advisory opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the Court gave the following statement, which was then repeated in other advisory opinions such as in the *Wall* case[239], the *Privileges and Immunities* case[240], and the *Western Sahara* case[241]:

> "The consent of States, parties to a dispute, is the basis of the Court's jurisdicition 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 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 take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; 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."[242]

It is thus undeniable that, by answering to the carefully written questions submitted by the UNGA, the Court has gotten its foot in the door of major interstate disputes. Admittedly, its ground of action is to fulfill its mission as the principal judicial organ of the United Nations, that is, to contribute to the purposes of the UN of maintaining international peace and security[243], and to clarify legal question in order to guide the General Assembly[244]. However,

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[236] *Idem.*
[237] *Ibid*, para. 30.
[238] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 47.
[239] *Idem.*
[240] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, I.C.J. Reports 1989, p. 177, para. 32.
[241] *Western Sahara*, *op. cit.* at 110, para. 31.
[242] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion, I.C.J. Reports 1950, p. 71.
[243] ALJAGHOUB (M.), *The Advisory Function of the International Court of Justice*, *op. cit.* at 15, p. 252.
[244] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95, para. 86.

as Pomerance noted, in its doing, the Court "moved steadily to assimilate its advisory to its contentious procedure, and thus enhanced the authoritativeness of its opinions"[245].

94. The recent case on the *Separation of the Chagos Archipelago* shows how the wording of the question asked to the Court matters to enable it to receive a request[246]. UNGA resolution 71/292 asked two questions to the ICJ[247]. The first one addressed the process of decolonization of Mauritius in 1968 and whether it was lawfully completed with respect to international law.[248] The second one concerns the consequences of the UK's continued administration of the Chagos Archipelago.[249] The United Kingdom considered that this request for an advisory opinion was used to settle a bilateral territorial dispute between two states without their consent. However, the precise and clever framing of the question emphasized the interrogations regarding the lawfulness of the process of decolonization of Mauritius rather than the question of Mauritius sovereignty over the Chagos Islands. In that respect, the question asked by the General Assembly concerned "a multilateral issue raising broader issues of principle".[250] In its analysis, the Court provides a summary of all the General Assembly's "long and consistent record in seeking to bring colonialism to an end"[251]. To that effect, the Court notes that the General Assembly does not seek to settle a territorial dispute between two states but to "receive the Court's assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius"[252]. In its reasoning, the ICJ quoted its *Western Sahara* opinion in which the same issue was raised:

> "The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an

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[245] POMERANCE (M.), "The ICJ's Advisory Jurisdiction and the Crumbling Wall between the political and the judicial", *American Journal of International Law,* vol. 99, n° 1, 2005, p. 27.

[246] MILANOVIC (M.), "ICJ Advisory Opinion Request on the Chagos Islands", EJIL:Talk! [online] https://www.ejiltalk.org/icj-advisory-opinion-request-on-the-chagos-islands/ [20 February 2021]

[247] A/RES/71/292, *Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965*, adopted by the General Assembly on 22 June 2017.

[248] *Ibid*, a): "Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly (GA) resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?"

[249] *Ibid*, b): "What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"

[250] JEFFERY (L.), « The International Court of Justice. Advisory Opinion on the Chagos Archipelago", *Anthropology Today*, Vol. 35, No. 3, June 2019, p. 25.

[251] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, op. cit. para. 87.

[252] *Ibid*, para. 86.

> entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonization of the territory."[253]

Therefore, in a case where divergences of views exist between states with regard to legal questions raised in advisory proceedings[254], the simple fact that the Court answers to these questions despite the opposition of views of said states does not mean that it is settling a bilateral dispute. From the Court's point of view, given that advisory opinions have no binding force[255], the Court is only accomplishing its mission of guidance, bringing enlightenment on obscure legal questions to assist the UNGA in its functions[256].

Section 2: The thin line between political and legal questions

95. It is clearly stated in Article 65 that the question put to the Court must be of a legal nature, as opposed to a political one.[257] The Court has frequently held in its advisory cases that the questions were "framed in terms of law and raise problems of international law", that they are "by their very nature susceptible of a reply based on law" and that "therefore, they appear to the Court to be questions of a legal character".[258] More than once, the Court had to deal with the argument that the question put to the Court is really of a political nature. This argument was actually raised for the first time in the first advisory opinion sought before the ICJ, in the case regarding the *Conditions of Admission of a State to Membership in the United Nations (Art. 4 of the Charter)*.[259] In its answer rejecting the political character of the request, the Court observed that the question was "framed in abstract terms", inviting it "to undertake an essentially judicial task, the interpretation of a treaty provision".[260] It further added that it was not of its concerned what motived may have inspired the request.[261] Since then, the Court continued to welcome advisory requests for treaty interpretations as of a legal nature, and to leave out the circumstances that led to the request for an advisory opinion.[262]

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[253] *Western Sahara*, *op. cit.* at 110, para. 39.
[254] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970*), Advisory Opinion, I.C.J. Reports 1971, p. 24, para. 34.
[255] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion, I. C. J. Reports 1950, p. 71.
[256] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, op. cit. para. 89.
[257] ELIAS (T.), 'How the International Court Deals with Requests for Advisory Opinions', in *Essays in International Law in Honour of Judge Manfred Lachs* (MAKARCZYK (J.), ed.), 1984, p. 355
[258] *Western Sahara*, *op.cit.* at 110, para. 15; See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403, para. 25.
[259] *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion : I. C. J. Reports 1948, p. 57, p. 61.
[260] *Idem*.
[261] *Idem.*
[262] ZIMMERMAN (A.), TAMS (C.), OELLERS-FRAHM (K.), *The Statute of the International Court of Justice. A Commentary, op. cit.* at 7, p.1614.

In the *Nuclear Weapons* advisory opinion, the Court reminded this point of view and even went further by stating that the existence of political aspects in the question does not prevent it from rendering an advisory opinion:

> "The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute" (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I. C. J. Reports 1973, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law".[263]

96. In the advisory opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, which was quoted in the Nuclear Weapons case, the Court also went further in stating that:

> "in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate, especially when these may include the interpretation of its constitution".[264]

Thereafter, in the more recent *Wall* and *Kosovo Declaration of Independence* cases, the Court applied the same reasoning and referred to its previous jurisprudence on the matter.[265] Therefore, not only does the Court refuse to reject requests for advisory opinions when there may be political issues at stakes, but it actually even reaches the point of view that these political considerations might be one of the factors that make the rendering of an advisory opinion even more important.

From all of this, it can easily be inferred that, "[a]lthough States will continue to argue that a question put by a competent organ to the Court is mainly of a political nature it is very

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[263] *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, Advisory Opinion, I. C. J. Reports 1996, p. 66, para. 16. The Court then referred to numerous of its previous advisory cases in which it came to the same conclusion: *Conditions of Admission of a State to Membership in the United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, pp. 61-62; Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I. C. J. Reports 1950, pp. 6-7; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I. C. J. Reports 1962, p. 155.*

[264] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, p. 87, para. 33

[265] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 136, para. 41; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 403, para. 27.

difficult to see that the Court will ever find that it has no jurisdiction on the basis of such an argument".[266]

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CONCLUSION OF THE CHAPTER

Before accepting a request for an advisory opinion, the ICJ proceeds to the assessment of the required conditions to give it jurisdiction for the advisory opinion. These conditions are threefold: "the agency requesting the opinion must be duly authorized, under the Charter, to request opinions from the Court; the opinion requested must be on a legal question; and this question must be one arising within the scope of the activities of the requesting agency".[267] To this day, the Court refused once to render an advisory opinion, on a request formed by the World Health Organisation, because according to the ICJ, the WHO's question was *ultra vires* and therefore did not satisfy the prerequisite of a question "arising within the scope of [its] activities".

Aside from the jurisdiction requirements, the Court has the discretion to refrain from accepting a request for an advisory opinion in any case, although as acting so would not be in line with its purpose to participate to the mission of the United Nations to maintain international peace and security, the Court only refrains from rendering advisory opinions in the presence of 'compelling reasons'. This never happened so far, despite the numerous attempts by states who were opposed to diverse requests for advisory opinions. These states tried to raise the issue of lack of consent from concerned states. However, if this is a condition prerequired to the jurisdiction of the Court in the contentious proceedings, it has no impact in the advisory one. States also tried to argue that some questions asked to the Court were political and therefore, that the Court could not accept the request, but again, the Court managed to find that even if the question had a political aspect in the background context, it would not deprive it from the ability to render an advisory opinion. In other words, it seems safe to conclude that the Court always tries to maximise its scope of action and to limit whatever obstacles it could meet to prevent it from rendering advisory opinions.

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[266] ZIMMERMAN (A.), TAMS (C.), OELLERS-FRAHM (K.), *The Statute of the International Court of Justice*. *A Commentary*, *op. cit.* at 7, p. 1615.

[267] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, I.C.J. Reports 1996, p. 72.

CHAPTER 2:
THE LIMITED IMPLEMENTATION OF ADVISORY OPINIONS

97. It is a clear fact that ICJ's advisory opinions have no binding force.[268] It is actually thanks to this absence of binding force that the aforementioned lack of consent of State has no impact on the jurisdiction or discretion of the Court to render advisory opinions.[269] However, the downside is that, given that advisory opinions are not binding, their compliance can never be guaranteed. In fact, it has been argued by some authors that the Court should use its discretion power and refuse to give an advisory opinion when it seems like this opinion will be ignored.[270] However, to borrow Malcolm Shaw's words, the Court "is not in a position to assess the chances of successful implementation".[271] If the possibility of non-compliance constituted a reason strong enough to not exercise its jurisdiction, the Court's advisory activity would be extremely narrow.

98. Besides, Shaw adds that "in any event the very act of clarifying the law in the relevant circumstances itself constitutes a form of implementation".[272] It concerns thus the question of implementation through the development and clarification of international law that we aimed to analyse in the first part of our development.[273] Be that as it may, that statements made by the ICJ in its advisory opinion will usually have relevant legal effects.[274] It is thus relevant to observe the concrete reception of the ICJ's advisory opinions, and to discuss the question of the 'binding' value of advisory opinions. Each of these two points will thus be targeted by the two following sections.

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[268] This general principle knows the exception of the binding force that can be given to advisory opinions by a provisional clause in specific conventions or acts of some international organisations. See *infra*, Part II, Chapter 2, Section 2.

[269] ZIMMERMAN (A.), TAMS (C.), OELLERS-FRAHM (K.), *The Statute of the International Court of Justice. A Commentary*, *op. cit.* at 7, p. 1621.

[270] POMERANCE (M.), "The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms", in: MULLER(A.S.), RAIC (D.) et al. (eds.), *The International Court of Justice: Its Future Role After Fifty Years*, The Hague, Martinus Nijhoff Publishers, 1997, p. 318; BOWETT (D.W.), "The Court's role in relation to international organizations" in: LOWE (V.), FITZMAURICE (M.)(eds.), *Fifty Years of the International Court of Justice*, *op. cit.* at 29, p. 186.

[271] SHAW (M.N.), "The Security Council and the International Court of Justice: Judicial Drift and Judicial Function", in: MULLER (A.S.); RAIC (D.) et al. (eds.), *The International Court of Justice*, *op. cit.* at 272, p. 248-249.

[272] *Idem.*

[273] See above, Part I.

[274] ROSENNE (S.), *The Law and Practice of the International Court*, *op. cit.* at 5, Vol III, p. 1699; HAMBRO (E.), "The Authority of the Advisory Opinions of the International Court of Justice", ICLQ 3 (1954), pp. 2-2; ZICCARDI CAPALDO (G.), "International Court of Justice: Advisory Opinions: Advisory Proceedings of Decisive Character", *the Global Community: Yearbook of International Law and Jurisprudence* (2001), pp. 249-266; FALK (R.) 'The *Kosovo* Advisory Opinion: Conflict Resolution and Precedent' AJIL, 105 (2011), pp. 52-54.

Section 1: The concrete reception of the ICJ's advisory opinions

99. The assessment of the reception of advisory opinions will be done in a dual way; first the assessment will focus on the reception by the organs from whom the request originates (A.), and second on the reception of advisory opinions by the states who are concerned by the advisory opinion (B.).

A. The reception of advisory opinions by the requesting organs

100. The requesting organ is in charge of determining the implementation of an opinion rendered by the ICJ, even though there is no provision in the Charter that permits UN organs to assess the legal findings in the Court's decision. In fact, member states and publicists often adopt the general view that advisory opinions should be accepted by the General Assembly without any further discussion of the Court's reasoning.[275] In its comment on the advisory opinion regarding *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, the United States representative expressed its opinion on the matter:

> "The General Assembly is not a Court. It is not a judicial organ of the United Nations, and still less it is `the principal judicial organ of the United Nations', as Article 92 of the Charter describes the International Court of Justice. It is not the function of this Assembly […] to act as a Court to review the International Court of Justice. To do so would depart from the Charter's clear intention. When the Court's opinion is asked, establishment and interpretation of the law, in the design of the Charter, is the function of the Court; action to implement the law is, as the case may be, the function of other organs of the United Nations."[276]

101. After the ICJ has given an advisory opinion on the request of the General Assembly, the general practice of the General Assembly is to adopt a resolution concerning said opinion. It first did so with regard to the advisory opinion on the *Conditions for Admission*, by adopting Resolution 197 (A) (III) of 8 December 1948, in which, after recalling the final decision of the ICJ in this opinion[277], the General Assembly recommended "that each member of the Security Council and of the General Assembly, in exercising its vote on the admission of new Member: should act in accordance with the foregoing opinion of the lnternational Court of Justice."[278] Thereafter, the General Assembly adopted several other resolutions acknowledging advisory opinions given by the ICJ.[279]

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[275] ALJAGHOUB (M.), *The Advisory Function of the International Court of Justice*, *op. cit.* at 15, p. 224.
[276] U.S. Delegation to UNGA, Press Release No.4112, 1962, p. 3.
[277] *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion : I. C. J. Reports 1948, p. 65.
[278] A/RES/197(III), *Admission of New Members*, adopted on 8 December 1948 by the General Assembly of the United Nations.
[279] ROSENNE (S.), *The Law and Practice of the International Court*, *op. cit.* at 5, pp. 304 *et seq.;* ZIMMERMAN (A.), TAMS (C.), OELLERS-FRAHM (K.), *The Statute of the International Court of Justice. A Commentary*, *op. cit.* at 7, pp. 1621-1622; See *inter alia* Resolution 41/45 M of 10 December 1996 that followed the advisory

B. The reception of advisory opinions by States

102. As we observed in the first part of our development, the ICJ has a tremendous influence as a guide in international law. Throughout its judgements and advisory opinions, the Court clarifies obscure points of international law and strengthen its coherence and judicial security. Therefore, despite the lack of binding force attached to the ICJ's advisory opinions, some scholars observe the wide compliance with them by requesting organs and by concerned states. In fact, this influence does not limit itself to the concerned parties to a case but goes beyond. In the words of Mahasen M. Aljaghoub, "[a]dvisory opinions rendered by the Court affect the understanding and interpretation of International Law for all the international community rather than for the particular 'parties' to an individual opinion".[280] In the same vein, Judge De Castro made the following statement in its separate opinion to the *Western Sahara case*:

> "[T]he effect of an advisory opinion is not confined to the parties as though it were a matter of a judgment; the opinion is authoritative *erga omnes*, and is not restricted to the States or organizations that make written or oral statements or submit information or documents to the Court."[281]

Nevertheless, the fact remains that advisory opinions may have very narrow effects on the real behaviour or states. It is even more true in the presence of very significant questions involving strong political considerations.[282]

Section 2: The question of the binding or non-binding value of advisory opinions

103. While the Statute of the ICJ provides that its judgments are binding to the states parties, advisory opinions are, due to their advisory character, non-compulsory. However, in several situations, the ICJ's advisory opinions can have a binding force, due to the presence of a clause providing so in agreements, statutes or constitutions of organisations. Indeed, such provisions can give to the opinion the value of 'decision' in relation to the dispute at

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opinion on the *Legality of the Threat or Use of Nuclear Weapons*; Resolution A/RES/ES-10/15 of 20 July 2004 that dealt with the *Wall* advisory opinion, Resolution A/RES/64/298 of 9 September 2010 regarding the advisory opinion on the *Declaration of Independence of Kosovo*.

[280] ALJAGHOUB (M.), *The Advisory Function of the International Court of Justice*, *op. cit.* at 15, p. 226.

[281] [T]he effect of an advisory opinion is not confined to the parties as though it were a matter of a judgment; the opinion is authoritative erga omnes, and is not restricted to the States or organizations that make written or oral statements or submit information or documents to the Court.

[282] ZIMMERMAN (A.), TAMS (C.), OELLERS-FRAHM (K.), *The Statute of the International Court of Justice*. *A Commentary*, *op. cit.* at 7, p. 1629.

stake.[283] This category of 'binding' advisory opinions was discussed by many authors who adopt different views on the matter. Shabtai Rosenne strongly considers that "an advisory opinion is not a *res judicata*"[284]. That being said, in the advisory opinion on *Judgments of the Administrative Tribunal of the I.L.O., upon complaints made against the U.N.E.S.C.O.*, thanks to Article XII of the Statute of this Tribunal, the advisory opinion requested to the ICJ would be mandatory for the Tribunal. In regards with this case, Rosenne observed that "an indirect means had thus been found to overcome the obstacle presented by the inability of the international organization […] to institute a contentious procedure to settle a dispute to which it was a party, and to secure examination of the matter and a decision on it by the Court".[285] The Court expressly acknowledged this substitution was made in said advisory opinion :

> "However, under Article 34, paragraph 1, of the Statute of the Court "only States may be parties in cases before the Court". In Article XII it was sought to avoid this difficulty while nevertheless securing an examination by and a decision of the Court by means of a Request, emanating from the Executive Board, for an Advisory Opinion. To the Executive Board-and to it alone-was given the right of challenging a Judgment of the Administrative Tribunal. The special feature of this procedure is that advisory proceedings take the place of contentious proceedings which would not be possible under the Statute of the Court."

104. Paolo Benvenuti's opinion on the matter is opposite to Rossenne's. He observes that proceedings, both advisory and contentious, are altogether equivalent. He affirms that the assessments made by the Court have a *secondum jus* feature based on the fundamental principles of objectivity, and that in both situations, proceedings lead to assert the certain existence of rights and obligations of the subjects of international law. The legal certainty that stems from this, allows in both proceedings to the consolidation of international law and thus strengthens judicial security.[286] He concludes that states can endeavour to appreciate the indisputable determination of international law in advisory proceedings as much as in contentious ones.[287]

105. Apart from the peculiar situation involving the existence of a clause in the founding texts of an organization, one might affirm that notwithstanding the lack of legal binding force of ICJ's advisory opinions, states and requesting organs have a moral obligation to comply with rendered advisory opinions because of the natural authority of the

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[283] AGO (R.), « 'Binding' advisory opinions of the International Court of Justice", The American Journal of International Law, Vol. 85, No. 3 (Jul. 1991), p. 439.
[284] ROSENNE (S.), *The Law and Practice of the International Court, op. cit.* at 5, p. 310.
[285] AGO (R.), « 'Binding' advisory opinions of the International Court of Justice", *op. cit.* at 283, p. 439.
[286] See above Part I, Chapter I, Section 2.
[287] BENVENUTI (P.), *L'accertamento del diritto mediante i pareri consultivi della Corte Internazionale di Giustizia*, 1985, p. 57.

ICJ and its relevant mission of clarifying international law and guiding subjects of international law. Indeed, they "carry great legal weight and moral authority".[288] Furthermore, the Court bases its reasonings on existing rules of international law in its advisory opinions and therein ascertains the existence of obligations binding on States. To that extent, "the formal non-binding character of an opinion barely influences the legal impact of its conclusions."[289]. In his separate opinion to the advisory opinion on the *Wall* case, Judge Koroma affirmed the following:

> "The Court's findings are based on the authoritative rules of international law and are of an *erga omnes* character. The Court's response provides an authoritative answer to the question submitted to it. Given the fact that all States are bound by those rules and have an interest in their observance, all States are subject to these findings."[290]

106. Notwithstanding this point of view, the fact remains that more than once, Supreme Courts of states concerned in a situation discussed in an ICJ advisory opinion held a decision denying the conclusion adopted by the ICJ in said advisory opinion. Following the *Wall* advisory opinion, Israel's Supreme Court's decision adopted on 10 July 2005 shows the intention of the Israeli Government not to comply with the advisory opinion of the ICJ and to continue the construction of the wall.[291] Similarly, on 8 February 2019, the High Court in London hurried to render a decision just a fortnight before the advisory opinion on the Separation of the Chagos Archipelago was given by the ICJ. In this decision, the High Court affirmed the lawfulness of the decision taken by the UK government in November 2016 not to facilitate Chagossian resettlement of the Chagos Archipelago.[292] This extremely short timeframe between the two cases cannot be coincidental and one might observe that the United Kingdom calculated to render this decision in order to avoid having to appreciate the ICJ advisory opinion.

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[288] ICJ, *Advisory Jurisdiction*, [online] https://www.icj-cij.org/en/advisory-jurisdiction [11/06/2020]; *Sandrine* De Herdt, « A Reference to the ICJ for an Advisory Opinion over COVID-19 Pandemic", EJIL:Talk!, May 20, 2020, [online] https://www.ejiltalk.org/a-reference-to-the-icj-for-an-advisory-opinion-over-covid-19-pandemic/ [11/06/2021].

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CONCLUSION

Since the days of the Permanent Court of International Justice, the advisory function of the World Court has demonstrated its creative power. After 1945, under the auspice of the United Nations Organisation, the International Court of Justice perpetrated the mission of clarifying the rules of international law to assist the agencies of the UN who needed guidance.

Through the construction of a solid and influential jurisprudence, the advisory activity of the Court acted as a lighthouse, not only guiding the agencies who sought for advice, but bringing lightning on obscures points of international law for other international courts and tribunals, which, in the course of an interjurisdictional dialogue, frequently referred to the findings of the ICJ to reinforce the legitimacy of their reasonings. This dialogue is even more necessary in the current context subject to the multiplication of jurisdictions of international law, so as to guarantee the coherence of international law and to strengthen judicial security.

More than a guide, the advisory function develops rules of international law. Throughout its advisory caselaw, the ICJ has contributed to the law of treaties, recognised the existence of customary rules, clarified the sources of international law, and clarified rules of international law and rules governing the law of the United Nations.

It must be noted, however, that the advisory proceedings can be limited by the conditions required to give jurisdiction to the Court. As well, the Court may decide to refuse a case under its discretion. However, only once in the history of the ICJ did the Court reject a request for an advisory opinion, due to the lack of one of the jurisdiction conditions. Otherwise, the Court always considers it to be of its duty to welcome as many requests as possible, and thus never refuses a case if its jurisdiction is acknowledged, notwithstanding the arguments that are sometimes raised to prevent it to do so.

The lack of binding force of advisory opinions leads to a very mitigated result regarding their implementation. While the General Assembly usually adopts resolutions to acknowledge the conclusion of the Court in its advisory opinions, on the other hand, states' reception of the advisory opinions, when they're concerned by the solution depends on their personal interest and will not hesitate to remain blind in front of them.

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