ADVISORY JURISDICTION: LESSONS FROM RECENT PRACTICE

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Rüdiger Wolfrum has long experience as a member, and President, of an international court, the International Tribunal for the Law of the Sea. The Tribunal itself has a potentially wide if somewhat controversial advisory jurisdiction. The Seabed Disputes Chamber of the Tribunal, on which Judge Wolfrum also sits, has advisory jurisdiction in certain deep seabed matters and delivered its first advisory opinion on 1 February 2011.[1]

In addition to the first advisory opinion of the Seabed Disputes Chamber, the 2010 opinion of the International Court of Justice on the *Declaration of independence in respect of Kosovo*,[2] together with its 2004 opinion on the *Wall in the Occupied Palestinian Territory* case,[3] have enhanced interest in the advisory jurisdiction.[4]

It seems therefore appropriate, in a volume offered to Rüdiger Wolfrum, to revisit certain questions concerning the advisory jurisdiction of international courts and tribunals.[5] The aim is not to provide a comprehensive account. There is already an ample literature.[6] The

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[1] ITLOS, *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea*, Advisory Opinion of 1 February 2011, to be published in ITLOS Reports 2011 (hereafter *Responsibilities and Obligations* case), available at http://www.itlos.org.

[2] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, available at http://www.icj-cij.org.

[3] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 136.

[4] See, also, the latest request for an advisory opinion from the International Court of Justice, made by the Executive Board of the International Fund for Agricultural Development (IFAD): *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development,* Orders of 29 April 2010 and 24 January 2011.

[5] Professor Wolfrum presented a paper on advisory opinions at a seminar held in Heidelberg on 3 November 2010: R. Wolfrum, Advisory Opinions, to be published in R. Wolfrum/I. Gätschmann (eds.), International Dispute Settlement: Room for Innovations.

[6] See, for example, K. Keith, The Extent of the Advisory Jurisdiction of the International Court of Justice (1971); D. Pratap, The Advisory Jurisdiction of the

present contribution deals mainly with two recent advisory proceedings, the *Kosovo* case before the International Court of Justice (ICJ)[7] and the *Responsibilities and Obligations* case before the Seabed Disputes Chamber.[8]

This contribution focuses on the initiation and reception of advisory opinions by the requesting organ, and the procedures employed by international courts and tribunals, in particular the International Court of Justice and the Seabed Disputes Chamber, when called upon to exercise their advisory jurisdiction. It is concerned too, albeit indirectly, with broader questions such as the usefulness of advisory proceedings, as to which doubts are expressed from time to time.[9] The procedural issues and the broader questions are not unrelated. Some of the doubts arise precisely because of perceived inadequacies in procedures.

The first part of this contribution recalls briefly the range of international courts and tribunals with advisory jurisdiction (Section I). The second reviews recent practice, with particular reference to the *Kosovo* and *Responsibilities and Obligations* cases (Section II). The third section considers what lessons may be learnt from recent practice for the three principal stages of the procedure: the request for an advisory

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International Court of Justice (1972); M. Pomerance, The Advisory Function of the International Court in the League and UN Eras (1972); C. Espósito, La Jurisdicción Consultiva de la Corte Internacional de Justicia (1996); G. Abi-Saab, On Discretion: Reflections on the Nature of the Consultative Function of the International Court of Justice, in: L. Boisson de Chazournes/P. Sands (eds.), International Law, the International Court of Justice and Nuclear Weapons, 36 (1999); H. Thirlway, The Law and Procedure of the International Court of Justice 1960–1989: Part Eleven, 71 BYBIL 71 (2000); R. Higgins, The New Challenges and the Role of the International Court of Justice, in: P. Fernández-Sánchez (ed.), The New Challenges of Humanitarian Law in Armed Conflicts, 244 (2005); M. Aliaghoub, The Advisory Function of the International Court of Justice (1945–2005) (2006); S. Rosenne, The Law and Practice of the International Court 1922–2005, Chapters 5 and 30 (2006); A. Zimmermann et al. (eds.), The Statute of the International Court of Justice: A Commentary (2006); H. Thirlway, Advisory Opinions, in: R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Oxford University Press (2008), online edition http://www.mpepil.com.

[7] Note 2 above.

[8] Note 1 above.

[9] See, for example, R. Higgins, A Comment on the Current Health of Advisory Proceedings, in: V. Lowe/M. Fitzmaurice (eds.), Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings, 567 (1996), reprinted in: R. Higgins, Themes and Theories. Selected Essays, Speeches, and Writings in International Law, at 1043 (2009); F. D. Berman, The Uses and Abuses of Advisory Opinions, in: N. Ando/E. McWhinney/R. Wolfrum (eds.), Liber Amicorum Judge Shigeru Oda, 809 (2002); A. Aust, Advisory Opinions, 1 Journal of International Dispute Settlement, 123 (2010).

opinion; the written and oral pleadings; and the "reception" of the opinion by the requesting organ (Section III).

A. Courts and Tribunals with Advisory Jurisdiction

The main international court with advisory jurisdiction, and the one with which this contribution is principally concerned, is the International Court of Justice (together with its predecessor, the Permanent Court of International Justice). But it should be recalled that other courts and tribunals have important advisory functions.

For example, the Inter-American Court of Human Rights[10] has a broad advisory jurisdiction under Article 64 of the American Convention on Human Rights,[11] which provides:

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

As of January 2011, the Inter-American Court had given 20 advisory opinions.

The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has jurisdiction, under the United Nations Convention on the Law of the Sea, to give an advisory opinion at the request of the Assembly or the Council of the International Seabed Authority on legal questions arising within the scope of their activities.[12] In its first

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[10] T. Buergenthal, The Advisory Practice of the Inter-American Human Rights Court, in: P. Nikken et al. (eds.), La Corte Interamericanos de derechos humanos: Estudios y documentos, 27 (1999); J. M. Pasqualucci/T. Buergenthal, The Practice and Procedure of the Inter-American Court of Human Rights (2003); J. C. Schmid, Advisory Opinions on Human Rights: Moving beyond a Pyrrhic Victory, 16 Duke Journal of Comparative and International Law 123 (2006).

[11] In 1982, the Court stated that "Article 64 of the Convention confers upon this Court an advisory jurisdiction that is more extensive than that enjoyed by any international tribunal in existence today": *"Other Treaties" subject to the advisory jurisdiction of the Court (Article 64 American Convention on Human Rights),* Advisory Opinion of 24 September 1982, I/A CHR (Ser. A) No 1, para. 25.

[12] Articles 159, para. 10 and 191 of the United Nations Convention on the Law of the Sea, 10 December 1982, UNTS Vol. 1833, No. 31363, 397.

advisory opinion, the Chamber described itself as "a separate judicial body within the Tribunal entrusted, through its advisory and contentious jurisdiction, with the exclusive function of interpreting Part XI of the Convention and the relevant annexes and regulations that are the legal basis for the organization and management of activities in the Area."[13] In addition, Article 138 paragraph 1 of the Rules of the International Tribunal for the Law of the Sea provides that "the Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion." This provision was presumably included in the Rules on the basis of the Article in the Tribunal's Statute which provides that the Tribunal's jurisdiction comprises, *inter alia*, "all mat ters specifically provided for in any other agreement which confers jurisdiction on the Tribunal".[14] No advisory opinion has been sought under Article 138, the legal basis for which is somewhat controversial.[15]

The Court of Justice of the European Union has jurisdiction to give opinions of various kinds. In particular, under Article 218 paragraph 11 of the Treaty on the Functioning of the European Union, a Member State, the European Parliament, the Council or the Commission may obtain the opinion of the European Court of Justice as to whether an agreement envisaged to be entered into by the Union with a third country or an international organization is compatible with the Treaty on European Union or the Treaty on the Functioning of the European Union.[16]

Under Article 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights (ECtHR) has a very narrow jurisdiction to give advisory opinions, which it has exercised on only two occasions over forty

[13] *Responsibilities and Obligations* case (note 1), para. 25.

[14] United Nations Convention on the Law of the Sea (note 12), Annex VI, Article 21.

[15] P. Chandrasekhara Rao/P. Gautier, The Rules of the International Tribunal for the Law of the Sea: A Commentary, at 393–394 (2006); Y. Ki-Jun, Advisory Opinions of the International Tribunal for the Law of the Sea: Article 138 of the Rules of the Tribunal, Revisited, 39 Ocean Development and International Law 360 (2008); T. Ndiaye, The Advisory Function of the International Tribunal for the Law of the Sea, 9 Chinese Journal of International Law 565 (2010).

[16] Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

years.[17] The African Court on Human and People's Rights, on the other hand, has a broad advisory jurisdiction, though this has yet to be exercised.[18] Another court with advisory jurisdiction, the Economic Court of the Commonwealth of Independent States, has been particularly active in its function of giving interpretative decisions and advisory opinions.[19]

Thus a large number of international courts and tribunals have some advisory jurisdiction, in addition to jurisdiction in contentious cases. The scope of the advisory jurisdiction varies from the very narrow, as with the European Court of Human Rights, to the broad, in particular the International Court of Justice. In practice, few international courts and tribunals exercise their advisory jurisdiction regularly, or at all, though the potential is there–as the recent proceedings before the Seabed Disputes Chamber show. The courts most active in the advisory field have, so far, been the International Court of Justice, which together with its predecessor, the Permanent Court of International Justice, has, as of January 2011, rendered 53 opinions,[20] and the Inter-American Court of Human Rights (20 opinions).

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[17] Article 47, para. 2 excludes many matters, by providing that the ECtHR's opinions "shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention". The ECtHR has given two Opinions (on 12 February 2008 and 22 January 2010, both on questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights). Earlier, on 2 June 2004, the Court declined to give an Opinion, because it was not within its competence under Protocol No. 2, on the matter raised in Recommendation 1519 (2001) of the Parliamentary Assembly concerning "the co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights". The provision on advisory opinions used to be contained in Protocol No. 2 to the Convention, which entered into force in 1970.

[18] Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June 1998, Article 4, provides that the Court may give advisory opinions on "any legal matter relating to the Charter or any other relevant human rights instrument provided the subject matter of the opinion is not related to a matter being examined by the African Commission".

[19] A. Douhan, Advisory Jurisdiction of the CIS Economic Court: A New Means of Settlement of International Disputes in the Region?, to be published in: R. Wolfrum/I. Gätschmann, International Dispute Settlement: Room for Innovations; R. Wolfrum, in his paper at note 5 above, citing M. Hudson, mentions other international bodies that were or are empowered to issue advisory opinions.

[20] The PCIJ rendered 27 opinions in its 17 years of activity, while the present Court has rendered 26 opinions in the last 65 years.

B. Recent Practice of the International Court of Justice and the Seabed Disputes Chamber

The advantages and disadvantages of advisory proceedings have been much debated. In considering the following comments, care should be taken to avoid generalizations. The nature of advisory opinions is diverse, and it is scarcely possible to speak in general terms.

It may be helpful to begin by recalling, first, that the ICJ has stated that "the purpose of the advisory function is not to settle–at least directly–disputes between States, but to offer legal advice to the organs and institutions requesting the opinion".[21]

Second, given the nature of the courts and tribunals concerned, which do not have legislative functions, the purpose of the advisory procedure should not be seen as to develop the law, though that may sometimes be the outcome, not least as regards United Nations law.[22]

It has been suggested that "because they are not limited to a strict analysis of facts, advisory opinions offer a court (or tribunal) a much greater potential to develop the law than do judgments in contentious proceedings",[23] but this is not in itself to be a reason for promoting advisory proceedings.[24] It has been suggested that the fact that advisory proceedings are, by definition, on legal questions, and are not fact-intensive, assists a court to develop the law. However, some advisory proceedings have involved, or ought to have involved, a great deal of factual investigation: *Western Sahara*, the *Wall*, and *Kosovo* come to mind. And moreover, one of the main difficulties with some advisory

[21] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226, 236, para. 15.

[22] Advisory opinions which are seen as having contributed to international law include *Reparation for injury suffered in the service of the United Nations*, ICJ Reports 1949, 174; *Reservations to the Convention on Genocide*, ICJ Reports 1951, 15; *Certain expenses of the United Nations (Article 17, para. 2, of the Charter)*, ICJ Reports 1962, 151; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16; *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, 136.

[23] J. Kateka, Advisory proceedings before the Seabed Disputes Chamber and before the ITLOS as a full court, paper written for the seminar referred to at note 5 above, citing M. Lachs, Some reflections on the contribution of the ICJ to the development of international law, 10 Syracuse Journal of International Law and Commerce 239, at 249 (2004).

[24] See below.

proceedings is precisely that the judges find themselves opining on the law in the abstract. Without the rigour that a detailed factual background gives to a case the judges can themselves only respond in general and largely abstract terms.

So the development of the law is not the principal objective of advisory proceedings. The law has been "developed" at least as much in contentious cases, based on, and argued on the basis of, real facts. Indeed, it may be that the law is better developed (or rather clarified or crystallized or revealed) on the basis of concrete cases, with real facts, not on the basis of abstract reasoning, divorced from actual situations. The *Responsibilities and Obligations* opinion[25] could have been a case in point; it might have been difficult or even hazardous for the Seabed Disputes Chamber to opine on the questions put to it in the abstract, when those questions might later come before it in a contentious case. In fact, while the Chamber gave a more detailed opinion than some had expected, on the whole its opinion seems likely to be helpful to those operating within the deep seabed system, and to have largely avoided giving hostages to fortune.

It is sometimes suggested that the advisory procedure could assist in the settlement of disputes, including disputes between states, or at least for resolving those aspects of a dispute involving legal issues.[26] Reference is made in this connection to the reluctance of states in some regions, such as Asia, to take matters to court. Indeed, at the Heidelberg seminar it was suggested that advisory proceedings could be used to settle disputes between states, and that among their advantages were openness (to participation by other states, and by organizations and even representatives of the international community), transparency, flexibility of procedure, and speed.[27] It is not obvious, however, that all

[25] See note 1 above.

[26] See the proposal by Secretary-General Boutros-Ghali that the Secretary-General should be given the power to request advisory opinions when the parties to a dispute so wanted (in preference to taking their dispute to a Court in the usual way): Agenda for Peace (1992)–a suggestion that was not followed.

[27] For the Seabed Disputes Chamber, UNCLOS provides that opinions requested by the Assembly and the Council of the International Seabed Authority "shall be given as a matter of urgency" (Article 191). The *Responsibilities and Obligations* opinion took eight and a half months from the request to delivery. But it is not the case that all advisory proceedings are treated as a matter of urgency. In the ICJ, that is only done if the requesting organ so requests. Some opinions have taken a considerable time, for example, the *Legality of the Threat or Use of Nuclear Weapons* opinion took 18 months from start to finish and the *Kosovo* opinion took over 21 months.

litigating states would necessarily regard each of these characteristics as advantages.

The use of advisory proceedings to settle disputes between states is only possible where there is agreement between the parties. As the Court has noted, a "distinction should (…) be drawn between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court, which, 'as such, (…) has no binding force'".[28]

The Permanent Court of International Justice (PCIJ) did indeed deal with a number of disputes in this way, but account must be taken of the important difference in the procedure for requesting advisory opinions at the time of the League. All opinions were sought by the Council of the League, acting unanimously (with the formal exclusion of the parties to the dispute). The League Assembly did not make any such request.[29] The contrast with the position under the Charter, where most opinions have been sought by the Assembly, often by a divided vote, could not be starker. Under the Charter, the Security Council has only once requested an advisory opinion.[30] The General Assembly has requested advisory opinions on most of the other occasions, often with a very divided vote. It has done so (as have other organs) with relative ease. For the General Assembly to seek to use the advisory procedure to settle disputes between states without their consent would breach the consensual basis of the Court's jurisdiction.

To the extent that an advisory opinion requires the Court to decide on matters in issue between two states, there is a danger of overriding the requirement of consent that underlies inter-state litigation. It is not a sufficient answer to this to say that the opinion is not legally binding and addressed to the organ that requested it. Or that states have agreed to the advisory procedure in the constituent instruments of the international courts and tribunals.[31] Given that they carry considerable authority, they may in practice be at least as constraining in fact on states as any international judgment.

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[28] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports 1999, 62, 77, para. 25.

[29] S. Rosenne, The Law and Practice of the International Court 1922–2005, at 274 (2006).

[30] Security Council resolution 284 (1970) of 29 July 1970: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports 1971, 16.

[31] Though *Eastern Carelia* might suggest the opposite.

On the other hand, advisory proceedings may sometimes be an appropriate way to settle dispute involving persons other than states, such as international organizations[32] and individuals, where this is done on the basis of agreement.[33]

The view is still sometimes expressed that the Court should not render an advisory opinion when the subject is politically controversial.[34] But the Court has routinely rejected such arguments, both in advisory and in contentious cases, and it seems unlikely that they will be any more successful in the future. The Court "has repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question."[35]

Turning next to the procedures at the International Court, it is notable that these have often served as a model for other international courts and tribunals. Thus the Seabed Disputes Chamber, in most respects, has sensibly followed ICJ practice. The Statute and Rules of Court allow the ICJ a large measure of flexibility in how it organizes advisory proceedings. The Court has usually sought to tailor its procedures to the particular case, especially on questions such as whether to have one or two rounds of written pleadings, whether to hold oral hearings, and if so whether to have one or two rounds and in which order and for how long to hear the participants.

The underlying conception seems to be that the participants in advisory proceedings are there to assist the Court, not to defend their own rights or legal positions, and to assist the Court with "information". As a result, and by contrast with contentious cases, an adversarial dialogue

[32] As, for example, under the procedure foreseen in Article 30 of the General Convention on the Privileges and Immunities of the United Nations, which was applied in the *Cumaraswamy* case, and in Article 66, para. 2 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, not yet in force; see R. Ago, "Binding" Advisory Opinions of the International Court of Justice, 85 AJIL 499 (1991); C. Brower/P. Bekker, Understanding "Binding" Advisory Opinions of the International Court of Justice, in: N. Ando/E. McWhinney/R. Wolfrum (eds.), Liber Amicorum Judge Shigeru Oda, 351 (2002); S. Rosenne, The Law and Practice of the International Court 1922–2005, at 277 (2006).

[33] As in the case of the former procedure for the review of United Nations Administrative Tribunal judgments: see M. Wood, United Nations Administrative Tribunal, Applications for Review (Advisory Opinions), in: R. Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, Oxford University Press (2008), online edition http://www.mpepil.com. The procedure still exists with respect to the ILO Administrative Tribunal.

[34] For example, A. Aust, (note 9).

[35] *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (note 2), para. 27.

is not normally seen as fundamental to the proceedings. The participants are not encouraged, and indeed are often not given the opportunity, to respond to what others say, especially in the oral proceedings. And since states may take part in the oral proceedings without having submitted anything in writing, there may be no opportunity whatsoever for one state or other participant to respond to another. They are usually at the mercy of the French or English alphabetical order (either of which, as it happens, tends to favour the United Kingdom, in so far as it comes towards the end). For example, in the *Responsibilities and Obligations* case the main mover of the request for an opinion, the Republic of Nauru, appeared late in the list of oral participants, and set out new arguments that had not been addressed in the written pleadings, or on the oral pleadings of those speaking before it. Thus most participants were not able to respond to what they had to say; the United Kingdom (Royaume-Uni) and the Russian Federation were the immediately following speakers, and so could respond, to a limited degree. Since it could have been anticipated that Nauru would be representing a particular point of view, it might have been more helpful in order to bring out the arguments if Nauru had been invited to speak first among the participating states.

Another issue of considerable practical importance is the question of participation in advisory proceedings. The Court has considerable discretion in the organization of advisory proceedings. The practice of the Court (as well as that of the Permanent Court) indicates that the Court has approached the question of participation flexibly.[36] This was demonstrated in the *Wall* case, in which the Court recognized the particular position and interests of Palestine in relation to the question put to the Court. As the Court has frequently recognized, equality of the parties and *audi alteram partem* are fundamental principles in all judicial proceedings.[37] This includes advisory proceedings.[38] Likewise, in the *Kosovo* case, "the authors" of the Declaration of Independence were invited to participate on a basis of equality with other participants, including the Republic of Serbia.[39] They were the first two

[36] S. Rosenne, The Law and Practice of the International Court, 1920–2005, at 1671–1674 (2006).
[37] Id., at 1048–1052.
[38] K. Keith, The Extent of the Advisory Jurisdiction of the International Court of Justice, at 157–164 (1971).
[39] Order of 17 October 2008, ICJ Reports 2008, 407.

speakers, and were given significantly more time than other participants. A number of representatives who spoke in the General Assembly debate at which the resolution requesting the opinion was adopted had stressed the importance of Kosovo being able to present its views to the Court.

The participation of interested international organizations in advisory proceedings is usually approached with a degree of flexibility. It is not confined to the UN specialized agencies. Thus the League of Arab States, the Organization of the Islamic Conference and the European Union participated in the *Wall* proceedings. However, in the *International Fund for Agricultural Development (IFAD)* case, the ICJ invited those specialized agencies of the United Nations which had accepted the jurisdiction of the ILO Administrative Tribunal, but it did not invite the Global Mechanism of the United Nations Convention to Combat Desertification[40], which was directly implicated in the matters before the Court. In the *Responsibilities and Obligations* case, two international organizations took part in the written stage: the Interoceanmetal Joint Organization[41] and the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization (IOC). At the oral stage there were also two organizations taking part: the IOC and the International Union for Conservation of Nature and Natural Resources (IUCN). A question that arises is how far those representing international organizations before the court or tribunal actually express policy and legal positions agreed by the policy organs of the organizations concerned. To the extent they do not, it must be questionable how far they are entitled to speak authoritatively in the name of the organization. Certainly, they should express themselves with discretion in this regard.

A related question has arisen where the case involves the employment rights of individuals. Here the practice has been for the proceedings to be entirely in writing.[42] This is apparently because it is not felt

[40] Full title: The Global Mechanism of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.

[41] Although technically an international organization, this body was in fact one of the pioneer investors.

[42] See, most recently, the case concerning *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a complaint filed against the International Fund for Agricultural Development,* Orders of 29 April 2010 and 29 January 2011.

desirable, and perhaps not even possible,[43] to adopt a procedure that would enable the individual to present his or her case orally. The head of the international organization has been ordered to transmit to the Court any (written) statement containing the views of the individual concerned. Yet in other courts, ways have been found for individuals to present their arguments orally as well as in writing.

Another issue is whether there should be one or two rounds of written pleadings. If the case is a major one involving significantly different views it would seem desirable to have two rounds, as was done in the *Kosovo* case (but not in the *Responsibilities and Obligations* case).

The reception of the opinion by the requesting organ is in operational terms the most important stage, but it is rather neglected in the literature. Since opinions are not, generally, legally binding, what matters in practice is the effect that those to whom they are addressed, the requesting organs and, indirectly, its members give to them. Their impact may be judged not merely by the immediate reaction of the requesting organ, but by such follow-up as there may be. It is instructive to look at the *Kosovo* case.

Following the *Kosovo* advisory opinion of 22 July 2010, Serbia proposed a draft resolution[44], the preamble to which would have said that the General Assembly was

> "*Aware* that an agreement between the parties on the effects of the unilateral declaration of independence of Kosovo from Serbia had not been reached,
>
> *Mindful* of the fact that a unilateral declaration of independence cannot be an acceptable way of resolving territorial issues".

In the operative part of the draft, the General Assembly would have called upon "the parties to find a mutually acceptable solution for all outstanding issues through peaceful dialogue, in the interests of peace, security and cooperation in the region"; and would have included an item on "Follow-up to the advisory opinion" in the provisional agenda of the sixty-sixth session of the General Assembly.

But, eventually, Serbia did not put its draft to a vote, despite repeatedly threatening to do so. Instead it co-sponsored, together with all 27 member states of the European Union, General Assembly resolution

[43] For example, in the ECtHR before 1998, when individuals were not parties to the case, the Commission included the individual or his or her lawyers among its own delegation.

[44] A/64/L.65.

64/298, adopted by consensus on 9 September 2010. In this resolution, the Assembly (1) acknowledged the content of the advisory opinion and (2) welcomed "the readiness of the European Union to facilitate a process of dialogue between the parties; the process of dialogue in itself would be a factor for peace, security and stability in the region, and that dialogue would be to promote cooperation, achieve progress on the path to the European Union and improve the lives of the people."

The outcome in the Assembly was acceptable to Kosovo and its supporters because, in contrast to the original Serbian draft, resolution 64/298 did not imply that status questions remained open. The extent to which the advisory process, and its outcome in resolution 64/298, will have contributed to a resolution of outstanding issues remains to be seen.[45]

C. Points of Concern at the Three Principal Stages of the Advisory Procedure

Having briefly surveyed some of the recent practice, we shall now look at each of the three main stages of the process, the request, the proceedings before the Court, and the reception of the opinion to see what lessons can be learnt.

The organs empowered to seek advisory opinions have, for the most part, shown considerable restraint.[46] But this is not always the case. They ought certainly to bear in mind that requests for advisory opinions are not cost-free. They place a heavy responsibility upon what in some cases are already overburdened courts, as well as on those states and others that feel the need to participate in the court proceedings. For this reason alone, a request for an advisory opinion is not something to be undertaken lightly.

Where the question put, while in form a legal question, is in reality a highly contentious matter in dispute between states, the risk is obvious of bringing the Court into disrepute, through no fault of its own. Cases like those on the *Legality of the Threat or Use of Nuclear Weapons*, on the *Wall*, or on *Kosovo* placed the Court at the heart of intense political debate. It was only with considerable care and caution that the Court avoided alienating a wide section of its constituency. In doing so, it did,

[45] In July 2011, the ISA Assembly took note with appreciation of the *Responsibilities and Obligations* opinion (note 1), (ISBA/17/A/9).

[46] I am not aware of any study of advisory opinions that have been proposed, in one form or another, but not requested. But there are undoubtedly many such cases.

in each case, lay itself open to sometimes harsh academic or private criticism–but that is not a particularly serious matter.

In these circumstances, the most careful consideration should be given by the requesting organ to the usefulness or otherwise of securing an opinion. On occasion, they may be seen as harmful both to international relations and to the court or tribunal concerned. However, it must be said that in most cases such fears prove to be unfounded, if only because of the skill and sensitivity of the judges.

The requesting organ needs to take particular care in drafting the question. Such care was shown, for example, by the Council of the International Seabed Authority in drafting the questions in the *Responsibilities and Obligations* case; Nauru's original formulations would have led to a very difficult case for all concerned. That this is not always the case is shown by the number of times that the International Court of Justice has found it necessary to reformulate the question, sometimes quite substantially, before answering it. And the requesting organ should be careful not to include prejudicial elements in either the question or the resolution containing the question. In the *Kosovo* case, what may have appeared to be a straightforward question[47] had at least four prejudicial elements: the superfluous word "unilateral" to describe Kosovo's declaration of independence, which recalled such previous cases as Rhodesia's UDI; the present tense "is", which could have suggested that the issue of legality was an ongoing one; the description of the authors of the declaration as "the Provisional Institutions of Self-Government", which may have been intended by the sole sponsor of the resolution to prejudge the position under the Constitutional Framework; and the concluding words "in accordance with international law", which could have been read as an assertion that some positive rule had to be found in order to decide that the declaration was lawful under international law. In its response the Court rightly avoided all four points, when, by ten votes to four, it was of the opinion "that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law."

The Rules of Procedure of the General Assembly envisage that requests for advisory opinions should be referred to the Sixth (Legal)

[47] The question asked by the General Assembly, by 77 votes in favour, 6 against, with 74 abstentions (and no less than 35 Members not participating) was: "*Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?*".

Committee "for advice on the legal aspects and on the drafting of the request".[48] This indicates a concern for careful legal input into the formulation of the questions, but in practice there has been no case where a request has been referred by another organ to the Sixth Committee for consideration. At the very least, the drafting of the question should follow appropriate consultations.[49]

A contrast may be drawn between the *Kosovo* case and the rather careful formulation of the questions asked in 2010 by the Council of the International Seabed Authority. As originally proposed by Nauru[50] the Seabed Dispute Chamber could have been asked an inappropriately complex and specific set of questions, which would have put the Chamber in a difficult position, not least because these were questions that it might well have been subsequently called upon to decide in contentious proceedings. With the assistance of the Secretariat, the Council was able to frame the questions in a more appropriate manner, to the satisfaction of all the states concerned.[51]

As we have seen there is no fixed procedure for the conduct of advisory opinions. Concern has been expressed over the length and repetitious nature, and questions asked about how they can be streamlined.[52] But this does not seem very practical. A more serious problem may be lack of participation, as in the *IFAD* case where, so far, only one State has participated. In such a case, the court or tribunal may have to decide without the benefit of hearing all sides of the argument. While the court or tribunal may be expected to seek to compensate for this, as the ICJ does in contentious cases where one of the parties fails to appear, that is no substitute for hearing proper argument.

Ways should be found to draw out the arguments more effectively rather than simply relying on the hazards of the alphabet. Attention needs to be paid to the realities of the case, and in particular the extent to which it resembles a contentious case or not. The idea that the participants are there merely to assist the Court rather than to argue for one particular "side" of the argument does not always reflect reality, and to that extent is something of a myth, and a rather misleading one

[48] Rules of Procedure of the General Assembly, Annex II.
[49] Something evidently lacking in the case of the *Kosovo* request (note 2).
[50] ISBA/6/C/6.
[51] See the description of the procedure followed in the speech of Mr. Lodge (ISBA Legal Adviser) in ITLOS/PV.2010/1/Rev.1.
[52] M. Mendelson, Seminar in honour of the memory of Sir Ian Brownlie, London, 19 November 2010.

at that. It was, therefore, right that in the *Kosovo* case the Court began the oral stage by hearing first Serbia, then "the authors" of the declaration of independence (i.e., Kosovo), and gave each of them substantially longer than the other participants, three hours as opposed to 45 minutes.[53]

A further issue is the participation of entities that are not member states of the United Nations, such as Palestine and Kosovo, or entities and persons that neither claim nor aspire to be states. Here the ICJ and the Seabed Disputes Chamber have been flexible. In the *Kosovo* case, for example, perhaps faced with the choice between admitting the participation of Kosovo, upon the request of the latter, or declining to hear the case because it could not comply with the principle *audi alteram partem*, the ICJ adopted a pragmatic approach and admitted Kosovo's participation (albeit under the description "the authors of the unilateral declaration of independence" of Kosovo).

The advisory procedure may indeed be more open to non-governmental organizations. The seriousness with which certain environmental organizations took part in the case before the Seabed Disputes Chamber in the *Responsibilities and Obligations* case was impressive.

Turning finally to the reception of the opinion by the requesting organ, the picture that emerges is mixed. Where the request itself has been controversial, not unnaturally the reception has been either noncommittal or itself controversial. The reception will usually demonstrate how useful or not the request actually was. A famous case where it seems to have had no effect whatsoever was *Conditions for Admission*.[54]

In conclusion, one might be forgiven for a certain degree of scepticism about the utility or the appropriateness of the advisory opinion procedure. But, to repeat the point, one cannot generalize. There are undoubtedly cases where the advisory opinions play a useful role, and not only as a safety valve. The procedure may be particularly useful in resolving disputes involving international organizations and other non-State actors, including individuals, to which–absent an amendment to the Statute–the Court could not otherwise contribute.

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[53] Another issue that may need to be addressed in particular cases is whether or not to admit ad hoc judges. This could have arisen in the *Wall* (note 3) and the *Kosovo* (note 2) cases, but there was no request for an ad hoc judge in either case.

[54] *Admission of a State to the United Nations (Article 4 of the Charter)*, ICJ Reports 1948, 57.

Seeking an advisory opinion is no light matter. It is not, simply, a request for legal advice, such as may be made to an in-house or external legal adviser.[55] The request sets in motion a judicial process, with normally one or two rounds of written pleadings and one round of oral pleadings by a range of states and organizations. And above all the outcome is an opinion which, while certainly not in itself binding (though it may become so by agreement), carries great authority.

Given its authors (judges) and the procedure (judicial), an advisory opinion is likely to carry more weight than any ordinary legal advice, however eminent the authors may be. As *Thirlway* put it succinctly, an advisory opinion is a "judicial opinion".[56] The UN Secretary-General has recently summarized the position as follows:

> "Advisory proceedings carry great weight and moral authority, often serving as an instrument of preventive diplomacy and contributing to the clarification of the state of international law".[57]

[55] This notwithstanding the original intent, at least as recalled by H. Thirlway: "Hudson has shown that while certain municipal courts possessed advisory jurisdiction, this was not the inspiration for Art. 14 Covenant of the League of Nations which was derived more from the concept of the PCIJ's secondary role as legal adviser to the League of Nations", H. Thirlway (note 6), para. 5.

[56] Id., para. 1.

[57] Strengthening and coordinating United Nations rule of law activities: Report of the Secretary-General (A/65/318), para. 25.