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THE INTERNATIONAL COURT OF JUSTICE'S ADVISORY JURISDICTION, DISPUTE SETTLEMENT AND STATE CONSENT: AN HISTORICAL PERSPECTIVE

Abstract. — *This article analyses the relationship between the International Court of Justice's advisory jurisdiction, dispute settlement and the consent principle in an historical perspective. After considering the circumstances which led to the introduction of advisory opinions in the Covenant of the League of Nations, it examines their practical use in inter-State disputes during the League of Nations and United Nations periods. For each of them, it investigates the nature and function of advisory jurisdiction and its relationship with other means of dispute settlement, notably contentious jurisdiction. Building on this analysis, it addresses the impact of the lack of the parties' consent on the exercise by the Court of its advisory jurisdiction.*

1. *Introduction*. — One century after the creation of the Permanent Court of International Justice, the precise limits of the International Court of Justice's advisory jurisdiction in inter-State disputes are still

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debated [1]. The discussions essentially concern the role of the parties' consent in these proceedings. While consent is not a requirement for the Court's advisory competence — which is based on Article 65 of the Statute —, opinions differ as to whether and to what extent the lack of consent can be a "compelling reason" justifying the Court's abstention for considerations of judicial propriety. The sharp discussions on this issue in the proceedings relating to the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* bear witness to this [2].

Several reasons recommend examining this question from an historical angle.

First, the Court's advisory jurisdiction was more frequently resorted to in the Permanent Court of International Justice's relatively short period of activity than in the whole 70 years of work — so far — of the International Court of Justice [3]. And in most cases, the opinions requested to the Permanent Court concerned the settlement of inter-State disputes [4].

Secondly, although the legal framework has remained substantially unchanged in the transition from the Permanent Court to the International Court of Justice, there remain many uncertainties as to the

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[1] On this issue, in general, see Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-4: Questions of Jurisdiction, Competence and Procedure*, *British Year Book of Int. Law*, 1958, p. 142 f.; Greig, *The Advisory Jurisdiction of the International Court and the Settlement of Disputes between States*, *Int. and Comparative Law Quarterly*, 1966, p. 325 ff.; Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice*, Leiden, 1971, p. 89 ff.; Pratap, *The Advisory Jurisdiction of the International Court*, Oxford, 1972, p. 154 ff.; Pomerance, *The Advisory Function of the International Court in the League and U.N. Eras*, Baltimore, 1973, p. 286 ff.; Luzzatto, *La competenza consultiva della Corte internazionale di giustizia nella soluzione delle controversie internazionali*, *Comunicazioni e studi*, vol. XIV, 1975, p. 493 ff.; Benvenuti, *L'accertamento del diritto mediante i pareri consultivi della Corte internazionale di giustizia*, Milano, 1985, p. 200; Dominicé, *Request of Advisory Opinions in Contentious Cases?*, in *International Law, the International Court of Justice and Nuclear Weapons* (Boisson de Chazournes and Sands eds.), Cambridge, 1998, p. 91 ff.; Aljaghoub, *The Absence of State Consent to Advisory Opinions in the International Court of Justice: Judicial and Political Restraints*, *Arab Law Quarterly*, 2010, p. 191 ff.; Frowein, Oellers-Frahm, *Article 65*, in *The Statute of the International Court of Justice. A Commentary*[2] (Zimmermann *et al.* eds.), Oxford, 2012, p. 1605 ff. at p. 1618 f.; D'Argent, *Article 65*, in *The Statute of the International Court of Justice. A Commentary*[3] (Zimmermann *et al.* eds.), Oxford, 2019, p. 1784 ff. at p. 1798 f.; Kolb, *The International Court of Justice*, Oxford/Portland, 2013, p. 1069 ff.

[2] See *infra*, para. 7.

[3] In its 20 years of activity, the Permanent Court of International Justice received the same number of requests for opinions (twenty-seven) as the International Court of Justice so far.

[4] See *infra*, para. 4.

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meaning of the precedents relating to the former's period of activity, and their continuing validity in the present system. The debate on the interpretation of the Permanent Court's decision in *Eastern Carelia* is emblematic in this respect. Several authors and Court's judges considered this decision as an expression of the principle that, also in advisory proceedings, the Court could not exercise its jurisdiction when the request concerns a dispute and the consent of the parties is lacking. Yet, if such interpretation is accepted, the precedent of *Eastern Carelia* seems contradicted by case law of the International Court of Justice. Indeed, since its advisory opinion in *Interpretation of Peace Treaties* [5] and up to its recent opinion in the *Chagos* case, the Court has always exercised its advisory jurisdiction even in the absence of the parties' consent.

Thirdly, understanding the relevance of States' consent in advisory proceedings requires identifying the nature and function of the Court's advisory jurisdiction and its relationship with other means of dispute settlement, notably contentious jurisdiction. As will be seen, such nature and function changed radically in the transition from the League's to the United Nations' system, thus impacting on the role of the consent principle in advisory jurisdiction.

The present contribution follows this approach and analyses the relationship between the Court's advisory jurisdiction, dispute settlement and the consent principle in an historical perspective. The first part (paragraphs 2-4) examines the League period, the second part (paragraphs 5-7) the United Nations period.

2. *Dispute settlement and the origins of the Permanent Court's advisory jurisdiction*. — The settlement of international disputes formed a key objective of the League of Nations. The primary responsibility for this function was placed upon the League's political organs, the Council and Assembly, through the procedures set by Articles 12 to 15 of the Covenant. However, the drafters of the Covenant deemed that also the future Permanent Court of International Justice should contribute to the achievement of this purpose.

During the *travaux préparatoires* for the Covenant, it was proposed to endow the Court, along with a contentious function (whereby States could submit their disputes to the Court through the traditional arbitral

[5] See *infra*, para. 5.

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pattern), also with the function of providing a judicial determination for those disputes which, though being referred to the League's political bodies, had significant legal aspects. In this case, the dispute would be referred to the Court not by States parties, but by the political bodies themselves.

The most significant document in this respect is a draft submitted by the British representative, Lord Cecil, and United States President Wilson, on 18 March 1919, whose Article 14 read as follows: "The executive Council shall formulate plans for the establishment of a Permanent Court of International Justice and this court shall, when established, be competent *to hear and determine* any matter which the parties recognise as suitable for submission to it for arbitration under the foregoing Article, and *also any issue referred to it by the Executive Council or Body of Delegates*" [6].

By its wording, this proposal did not refer to advisory opinions, and the respective forms and effects of the Court's pronouncements in the exercise of the two above-mentioned functions were not yet clearly distinguished.

Owing to the opposition encountered by this proposal, the final version of Article 14 specified that, when the Court would be seized by the League's bodies — as opposed to being seized the State parties to the dispute — the Court's pronouncement should take the form of an advisory opinion [7]: "The Council shall formulate and submit to the

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[6] Miller, *The Drafting of the Covenant*, vol. II, New York/London, 1928, p. 580 ff. (Doc. No. 24); emphasis added. An earlier draft approved by the drafting commission and submitted to the plenary session of the Peace Conference on 14 February 1919 did not contemplate the possibility for the League's political bodies to refer disputes to the Court. Article 12 of this draft only provided that "[t]he Executive Council will formulate plans for the establishment of a Permanent Court of International Justice, and this Court will be competent to hear and determine any matter *which the parties recognise as suitable for submission to it for arbitration* under the foregoing Article" (*ibid.*, p. 231 ff. (Doc. No. 19); emphasis added). In contrast, such possibility was contemplated in an earlier draft by Lord Cecil dated 20 January 1919, whose Chapter II, Article 7, provided that "[w]here the Conference or the Council finds that the dispute can with advantage be submitted to a court of international law, or that any particular question involved in the dispute can with advantage be referred to a court of international law, it may submit the dispute or the particular question accordingly, and *may formulate the questions for decision*, and may give such directions as to procedure as it may think desirable. In such case, the decision of the Court shall have no force or effect unless it is confirmed by the Report of the Conference or Council" (*ibid.*, vol. I, p. 51; vol. II, p. 106 ff. (Doc. No. 10); emphasis added).

[7] In the proceedings of the Drafting Committee appointed on 26 March 1919, intermediate proposals referred to the Court's "advising upon", as opposed to giving an advisory

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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 on any dispute or question referred to it by the Council or by the Assembly*" [8].

At that time, the pattern of advisory opinions was drawn from the experience of certain common-law jurisdictions, where legislative or governmental bodies could ask supreme courts for advisory opinions on legal questions relevant to their functions. In these systems, however, advisory opinions were not aimed at settling disputes: their function was rather to provide guidance to public bodies on legal issues which they met in the exercise of their tasks [9].

This non-alignment between i) the function of advisory opinions in their original context (within domestic systems) and ii) the task ascribed to them by the Covenant resulted in two opposite characters imprinting this new procedural institution within the Court's system:

a) on the one hand, its introduction aimed at endowing the League's system with a new means of judicial dispute settlement, upon request by the League's political bodies, alternative to, and more flexible than, contentious jurisdiction, but equivalent to the latter in its forms and results (hereinafter, the "self-standing" character);

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opinion: see the Hurst/Miller revision ("and also to advise upon any legal questions referred to it by the Council or by the Body of Delegates") and the later British suggestion ("and also to advise upon any dispute or question referred to it by the Council or by the Assembly"). As noted by Miller (*supra* note 6, vol. I, p. 406), the replacement of these expressions by "advisory opinion" in the final version indicated that the function to be exercised should be a judicial one.

[8] Emphasis added. The Statute of the Permanent Court approved in December 1919 did not contain any provision on advisory jurisdiction. Therefore, Article 14 of the Covenant, which was expressly recalled by Article 1 of the Statute, formed the legal basis for the Permanent Court's advisory competence, see Hudson, *Les avis consultatifs de la Cour permanente de justice internationale*, *Recueil des cours*, vol. 8, 1925, p. 341 ff. at p. 355; Id., *La Cour permanente de justice internationale*, Paris, 1936, p. 450; De Visscher (Ch.), *Les avis consultatifs de la Cour permanente de justice internationale*, *Recueil des cours*, vol. 26, 1929, p. 1 ff. at p. 20. An amendment adopted in 1929 and entered into force on 1st February 1936 introduced a new chapter IV of the Statute devoted to advisory opinions (Articles 65 to 68): see *P.C.I.J.*, *Publications*, Series D, No. 1[4], p. 13 ff. at p. 27 f.; Négulesco, *L'évolution de la procédure des avis consultatifs de la Cour permanente de justice internationale*, *Recueil des cours*, vol. 57, 1936, p. 1 ff. at p. 45 ff. However, unlike the Statute currently in force — where the basis of the Court's advisory competence is set at Article 65 —, these new rules did not include a comparable provision setting the basis of the Court's advisory competence.

[9] See Hudson, *Les avis*, *supra* note 8, p. 382 ff.; De Visscher (Ch.), *supra* note 8, p. 8 ff.

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b) on the other hand, the reference to the procedural instrument of advisory opinions suggested that, in principle, the Court's activity should not have self-standing effects, but rather become part of a unitary decision process within the organization to which the Court belonged (hereinafter, the "organizational" character) [10].

As noted by others, the coexistence of these two opposite features deeply influenced the Court's advisory jurisdiction, both from a theoretical and practical standpoint. Depending on the specific phase of the Court's history, the "self-standing" or "organizational" character prevailed [11].

3. Continued*: the Permanent Court's practice*. — During the period of activity of the Permanent Court, the "self-standing" character predominated. Advisory jurisdiction emerged as an autonomous judicial means of dispute settlement for those disputes which, albeit being submitted to the Council (or other bodies), hinged on a disagreement on important legal aspects that could benefit from an authoritative assessment by the Court.

Although formally distinct from contentious jurisdiction, in practice advisory jurisdiction proved to be equivalent to the former as to its form and results [12].

At the Advisory Committee of Jurists instructed by the Council to draft the statute of the future Court, M. de Lapradelle's final report recognised such equivalence between the Court's two functions, when he noted: "Si les parties ont décidé de saisir le Conseil ou l'Assemblée, elles n'ont pas à s'étonner que la Cour puisse connaître de l'affaire sur renvoi du Conseil ou de l'Assemblée. Cela ne donnera pas à l'avis de la Cour force de chose jugée obligatoire entre les deux parties. Mais la *décision de la Cour n'en aura pas moins la valeur morale qui s'attache à tous ses arrêts* et, si le Conseil ou l'Assemblée se l'approprient, elle aura sur l'opinion publique le même heureux effet. Dès l'instant qu'il s'agit d'un différend actuellement né, la *Cour devra donc statuer de la même manière que s'il s'agissait d'un litige* porté devant elle" [13].

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[10] See Luzzatto, *supra* note 1, p. 484.

[11] See Luzzatto, *ibid.*, p. 485.

[12] See De Visscher (Ch.), *supra* note 8, p. 41; Negulesco, *supra* note 8, p. 64 ff.; Luzzatto, *supra* note 1, p. 485 ff.

[13] Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-verbaux of the proceedings of the Committee (June 16th - July 24th 1920)*, p. 731, available at www.icj-cij.org; emphasis added. Accordingly, Article 36 of the final draft adopted by the

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Practice confirmed this conception of advisory jurisdiction as an autonomous dispute-settlement instrument, as effective as contentious jurisdiction. Out of the twenty-seven advisory opinions delivered by the Permanent Court, seventeen related to existing disputes between States [14]. The subject matter of these opinions included the interpretation of treaties or State's declarations, the alleged breach by a State of certain international obligations, the extent of jurisdiction of a river commission, the nature and extent of the Council's dispute settlement powers, the inclusion of a certain matter in a State's domestic jurisdiction, the determination of a disputed boundary by an international organ.

Although Article 14 of the Covenant entitled both the Council and the Assembly, all the requests were made by the Council. The greater part of the opinions concerned disputes laid before this organ; a smaller part concerned disputes before other international organs whose requests were channelled to the Court by the Council [15]. In some cases, the

Committee provided for a different composition of the bench depending on whether the request for advisory opinion would concern an abstract question or a question "form[ing] the subject matter of an existing dispute" ("une question qui fait l'objet d'un différend actuellement né"). In the former case the opinion should be given by a commission of from three to five members, while in the latter the opinion should be given "under the same conditions as if the case had been actually submitted to it for decision". The League's Assembly then resolved to delete Article 36 (see Moore, *The Question of Advisory Opinions*, Memorandum, 18 February 1922, *P.C.I.J.*, *Publications*, Series D, No. 2, p. 383 ff. at p. 390 ff.; Hammarskjold, *La Cour permanente de justice internationale à la IX^ème session de l'Assemblée de la Société des Nations*, *Revue de droit int. et de législation comparée*, 1928, p. 665 ff. at p. 712 f.

[14] See *C.P.J.I.*, *Publications*, Series B, No. 4 (*Nationality Decrees Issued in Tunis and Morocco*); *ibid*., No. 5 (*Status of Eastern Carelia*); *ibid.*, No. 8 (*Polish-Czechoslovakian Frontier - Question of Jaworzina*); *ibid.*, No. 9 (*Monastery of Saint-Naoum - Serbian-Albanian Frontier*); *ibid.*, No. 10 (*Exchange of Greek and Turkish Populations*); *ibid.*, No. 11 (*Polish Postal Service in Danzig*); *ibid.*, No. 12 (*Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*); *ibid.*, No. 14 (*Jurisdiction of the European Commission of the Danube*); *ibid.*, No. 15 (*Jurisdiction of the Courts of Danzig*); *ibid.*, No. 16 (*Interpretation of the Greco-Turkish Agreement of 1 December 1926 - Final Protocol, Article IV*); *ibid.*, No. 17 (*Greco-Bulgarian "Communities"*); *C.P.J.I.*, *Publications*, Series A/B, No. 40 (*Access to German Minority Schools in Upper Silesia*); *ibid.*, No. 41 (*Customs Regime between Germany and Austria*); *ibid.*, No. 42 (*Railway Traffic between Lithuania and Poland*); *ibid.*, No. 43 (*Access to and Anchorage in the Port of Danzig for Polish War Vessels*); *ibid.*, No. 44 (*Treatment of Polish Nationals in Danzig*); *ibid.*, No. 45 (*Caphandaris-Molloff Agreement of December 9^th 1927*). For this classification, see Goodrich, *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, *American Journal of Int. Law*, 1938, p. 738 ff. at p. 744 f.; Oda, *The International Court of Justice Viewed from the Bench (1976-1993)*, *Recueil des cours*, vol. 244, 1993, p. 9 ff. at p. 90 ff., according to whom the other ten opinions concerned legal issues pertaining to the activities of international organizations and general legal issues.

[15] Advisory opinions Nos. 10 and 16 (Mixed Commission set up under Article 2 of the Convention concerning the exchange of Greece and Turkish populations); No. 14 (Advisory

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initiative to seize the Court was taken by the parties themselves, who asked the Council to submit a request to Court [16].

The procedural organization of advisory proceedings also confirmed the latter's assimilation to the Court's contentious functions [17].

The rules adopted in 1922 [18] provided that: i) advisory opinions should be given after deliberation by the full Court [19]; ii) opinions of dissenting judges might be attached to the opinion of the Court [20]; iii) requests for advisory opinions, once received by the Court, should be transmitted to all the League's Members and to States mentioned in the Annex to the Covenant [21]; iv) advisory opinions would be public [22].

Besides, the Court always allowed States parties to the dispute to take part in the proceedings by submitting memoranda and being heard during public sittings.

With a modification of the Rules of the Court in 1927, Article 31 of the Statute (regulating the composition of the Bench in contentious cases) was declared applicable also to advisory proceedings concerning a dispute pending between two or more States [23].

and technical committee for communications and transit); No. 17 (Greco-Bulgarian Mixed Commission provided for under the Convention of November 27, 1919). See GOODRICH, *supra* note 14, p. 745 f.

[16] Advisory opinions No. 4 (at the Council's meeting Great Britain and France jointly requested the Council to ask the Court for an advisory opinion on the preliminary issue of domestic jurisdiction invoked by France, see *League of Nations Official Journal*, 1922, p. 1206 f.) and No.14 (the parties agreed in writing to request the Council to submit three questions to the Court for advisory opinion, which agreement was then sent to the Council via the League's Secretary General, see *League of Nations Official Journal*, 1927, pp. 151 and 233).

[17] See DE VISSCHER (Ch.), *supra* note 8, p. 52 ff., referring to a "glissement si caractéristique de la fonction consultative vers la fonction contentieuse"; NÉGULESCO, *supra* note 8, p. 16 ff.

[18] Articles 71-74 (*P.C.I.J.*, *Publications*, Series D, No. 1, p. 66 ff.).

[19] See Article 71, paragraph 1. Judge Négulesco's proposal to provide for a smaller composition of the bench in cases concerning abstract questions (as opposed to disputes actually pending between States) was rejected (*P.C.I.J., Publications*, Series D, No. 2, p. 162 f.). As recalled, a similar proposal by the Advisory Committee of Jurists was also rejected by the League's Assembly (*supra* note 13).

[20] Article 71, paragraph 2.

[21] Article 73.

[22] Cf. Article 74. The Court dismissed judge Anzilotti's proposal to enable the Council to ask the Court for secret advice (see *P.C.I.J.*, *Publications*, Series D, No. 2, p. 160).

[23] See Article 71, paragraph 2, of the Rules of Court, as introduced by an amendment of 7 September 1927, upon judge Anzilotti's proposal: "On a question relating to an existing dispute between two or more States or Members of the League of Nations, Article 31 of the Statute shall apply. In case of doubt the Court shall decide" (*P.C.I.J.*, *Publications*, Series E, No. 4, p. 62 ff.). This provision has been maintained, with slight changes, in the subsequent versions of the Rules, up to Article 102, paragraph 3, of the Rules currently in force. Following

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In 1929, Article 68 of the Statute was also amended to the effect that provisions on contentious cases would govern advisory proceedings "to the extent to which it [the Court] recognizes them to be applicable" [24].

In its results, also, the Permanent Court's advisory function demonstrated its equivalence to contentious jurisdiction. Clearly, advisory opinions were (and are) not formally binding on the States parties to the dispute [25]. Yet, since the outset these opinions proved to be as effective as judgments for dispute settlement purpose, irrespective of any further action taken by the Council. As noted by De Visscher, "[i]l n'est pas possible d'isoler l'aspect juridique du différend, sur lequel a porté l'avis de la Cour, de la solution du différend lui-même: c'est l'ensemble du litige qui, par l'effet de la position même de la question, *a reçu son règlement devant la Cour*" [26].

It is telling that advisory opinions proved to be much more effective than other forms of legal advice sought from committees of jurists appointed by the Council from time to time. On many occasions, the Council resolved to request an advisory opinion to the Court after the conclusions of these jurists had failed to be accepted by the State parties to the dispute (or their internal public opinion), however distinguished the jurists consulted [27].

Advisory opinions given by the Court on inter-State disputes were generally accepted by the Council with no discussion [28]. Where further

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the amendment of the rules in 1927, the parties appointed judges *ad hoc* in the following cases (among those cited above, note 14): Nos. 15, 17, 42, 43, 44 and 45.

[24] See *P.C.I.J.*, *Publications*, Series D, No. 1[4], p. 13 ff. This amendment entered into force on 1 February 1936 (*P.C.I.J.*, *Publications*, Series E, No. 12, p. 54 ff.). The same provision is contained in Article 68 of the Statute of the International Court of Justice, which provides that "[i]n the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable" (see Cot, Wittich, *Article 68*, in *The Statute of The Statute of the International Court of Justice. A Commentary*[3], *supra* note 1, p. 1844 ff.).

[25] An aspect notably stressed by Hudson, *La Cour*, *supra* note 8, p. 533 ff.

[26] De Visscher (Ch.), *supra* note 8, p. 37. In general, on this aspect, see Benvenuti, *supra* note 1, p. 285 ff.

[27] See De Visscher (Ch.), *supra* note 8, p. 61. This notably occurred in the proceedings which led to the requests for advisory opinions Nos. 8, 9, 14, 17 and 42 (among those cited above, note 14). See also Advisory Opinion No. 6 (*German Settlers in Poland*), *C.P.J.I.*, *Publications*, Series B, No. 6, which however did not relate to an existing dispute. For further references, see Pomerance, *supra* note 1, p. 58 ff.

[28] See Goodrich, *supra* note 14, p. 747. Such favourable attitude of the Council is also a consequence of the fact that this organ always followed the unanimity rule for resolutions requesting advisory opinions (despite certain proposals to follow the majority rule: see Pomerance, *supra* note 1, p. 213 ff.).

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action was required by the Council, these opinions formed the basis for such action. In cases where the Council acted as intermediary in channelling a request formulated by another international body, the Council took notice of the opinion and instructed the Secretary General to transmit it to the requesting organ [29].

States themselves almost uniformly accepted the solution indicated in the Court's advisory opinions, irrespective of any prior obligation assumed to this effect [30]. In several cases, these opinions formed the basis for a final settlement of the dispute [31].

As noted by Judges Loder, Moore and Anzilotti in a report prepared for the Court in 1927, in support of their proposal to extend the application of Article 31 of the Statute to advisory proceedings, "[i]n reality, where there are in fact contending parties, *the difference between contentious cases and advisory cases is only nominal*. The main difference is in the way in which the case comes before the Court, and even this difference may virtually disappear, as it did in the Tunisian case. So *the view that advisory opinions are not binding is more theoretical than real*" [32].

The effectiveness of advisory opinions as an alternative instrument for the settlement of international disputes was recognised in a resolution of the Institut de droit international of 1937. It states that "la procédure consultative, facilitant le règlement judiciaire des conflits internationaux

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[29] For further details, see Hudson, *La Cour*, *supra* note 8, p. 535 ff.; Goodrich, *supra* note 14, p. 747 ff.; Pomerance, *supra* note 1, p. 331 ff.

[30] Only in two cases the States parties accepted in advance to consider the Court's opinion as binding: No. 4 (*Nationality Decrees Issued in Tunis and Morocco*) and 8 (*Jaworzina*), *supra* note 14. In the former case, France and Great Britain jointly requested the Council to ask an advisory opinion to the Court on the preliminary issue of domestic jurisdiction raised by France. They also agreed that, "if the opinion of the Court upon the above question is that it is not solely a matter of domestic jurisdiction, the whole dispute will be referred to arbitration or to judicial settlement under conditions to be agreed between the Governments" (*League of Nations Official Journal*, 1922, p. 1206 f.). In the latter case, Poland and Czechoslovakia, in agreeing to the Council rapporteur's proposal to address a request for advisory opinion to the Court, took the position that, should the matter be submitted to the Court, "everyone would accept its decisions" and "the solution reached would undoubtedly be recognised by all as valid and final" (*League of Nations Official Journal*, 1923, p. 1316 f.).

[31] See Goodrich, *supra* note 14, p. 448 ff.

[32] *P.C.I.J.*, *Publications*, Series E, No. 4, p. 76; emphasis added. In the same vein, De Visscher (Ch.), *supra* note 8, p. 36: "Quand la Cour, par voie d'avis, a statué soit sur l'ensemble du différend, soit sur le point essentiel du différend, *l'avis rendu a, ici, exceptionnellement mais forcément, l'autorité de la chose jugée*, en ce sens qu'il rend légalement certaine l'existence ou la non existence du rapport juridique qui fait l'objet de la contestation"; emphasis added.

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là où l'arbitrage obligatoire fait défaut, rend les plus grands services à la solution pacifique des différends" [33].

4. *The issue of consent in the Permanent Court's case law:* Eastern Carelia *and* Treaty of Lausanne. — One might expect that resort to advisory — as an alternative to contentious — jurisdiction for dispute settlement could make the parties' consent a requirement also for advisory proceedings, as provided for contentious cases by Article 36 of the Statute. However, as will be seen, no such conclusion can be drawn from the practice and case law relating to the Permanent Court's period of activity.

In most cases this problem did not arise, since the interested States consented to the submission of their dispute to the Court's advisory jurisdiction [34]. The parties' consent was sometimes expressed in a prior agreement directly between the parties themselves [35] or in a declaration by their representatives at the Council's meeting [36].

In the other cases, the parties' consent might have been inferred from the lack of any recorded objection to the resolution in the minutes of the meeting [37]. In one case, one of the States voted against the

[33] See Institut de droit international, Session de Luxembourg, résolution sur *La nature juridique des avis consultatifs de la Cour permanente de Justice internationale, leur valeur et leur portée en droit international*, 3 September 1937, available at www.idi-iil.org. This resolution expressed the wish that, "dans les cas où les Puissances ne jugeront pas possible de soumettre leurs conflits au règlement judiciaire par la procédure contentieuse, elles en saisissent le Conseil, en lui demandant d'obtenir de la Cour un avis consultatif sur un ou plusieurs points litigieux".

[34] According to the prevailing interpretation of the Covenant, the vote of the States parties to the dispute should not be considered in applying the unanimity rule (see De Visscher (Ch.), *supra* note 8, p. 48 f.). Nevertheless, in some cases the objection by one of the parties to the dispute resulted in the withdrawal of the proposed resolution for political considerations (see Pomerance, *supra* note 1, p. 173 ff.).

[35] See Advisory opinions No. 4 (*Nationality decrees in Tunisia and Morocco*) and 14 (*Jurisdiction of the European Commisison of the Danube*), *supra* note 14.

[36] See *League of Nations Official Journal*, 1924, p. 1006 ff. as concerns advisory opinions No. 8 (*Jaworzina*), *supra* note 30, and 9 (*Monastery of St. Naoum*), *supra* note 14.

[37] In *Danzig Postal Service*, the representative of Poland expressed some reservations to the proposal to refer the dispute to the Court: he maintained that "the Senate of the Free City could appeal to the Council of the League but not to the Permanent Court of International Justice". The President, however, replied and said that it was not an appeal by Poland or Danzig to the Permanent Court of International Justice but a point of great difficulty on which the Council desired to have the advice of the Court". After reporting this discussion, the minutes only mention that "The Council adopted the resolution" (*League of Nations Official Journal*, 1925, p. 472). Both parties took part in the Court proceedings by filing a memorandum and a reply.

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Council's resolution requesting the advisory opinion but took part in the proceedings before the Court with no further objection [38].

In two cases the Court faced a situation in which one of the parties to the dispute did not consent to its advisory jurisdiction: *Status of Eastern Carelia* [39] and *Article 3, paragraph 2 of Treaty of Lausanne* [40]. The Court declined to give its opinion in the former, but accepted in the latter.

The precise identification of the reasons behind these two decisions, and their precedential value for the issue of consent, has given rise to much debate.

Eastern Carelia concerned a dispute between Finland and Russia, at that time not a member of the League of Nations. Finland alleged that Russia had breached its obligations regarding the autonomy of Eastern Carelia under a treaty of peace done at Dorpat on 14 October 1920 and an annexed declaration made by the Russian delegation. On 13 January 1922, Finland laid the dispute before the Council, which adopted a resolution the day after stating its willingness "to consider the question with a view to arriving at a satisfactory conclusion if the two parties concerned agree". However, on two occasions the Russian Government rejected the Council's intervention, stating that it considered the question of the status of Eastern Carelia as a domestic issue. Nevertheless, on 20 April 1923, upon solicitation by Finland, the Council resolved to submit the following request to the Court: "Do Articles 10 and 12 of the Treaty of Peace between Finland and Russia, signed at Dorpat on October 14th, 1920, and the annexed Declaration of the Russian Delegation regarding the autonomy of Eastern Carelia, constitute engagements of an international character which place Russia under an obligation to Finland as to the carrying out of the provisions contained therein?" [41].

[38] See Advisory opinion No. 7 (*Acquisition of Polish Nationality*). This case concerned the interpretation of Article 4 of a treaty of 28 June 1919 on minorities between the Principal Allied and Associated Powers and Poland. Poland objected to the request and abstained from voting as it considered that the Council should first hear other States that had concluded similar treaties with the Principal Allied and Associated Powers (*League of Nations Official Journal*, 1923, p. 934 f.). Properly speaking, this case did not concern an actual dispute between two States, because Germany (whose nationals were concerned by the question) was not a party to the minority treaty in question and no State, member of the Council, appeared as a party to an actual dispute with Poland over the interpretation of the treaty, see Goodrich, *supra* note 14, p. 745.

[39] *P.C.I.J.*, *Publications*, Series B, No. 5, p. 7 ff.

[40] *P.C.I.J.*, *Publications*, Series B, No. 12, p. 6 ff.

[41] *League of Nations Official Journal*, 1923, p. 577 f.

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On 23 July 1923, the Court issued a decision in which it declined to deliver the requested opinion.

This decision has been interpreted by some as establishing a principle according to which, when a request for advisory opinion concerns an inter-State dispute, the consent of the States concerned forms a condition for the advisory competence of the Court, as in contentious cases [42]. This interpretation is based on the following passage of the *Eastern Carelia* Opinion: "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" [43].

However, according to a different and more convincing interpretation of the decision, the Court's refusal to deliver an opinion derived from the fact that Russia was not a member of the League of Nations and had not agreed to submitting its dispute with Finland to the means of peaceful settlement contemplated by the Covenant. This rationale was expressed in the following passage from the *Eastern Carelia* Opinion, which *precedes* the one quoted above: "As concerns States not members of the League, the situation is quite different; they are not bound by the Covenant. The submission, therefore, of a dispute between them and a Member of the League for solution according to the methods provided for in the Covenant, could take place only by virtue of their consent. Such consent, however, has never been given by Russia. On the contrary, Russia has, on several occasions, clearly *declared that it accepts no intervention by the League of Nations in the dispute with Finland*. The refusals which Russia had already opposed to the steps suggested by the Council have been renewed upon the receipt by it of the notification of

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[42] See Négulesco, *supra* note 8, p. 61; Oda, *supra* note 14, p. 92. See also the individual and dissenting opinions of judges Azevedo, Winiarski, Zoričić and Krylov appended to the advisory opinion of 30 March 1950 in the case concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, *I.C.J. Reports*, 1950, pp. 79 ff., 89 ff., 98 ff. and 105 ff.

[43] *P.C.I.J.*, *Publications*, Series B, No. 5, p. 28 f.; emphasis added.

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the request for an advisory opinion. *The Court therefore finds it impossible to give its opinion on a dispute of this kind*" [44].

It is reasonable to assume that, according to the Court, the lack of Russia's consent to the intervention of the League in its dispute with Finland resulted in the Council's lack of competence to request the Court's advisory opinion. The absence of jurisdiction of the Court derived from the lack of powers of the Council to request the advisory opinion, and not from the application of the consent requirement to advisory jurisdiction [45], an issue which the Court considered unnecessary to deal with: "There has been some discussion as to whether questions for an advisory opinion, if they relate to matters which form the subject of a pending dispute between nations, should be put to the Court without the consent of the parties. *It is unnecessary in the present case to deal with this topic*" [46].

In light of this case-specific rationale, it is submitted that the Court's decision in *Eastern Carelia* does not qualify as a precedent with respect to other situations in which the competence of the requesting organ is not at issue.

This interpretation of *Eastern Carelia* is also supported by the subsequent negotiations for the accession of the United States to the Protocol of Signature to the Statute of the Court. On 27 January 1926, the United States Senate consented to the United States' accession to the Protocol, subject to five reservations. The fifth reservation aimed at ensuring that the Court would not "entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest" [47]. In addressing this reservation, the Conference of the Signatories noted that, "[a]s regards disputes to which the United States is a Party, it seems sufficient to refer to the jurisprudence of the

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[44] *Ibid.*, p. 27 f.; emphasis added. It is only after having reached this conclusion that the Court mentioned "other cogent reasons which render it very inexpedient that the Court should attempt to deal with the present question". These "other reasons" included the first passage quoted above, where the Court noted that the question put to it "concerns directly the main point of the controversy between Finland and Russia".

[45] See Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale*, Paris, 1967, p. 79; Keith, *supra* note 1, 494 ff.; Luzzatto, *ibid.*, p. 486 f. See also advisory opinion of 21 June 1971 on *Namibia*, *I.C.J. Reports*, 1971, 23, para. 31; advisory opinion of 16 October 1975 on *Western Sahara*, *I.C.J. Reports*, 1975, p. 23 f., para. 30.

[46] *P.C.I.J.*, *Publications*, Series B, No. 5, p. 27; emphasis added.

[47] *Second Annual Report of the Permanent Court of International Justice*, *P.C.I.J*, *Publications*, Series E, No. 2, p. 85.

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Court, which has already had occasion to pronounce upon the matter of disputes between a Member of the League of Nations *and a State not belonging to the League*. This jurisprudence, as formulated in Advisory Opinion No. 5 (*Eastern Carelia*), given on July 23rd, 1923, seems to meet the desire of the United States" [48]. This reply reveals that the Conference understood *Eastern Carelia* as focusing on the Council's incompetence to deal with a dispute involving a third State without the latter's consent, rather than on application of the consent principle to advisory jurisdiction.

The second opinion to be examined is *Article 3, paragraph 2, of the Treaty of Lausanne*. This case concerned a dispute between the United Kingdom and Turkey (also not a member of the League of Nations) on the determination of the boundary between the latter and Iraq, at that time under British mandate. Article 3, paragraph 2, of the Treaty of Lausanne provided that "[t]he frontier between Turkey and Iraq shall be laid down in friendly arrangement to be concluded between Turkey and Great Britain within nine months" and, "[i]n the event of no agreement being reached between the two Governments within the time mentioned, *the dispute shall be referred to the Council of the League of Nations*" [49].

On 6 August 1924, following failure of the negotiations with Turkey, the British Government referred the dispute to the Council. Although Turkey agreed to the involvement of the Council and took part in proceedings before the latter, the parties had different views as to the role of the Council pursuant to Article 3, paragraph 2: while the British Government considered that the Council should act as an "arbitrator, whose ultimate award must be accepted in advance by both Parties", Turkey maintained that the only possible procedure was to reach a solution with the consent of the parties "through the good offices of the Council".

On 19 September 1925, to dispel these uncertainties, the Council resolved to request the Court an advisory opinion on the following questions: "1) What is the character of the decision to be taken by the Council in virtue of Article 3, paragraph 2, of the Treaty of Lausanne – is it an arbitral award, a recommendation or a simple mediation? 2) Must

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[48] Final Act of the Conference of the Signatories, 23 September 1926, *P.C.I.J*, *Publications*, Series E, No. 3, p. 94; emphasis added.

[49] *P.C.I.J.*, *Publications*, Series B, No. 12, p. 19; emphasis added. This Treaty was signed by the United Kingdom and Turkey on 24 July 1923.

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the decision be unanimous or may it be taken by a majority? May the representatives of the interested Parties take part in the vote?".

In a telegram in reply to an invitation by the Court to Great Britain and Turkey to supply information on the questions, the Turkish Government declared that it considered the questions put to the Court as being "of a distinctly political character" and, as such, unsuitable of forming the subject matter of legal interpretation. In the same telegram, Turkey stated that it would not be represented in proceedings before the Court.

Turkey, however, accepted to reply to certain questions put to it by the Court, subject to the reservations made in the above-mentioned telegram [50]. The parties provided the Court with the relevant documents relating to the questions.

In its advisory opinion of 21 November 1925 [51], the Court replied to the questions put to it by the Council. It stated that: "1) the 'decision to be taken' by the Council of the League of Nations in virtue of Article 3, paragraph 2, of the Treaty of Lausanne, will be binding on the Parties and will constitute a definitive determination of the frontier between Turkey and Iraq"; and "2) the 'decision to be taken' must be taken by a unanimous vote, the representatives of the Parties taking part in the voting, but their votes not being counted in ascertaining whether there is unanimity".

As in *Eastern Carelia*, in this case one of the parties involved was not a member of the League of Nations and had not expressed its consent to the submission of the case to the Court (although Turkey provided some documents and information to the Court).

The fact that, in *Treaty of Lausanne*, the Court accepted to give its opinion was explained by some in light of the circumstance that, unlike in *Eastern Carelia*, "the questions before the Court referred not to the merits of the affair but to the competence of the Council"[52].

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[50] *Ibid*., p. 8 f.

[51] See *supra*, note 40.

[52] *P.C.I.J., Publications*, Series E, No. 2, p. 164. A similar reading of *Eastern Carelia* may be found in *Interpretation of Peace Treaties*, where the Court noted: "In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the Eastern Carelia case, when that Court declined to give an Opinion because it found that the question put to *it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties*, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties. As has been observed, the present Request for an Opinion is solely concerned with the

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However, this explanation is unconvincing. The actual reason for the different solution reached in *Eastern Carelia* and *Treaty of Lausanne* is the fact that, in the latter, the Council had been properly seized of the matter. Indeed, although Turkey was not a member of the League of Nations, it had expressly agreed to the Council's competence based on Article 3, paragraph 2, of the Treaty of Lausanne. Moreover, as the Court noted in its advisory opinion, the Turkish Government had agreed to the inscription of the question in the agenda of the Council and participated in proceedings before it [53].

Since the Council's competence was established, the fact that Turkey voted against the Council's resolution referring the questions to the Court was irrelevant and, significantly, was not even mentioned in the opinion. In sum, as noted by Keith, "this case and *Eastern Carelia* can be read consistently only on the basis that they turned on the competence of the Council" [54].

The above analysis, it is submitted, confirms the absence in the Permanent Court's case law of any precedent considering the parties' consent as a prerequisite for its advisory jurisdiction. In *Eastern Carelia*, the only case in which it refused to give its opinion, the Court simply did not examine the consequences of Russia's lack of consent to its own competence, having been prevented to do so by a preliminary objection relating to the Council's incompetence to deal with the dispute [55].

5. *Advisory jurisdiction, dispute settlement and the transition from the League's to the United Nations' system:* Peace Treaties. — The possibility to resort to advisory jurisdiction for the settlement of disputes was maintained with the transition to the International Court of Justice in 1945 [56], although Article 65 of the new Statute only mentions, as a possible subject matter of a request for advisory opinion, "any legal

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applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that *it in no way touches the merits of those disputes*" (*I.C.J. Reports*, 1950, p. 72 (citations omitted, emphasis added)).

[53] *P.C.I.J., Publications*, Series B, No. 12, p. 15 f.

[54] Keith, *supra* note 1, p. 101.

[55] As noted above, the Council's incompetence to deal with the dispute derived from the fact that Russia, which was not a member of the League of Nations, had not accepted to submit its dispute with Finland to the means of dispute settlement provided for by the Covenant.

[56] This conclusion is widely accepted (see Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*[5], Leiden, 2016, 294; Kolb, *supra* note 1, p. 1062). For the contrary view, see the dissenting opinion of judge Azevedo appended to the advisory opinion

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question", while leaving out "any dispute" as in Article 14 of the Covenant of the League of Nations. In contrast, the Rules of the Court continue to address situations in which an advisory request concerns an inter-State dispute, which is defined as a "legal question actually pending between two or more States". For these situations, Article 102, paragraph 3, of the Rules still provides for applicability of Article 31 of the Statute [57].

Yet, despite the substantial continuity of their legal framework, the role of advisory opinions changed radically with the transition to the United Nations system. The function which they fulfilled during the period of activity of the Permanent Court — i.e. a self-standing judicial means of dispute-settlement, substantially equivalent to contentious jurisdiction — vanished. It was replaced by the "organisational" function of advisory opinions, namely advising the requesting organ on issues which the latter faced in discharging its duties [58].

The distinction between advisory and contentious jurisdiction, which practice in the League period had blunted despite the lack of formal binding effects of advisory opinions, sharpened in the United Nations period [59]. In fact, out of the twenty-seven requests made to the International Court of Justice, only a few cases concerned the settlement of inter-State disputes [60].

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of 30 March 1950 concerning the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, *I.C.J. Reports*, 1950, p. 86 ss.

[57] See *supra*, note 23.

[58] This change is partly due to the fact that, unlike the Permanent Court, the International Court of Justice is the principal judicial organ of the United Nations (see Kolb, *supra* note 1, p. 1030).

[59] Luzzatto, *supra* note 1, p. 490.

[60] See Oda, *supra* note 14, p. 96 ff., mentioning *Peace Treaties* and *Western Sahara* in this category, the latter being the only case in which the International Court of Justice authorised one of the States involved, Morocco, to appoint a judge *ad hoc*. This author identifies the following other categories of questions forming the subject matter of requests of advisory opinions during the International Court of Justice's period of activity: procedural matters of international organizations and legal questions arising within the latter's scope of the activities; consultation of general legal questions; review of judgments of administrative tribunals; legal issues between States and international organizations. For the sake of completeness, it should be recalled that advisory jurisdiction has sometimes been resorted to in the context of disputes between States and international organizations, based on certain treaty provisions providing for the parties' obligation to consider the Court's advisory opinion as a binding determination of the dispute, see Bacot, *Réflexions sur les clauses qui rendent obligatoires les avis consultatifs de la CPJI et de la CIJ*, *Revue générale de droit int. public*, 1980, p. 1027 ff.; Ago, *I pareri consultivi "vincolanti" della Corte internazionale di giustizia. Problemi di ieri e di oggi*, *Rivista*, 1991, p. 5 ff.; Id., *"Binding" Advisory Opinions of the International Court of Justice*, *American*

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States' attitude towards advisory jurisdiction also changed deeply. Within political organs (especially the United Nations General Assembly), the replacement of the unanimity by the majority rule resulted in the adoption of requests for advisory opinions with the opposition of a significant number of States, a situation which never occurred at the time of the League [61].

Moreover, while the League Council's requests of advisory opinions were generally adopted with the consent of the States parties to the dispute, United Nations' requests almost always faced the opposition of one of the States involved. This situation resulted in many procedural objections to advisory jurisdiction being raised not only before the political body requesting the opinion, but also before the Court itself.

The lack of unanimity of its members has affected the reception of opinions by the requesting organs. While in the League period the Council generally took notice and implemented advisory opinions with no further debate, in the United Nations the opinions' very acceptance and implementation has frequently arisen heated discussions [62].

This new conception was reflected in the Court's perception of its advisory jurisdiction. A remarkable illustration of such shift in trend is offered by the opinion of 30 March 1950 on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* [63], one of the first advisory opinions of the current Court, and one of the rare ones relating to inter-State disputes.

In this case, the questions put by the General Assembly concerned the interpretation of peace treaties entered into by Bulgaria, Hungary and Romania with the allied powers with respect to certain procedural obligations concerning the settlement of disputes. These three States objected to the Court's competence. They argued that, in the absence of their agreement, the Court could not answer the questions without violating the principle of consent to adjudication.

Journal of Int. Law, 1991, p. 439 ff.; Brower, Bekker, *Understanding "Binding" Advisory Opinions of the International Court of Justice*, in *Liber Amicorum Judge Shigeru Oda* (Ando, McWhinney and Wolfrum eds.), The Hague, 2002, p. 351 f. This procedure was resorted to only in one case: *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, *I.C.J. Reports*, 1999, p. 62 ff.

[61] See Shaw, *supra* note 56, p. 292 f.

[62] See Pomerance, *supra* note 1, p. 341 ff. at 355; Puente Egidio, *Consideraciones sobre la naturaleza y efectos de las opiniones consultivas*, *Zeitschrift für ausländisches öffentliches Recht und Volkerrecht*, 1971, p. 730 ff. at. p. 788 ff.

[63] *I.C.J. Reports*, 1950, p. 65 ff.

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As *Eastern Carelia*, also this case raised the issue of the impact on the Court's advisory competence of the lack of consent of one of the parties to a dispute, an issue which the Permanent Court did not analyse for the reasons set out above. In *Peace Treaties*, the Court dismissed the objections to its competence.

The reasons for their dismissal are emblematic of the new approach: "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The *Court's reply is only of an advisory character: as such, it has no binding force*" [64].

Such emphasis on the lack of binding force of advisory opinions — a feature which already existed in the League period, but which practice had in reality attenuated, as noted — is a first element showing that the Court did no longer consider advisory opinions as a means of dispute settlement substantially equivalent to contentious jurisdiction [65].

A second element is offered by the next passage of the Court's reasoning: "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 consider 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" [66].

This passage reveals that the Court no longer perceived its advisory jurisdiction as a self-standing means of dispute settlement, but rather as a judicial advice delivered to the requesting organ, which needed it for the fulfilment of its duties.

A confirmation of this change in the Court's perception of the role of its advisory jurisdiction can be found, by contrast, in the dissenting opinions by judges Azevedo, Winiarski and Zoričič appended to the Court's opinion. In support of their contention that the Court should have refused to exercise its jurisdiction in the absence of the parties'

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[64] *Ibid.*, p. 71; emphasis added.

[65] See Gross, *The International Court of Justice and the United Nations*, *Recueil des cours*, vol. 120, 1967, p. 313 ff. at p. 416; Luzzatto, *supra* note 1, p. 492.

[66] *I.C.J. Reports*, 1950, p. 71; emphasis added.

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consent, these judges emphasised that advisory opinions, though not formally binding, would nevertheless result in the settlement of the dispute [67]. Their point of view reflected the "self-standing" perception of advisory jurisdiction at the time of the Permanent Court, but this perception was not any longer the one of the International Court of Justice. As noted by Gross, in *Peace Treaties* "[t]he Court wrote a prologue for the future, the minority wrote an epilogue for the past" [68].

6. *The issue of consent in the subsequent case law:* Namibia*,* Western Sahara *and* Wall. — The new conception of advisory jurisdiction in the United Nations system deeply influenced its relationship with the consent principle.

In *Peace Treaties*, as recalled, the Court clarified that the absence of the States parties' consent did not deprive it of its advisory competence. Indeed, unlike in contentious jurisdiction, such competence is grounded on Article 65 of the Statute and not on the parties' consent.

However, the Court pointed out that "[t]here are certain limits ... to the Court's duty to reply to a Request for an Opinion. It is not merely an 'organ of the United Nations', it is essentially the 'principal judicial organ' of the Organization (Article 92 of the Charter and Article 1 of the Statute)" [69]. The Court then noted that, considering the permissive wording of Article 65, the latter "gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request" [70]. In the case before it, however, it considered that there were no reasons to justify its abstaining.

Since then, the relationship between advisory jurisdiction and the consent principle has been addressed in the perspective of the Court's discretional power to abstain from delivering and opinion based on

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[67] Azevedo: "L'avis de la Cour aura donc une *exécution sui generis*" (*ibid.*, p. 87); Zoričič: "Dans la vie réelle, toutefois, les choses se présentent sous un aspect bien différent, de sorte que l'on peut dire qu'en pratique un avis consultatif de la Cour, concernant un litige entre États, n'est autre chose qu'un *jugement non exécutoire*" (*ibid.*, p. 101); Winiarski: "les États intéressés voient leurs droits, leurs intérêts politiques et quelquefois leur position morale affectés par un avis de la Cour, *leurs différends en fait tranchés* par la réponse donnée à une question qui s'y rapporte et qui peut constituer une 'question-clef' du différend" (*ibid.*, p. 92); emphasis added.

[68] Gross, *supra* note 65, p. 416.

[69] *I.C.J. Reports*, 1950, p. 71.

[70] *I.C.J. Reports*, 1950, p. 71 f.

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considerations of *judicial propriety*, to protect its integrity as a court of justice [71].

In its advisory opinion of 21 June 1971 on *Namibia*, the Court dismissed South Africa's objection to the exercise of its advisory jurisdiction [72]. It noted that the Security Council's request did not relate to "a legal dispute actually pending between two or more States". Indeed, the purpose of the request was not "to obtain the assistance of the Court in the exercise of the Security Council's functions relating to the pacific settlement of a dispute pending before it between two or more States". The request had been "put forward by a United Nations organ with reference to its own decisions and it [sought] legal advice from the Court on the consequences and implications of these decisions" [73].

In its advisory opinion of 16 October 1975 on *Western Sahara*, the Court dismissed a similar objection by Spain, which was also based on the alleged breach of the principle of consent to adjudication [74]. The Court clarified that, among the "compelling reasons" for declining to answer a request for advisory opinion, there was the case in which "the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character". This could occur when "to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent" [75]. However, the Court found that the situation existing in *Western Sahara* was not of such a character.

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[71] According to some authors, the Court's power to decline to give an opinion is not discretionary, but rests on considerations of admissibility (Abi-Saab, *supra* note 45, p. 152 f.; Id., *On Discretion. Reflections on the Nature of the Consultative Function of the International Court of Justice*, in *International Organizations and International Dispute Settlement: Terms and Prospects* (Boisson de Chazournes, Romano and Mackenzie eds.), Ardsley (N.Y.), 2002, p. 37 ff. at p. 41 ff.; Kolb, *supra* note 1, p. 1091 ff.).

[72] *I.C.J. Reports*, 1971, p. 16 ff. In these proceedings, the Security Council requested the Court to determine "the legal consequences for States of the continued presence of South Africa in Narnibia, notwithstanding Security Council resolution 276 (1970)". South Africa invoked *Eastern Carelia* and argued that the Court should not rule upon this question because the latter was "directly related to the main point of a dispute actually pending between two States".

[73] *Ibid.*, p. 24, para. 32. Moreover, the Court noted that, unlike in *Eastern Carelia*, South Africa was a member of the United Nations and had participated in the proceedings.

[74] *I.C.J. Reports*, 1975, p. 12 ff. In these proceedings, the General Assembly asked the Court whether Western Sahara at the time of colonization by Spain was a territory belonging to no one (*terra nullius*) and, in the negative, what were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity.

[75] *Ibid.*, p. 25, para. 33.

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Indeed, "[t]here is in this case a legal controversy, but one which arose *during the proceedings of the General Assembly and in relation to matters with which it was dealing*. It did not arise independently in bilateral relations" [76].

The Court confirmed this approach in its advisory opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [77]. In this case, it clarified that a request for advisory opinion does not raise any issue of judicial propriety when it concerns "a question which is of particularly acute concern to the United Nations, and one which is located in *a much broader frame of reference than a bilateral dispute*" [78].

7. *Continued:* Chagos. — More recently, the Court addressed the impact of the parties' lack of consent on its advisory jurisdiction in its opinion of 25 February 2019 on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* [79]. The General

[76] *Ibid.*, p. 25, para. 33; emphasis added. In *Western Sahara*, though, the Court authorised one of the States involved, Morocco, to appoint a judge of its nationality.

[77] *I.C.J. Reports*, 2004, p. 136 ff. at p. 157 f., para. 47. In this case, Israel and other States argued that the Court should refrain from exercise its advisory jurisdiction because the request concerned a contentious matter between Israel and Palestine, in respect of which Israel had not consented to the exercise of that jurisdiction.

[78] *Ibid.*, p. 159, para. 50; emphasis added.

[79] *I.C.J. Reports*, 2019, p. 95 ff. The request for advisory opinion concerning *Chagos* was made by the General Assembly on 22 June 2017 with resolution 71/292 (UN Doc. A/RES/71/292). This resolution was approved with 94 votes to 15, with 65 abstentions (UN Doc. A/71/PV.88). On the procedural aspects of the *Chagos* advisory proceedings, see Yee, *Notes on the International Court of Justice (Part 7) - The Upcoming* Separation of the Chagos Archipelago *Advisory Opinion: Between the Court's Participation in the UN's Work on Decolonization and the Consent Principle in International Dispute Settlement*, *Chinese Journal of Int. Law*, 2017, p. 623 ff.; Burri, *Two Points for the International Court of Justice in Chagos: Take the Case, All of It - It Is a Human Rights Case*, *Questions of Int. Law, Zoom-out*, 2018, p. 93 ff.; Wagner, *The Chagos Request and the Role of the Consent Principle in the ICJ's Advisory Jurisdiction, or: What to Do When Opportunity Knocks*, *ibid.*, p. 177 ff.; Crespi Reghizzi, *La juridiction consultative à l'épreuve du principe consensuel: l'affaire des* Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965, *ibid.*, p. 15 ff.; Id., *Giurisdizione consultiva e principio consensuale: il parere della Corte internazionale di giustizia sulle* Isole Chagos, *Rivista*, 2019, p. 807 ff.; Id., *The* Chagos *Advisory Opinion and the Principle of Consent to Adjudication*, in *The International Court of Justice and Decolonisation* (Burri and Trinidad, eds.), Cambridge, 2021 (forthcoming); Puma, *Preliminary Questions in the ICJ Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2019, p. 841 ff.; Iten, *L'avis consultatif de la Cour internationale de Justice du 25 février 2019 sur les* Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965, in *Revue générale de droit int. public*, 2019, p. 391 ff. at p. 396 ff.

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Assembly asked the Court: i) whether the process of decolonization of Mauritius was lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius, having regard to international law, and ii) what where the consequences under international law arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago.

While most participants (including Mauritius) were in favour of the delivery of the advisory opinion, the United Kingdom and other five States maintained that the Court should abstain on grounds of judicial propriety. These States considered that, although literally the request referred to the decolonisation of Mauritius, in substance it aimed at obtaining a Court pronouncement on a longstanding bilateral dispute between Mauritius and the United Kingdom on sovereignty over the Chagos Archipelago. According to these States, such pronouncement was not admissible, given the lack of United Kingdom's consent.

The existence of a dispute between Mauritius and the United Kingdom regarding Mauritius's claims to Chagos had not been contested by any of the participants to the procedure, not even Mauritius [80]. This dispute originated in the claims made by Mauritius since the 1980s and had never ceased to exist. As indicated by the United Kingdom, Mauritius had attempted to submit it under the contentious jurisdiction of the Court [81] and, more recently, with respect to some of its aspects, to the *Chagos Marine Protected Area* arbitration under the UNCLOS [82]. In the advisory proceedings, the constitutive elements of such dispute between Mauritius and the United Kingdom were reflected in their respective conclusions [83].

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[80] See Klein:"Existe-t-il un différend entre Maurice et la puissance administrante? Oui, évidemment; personne ne le nie, je crois, et certainement pas Maurice elle-même" (International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Public Sitting held on 3 September 2018, Doc. CR 2018/20, p. 35, available at https://www.icj.cij.org/en/case/169/oral-proceedings).

[81] See International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written statement of the United Kingdom, 27 February 2018, para. 7.13.d, available at https://www.icj-cij.org/en/case/169/written-proceedings.

[82] Permanent Court of Arbitration, award of 18 March 2015, in the case concerning *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, available at www.pca-cpa.org.

[83] Mauritius sought, in particular, the immediate cessation of the administration of the Chagos Archipelago by the United Kingdom "so that Mauritius is able to exercise sovereignty over the totality of its territory" and the possibility for itself "to implement with immediate

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The Court, however, dismissed these objections and consequently decided to comply with the request for an advisory opinion [84]. It considered that, in the instant case, the requirement of "compelling reasons" for abstention invoked by the States opposing the request was not met.

In support of its decision, the Court recalled the above-mentioned principles set out in the *Western Sahara* and *Wall* cases and noted that "[t]he General Assembly has not sought the Court's opinion to resolve a territorial dispute between two States. Rather, the purpose of the request is for the General Assembly to receive the Court's assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius" [85] and "[t]he issues raised by the request are located in the broader frame of reference of decolonization, including the General Assembly's role therein, from which those issues are inseparable" [86].

This enabled the Court to deny that, in the instant case, issuing the advisory opinion could result in a circumvention of the principle of consent.

Two key elements may be identified in the Court's conclusion: the object and purpose of the advisory opinion in relation with the General Assembly's functions, and the material content and structure of the legal relationships underlying the questions put to the Court.

As to the first element, the General Assembly was not seeking a legal evaluation of a dispute between Mauritius and the United Kingdom, but rather a legal evaluation of a situation [87]: the situation of Mauritius and

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effect a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin" (International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written statement of Mauritius, p. 285, available at https://www.icj-cij.org/en/case/169/written-proceedings). These claims were contested by the United Kingdom. This State admitted its obligation to "cede" the Archipelago to Mauritius, but only "when it is no longer needed for defence purposes". Until that moment, it considered itself entitled to continue the administration of the Archipelago, though admitting its obligation "to recognize Mauritius' interest in the condition in which the Archipelago will be returned". Moreover, the United Kingdom excluded that it was under an international obligation to resettle the Chagos population (International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written statement of the United Kingdom, *cit.*, para. 9.20).

[84] The decision was adopted by majority, against the votes of judges Donoghue and Tomka. Despite his negative vote on discretion, judge Tomka voted in favour of the merits of the advisory opinion.

[85] *I.C.J. Reports*, 2019, p. 117 f., para. 86.

[86] *I.C.J. Reports*, 2019, p. 118, para. 88.

[87] On this distinction, see *Namibia* opinion, *supra* note 73.

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the Chagos Archipelago following the separation of the latter from the former in 1965 and the establishment of the British Indian Overseas Territory. Such legal evaluation was requested by the General Assembly *in the exercise of its functions in matters of decolonization*, a field in which this organ "has a long and consistent record" within the framework of Chapter XI of the United Nations Charter[88].

As to the second element, the request for advisory opinion involved interests and values that were not confined to the legal relationship between Mauritius and the United Kingdom, but were placed "in a much broader frame of reference than a bilateral dispute". Indeed, as remarked in particular by Argentina during the procedure, answering the questions put by the General Assembly required the application of the rules of international law on decolonization, *i.e.* a "corpus composé à la fois de règles, de procédures et d'organes internationaux compétents" developed from Chapter XI of the Charter [89]. The legal relationships created by these rules are not confined to the relationship between the administering power and the former colony, but included a set of rights, *erga omnes* obligations and powers granted to the United Nations organs for the regulation of the decolonization process [90].

The collective structure of these legal relationships, and specifically the *erga omnes* character of the duty to respect the right of self-determination, played a decisive role in the denial that the request for advisory opinion could result in circumventing the consent principle, though this aspect was not addressed in the relevant passage of the advisory opinion [91].

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[88] *I.C.J. Reports*, 2019, p. 118, para. 87. In hindsight, the close relationship between the advisory opinion and the involvement of the General Assembly on Chagos is also confirmed by a resolution of 22 May 2019, by which the General Assembly took note of the opinion of the Court and made certain recommendations regarding the completion of the decolonization process of Mauritius (UN Doc. A/RES/73/295).

[89] See Kohen in International Court of Justice, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Public sitting held on 3 September 2018, doc. CR 2018/22, cit., p. 40.

[90] See Virally, *Droit international et décolonisation devant les Nations Unies*, *Annuaire français de droit int.*, 1963, p. 508 ff.; Calogeropoulos-Stratis, *Le droit des peuples à disposer d'eux-mêmes*, Bruxelles, 1973, p. 105 ff..; Crawford, *The Creation of States in International Law*, Oxford, 1979, p. 356 ff.; Cassese, *Self-Determination of Peoples*, Cambridge, 1995, p. 71 ff.; Kohen, *Possession contestée et souveraineté territoriale*, Paris, 1997, p. 73 ff.

[91] Indeed, the reasoning of the Advisory Opinion considers the *erga omnes* character of the right of self-determination only with respect to the merits of the questions (see *I.C.J. Reports*, 2019, p. 139, para. 180). Such collective structure of the legal relationships involved

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In sum, compared to earlier cases, the request for advisory opinion in *Chagos* showed a particularly close connection with the bilateral dispute between Mauritius and the United Kingdom concerning sovereignty over the Chagos Archipelago. Despite this peculiarity, though, the Court treated this case as one relating to the functions of the United Nations in decolonization matters, and raising issues of concern for the whole international community, and not confined to the bilateral relationship between the two States involved.

It follows that, where a request for advisory opinion concerns an inter-State dispute and lacks the two above-mentioned elements, the absence of consent of a party could still form a "compelling reason" such as to justify the Court's abstention [92].

8. *Concluding remarks*. — This study has analysed the relationship between the Court's advisory jurisdiction, dispute settlement and the consent principle from an historical perspective.

The introduction in the League's Covenant of advisory opinions for the purpose of settling inter-State disputes imprinted on such institution two opposite features, each of which was characteristic at a certain time [93].

During the Permanent Court's period of activity, advisory opinions emerged as an autonomous judicial means of settlement for those disputes which, though being submitted to the Council (or other bodies), were focused on a disagreement on important legal aspects that could benefit from an authoritative assessment by the Court (the "self-standing" character). Although formally distinct from contentious jurisdiction, in practice advisory jurisdiction proved to be equivalent to the former as to its form and results [94]. In most cases the interested States consented to the request, in two cases they did not: *Eastern Carelia* and *Treaty of Lausanne*. The Court declined to give its opinion in the former, but accepted to do so in the latter. According to the more convincing reading,

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was acknowledged, though, in the declaration of vice-president Xue (*ibid.*, p. 146 f., para. 19) and the separate opinion of judge Gaja (*ibid.*, p. 268 f., para. 4).

[92] Accordingly, circumvention of consent has not become purely theoretical with *Chagos*. *Contra* Iten, *supra* note 79 p. 399, according to whom it would always be possible to find a further reason (though perhaps a minor one) underpinning the request for advisory opinion other than that of settling a dispute.

[93] See *supra*, para. 2.

[94] See *supra*, para. 3.

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both cases hinged on the Council's competence, as opposed to the Court's competence, an issue which they did not examine [95].

During the International Court of Justice's period of activity, the above-mentioned conception of advisory jurisdiction as a self-standing means of dispute settlement vanished. Since *Peace Treaties*, advisory opinions were perceived as the Court's contribution to the functions of the United Nations, whereby the Court would enlighten the requesting organ as to the course of action the latter should take (the "organizational" character). The Court accordingly excluded that States' consent could form a prerequisite for its advisory competence [96].

Since then, lack of consent has been examined in the perspective of the exercise by the Court of its power to decline to give its opinion for considerations of judicial propriety. In *Western Sahara* the Court notably acknowledged that, among the "compelling reasons" justifying its abstention, there was the case in which to give a reply would have the effect of circumventing the consent principle. However, in this and the following cases the Court never found that such a situation occurred [97].

The Court dismissed the circumvention argument each time it found the request for advisory opinion closely related to the functions of the requesting organ and involving legal positions of concern for the whole international community. As witnessed by the recent *Chagos* opinion, the presence of these two elements may justify the Court in answering the request for opinion even if the latter has a close connection with an inter-State dispute [98].

Such approach, it is submitted, confirms that the Court still perceives advisory jurisdiction as a contribution to the functions of the requesting organ (the "organizational" character), rather than an autonomous means of dispute settlement, alternative to contentious jurisdiction (the "self-standing" character).

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[95] See *supra*, para. 4.
[96] See *supra*, para. 5.
[97] See *supra*, para. 6.
[98] See *supra*, para. 7.