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Advisory Jurisdiction of the International Court of Justice

*F. Blaine Sloan**

SINCE the early days of the Republic when the United States Supreme Court refused to give an advisory opinion to President Washington at the time of the Genet Affair, Americans have looked askance at advisory jurisdiction.¹ Perhaps it was this distrust of the exercise of "non-judicial functions" by a court which colored the attitude of the United States toward the Permanent Court of International Justice. It is at least a matter of record that the power of the Court to give advisory opinions was opposed and criticized by eminent American jurists, and the advisory functions of the Court figured prominently in the difficulties which beset American adherence to the Court.²

It is, therefore, a particular tribute to the wisdom and circumspection with which this advisory jurisdiction was exercised that there was little or no opposition to its retention at San Francisco when the Charter of the United Nations and Statute of the International Court of Justice were drafted.

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¹ See 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486-489. See also *Muskrat v. United States*, 219 U. S. 346, 354 (1911) and Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002-1009 (1924). Advisory opinions are, however, given by a number of state courts. See Hudson, *Advisory Opinions of National and International Courts*, 37 HARV. L. REV. 970-1001 (1924); ELLINGWOOD, *DEPARTMENTAL COOPERATION IN STATE GOVERNMENT* (1918).

² See position of Elihu Root, MINUTES OF 1920 COMMITTEE OF JURISTS 584-585, and of John Bassett Moore, P. C. I. J., Ser. D, No. 2, pp. 383-398. The fifth reservation proposed by the United States in 1926 as a condition for its accession was as follows:

"That the Court shall not render any advisory opinion except publicly after due notice to all States adhering to the Court and to all interested States after public hearing or opportunity for hearing given to any State concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest." See HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942*, p. 219 *et seq.* (1943).

The Charter established the International Court of Justice as the principal judicial organ of the United Nations. This World Court is the direct successor not only historically but jurisdictionally to the Permanent Court of International Justice which functioned under the aegis of the League of Nations. Not only is the Statute of the International Court patterned with only minor changes upon the Statute of the Permanent Court, but by virtue of Articles 36(5) and 37 of its Statute it succeeds to the compulsory jurisdiction of the Permanent Court. Furthermore, the practice and jurisprudence of the Permanent Court have exercised a marked influence on the work of the International Court of Justice.

As in the time of the old Court the cases coming before the International Court of Justice fall within two main categories—cases coming to the Court for judgment and cases coming to the Court for advisory opinion—the contentious and advisory jurisdiction of the Court. The contentious jurisdiction covers those cases brought to the Court by States parties to a dispute. The case may be brought by special agreement between the parties where compulsory jurisdiction does not exist; or where States have recognized as compulsory the jurisdiction of the Court by a declaration under paragraph 2 of Article 36 or by a treaty or agreement in force under the first paragraph of that Article, a case may be brought by unilateral application of one of the parties.

The advisory jurisdiction of the Court on the other hand is exercised in response to requests for opinions from organs of the United Nations and specialized agencies.

As will be indicated later, however, the actual difference between the contentious and advisory jurisdiction is often not very great, and the jurisprudence of the Permanent Court of International Justice demonstrated that the advisory and contentious jurisdictions were of nearly equal importance. The Permanent Court rendered 31 judgments in contentious cases and gave 27 advisory opinions at the request of the Council of the League of Nations. These judgments and advisory opinions are regarded as of equal significance in the jurisprudence of the Court.

Thus far the advisory jurisdiction of the International Court has been invoked more frequently than its contentious jurisdiction.³ Judgments have been rendered in only one case, that of the Corfu Channel

³ This was also true in the early years of the Permanent Court of International Justice.

dispute between the United Kingdom and Albania.^{3a} There were, however, three separate judgments in this case given over a period of almost two years. There are two other contentious cases now on the docket of the Court, the Anglo-Norwegian Fisheries Case and the Colombian-Peruvian Asylum Case,⁴ and a proceeding instituted by application of France against Egypt has been withdrawn. The Court on the other hand has given advisory opinions in five cases; two concerning the *Admission of States to Membership in the United Nations*; one dealing with the right of the United Nations to bring a claim for *Reparation for Injuries Suffered in the Service of the United Nations*; one on the *International Status of South West Africa*; and one on the *Interpretation of the Peace Treaties with Bulgaria, Hungary, and Rumania*. Since there were two separate opinions given in the peace treaty case there have been a total of six opinions compared with three judgments. The fifth Assembly, it appears at this writing, will make a request for at least one opinion, that concerning reservations as they effect the Genocide Convention.^{4a}

Notwithstanding the importance which the advisory jurisdiction of the Court has attained in international jurisprudence, or perhaps because of this importance, there exists a great diversity of opinion concerning its nature and legal effect. The present article will attempt first, to describe in some detail this advisory jurisdiction, and then to examine the legal nature of the opinions and consider some of their potentialities.

I. THE REQUEST FOR AN ADVISORY OPINION

Article 65 of the Statute of the Court provides that the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request. By Article 96, paragraph 1, of the Charter the General Assembly and the Security Council are authorized to request the Court to give an advisory opinion on

^{3a} On November 20, 1950 the Court delivered its judgment in the Colombian-Peruvian Asylum Case. On November 27 the Court delivered a second judgment in this case holding that a request by the Colombian government for an interpretation of the first judgment was inadmissible.

⁴ On October 28, 1950 a new case was docketed by the application of France instituting proceedings against the United States in a dispute involving Rights of American Nationals in Morocco. (1950 General List No. 11).

^{4a} On November 16, 1950 the General Assembly adopted a resolution requesting an advisory opinion on this subject. U. N. Doc. A/1517.

any legal question. In accordance with Article 96, paragraph 2, other organs of the United Nations and specialized agencies may be authorized by the General Assembly to request advisory opinions of the Court on legal questions arising within the scope of their activities.

Of the six principal organs of the United Nations four are now entitled to request opinions of the court: the General Assembly and the Security Council by direct authorization by the Charter; and the Economic and Social Council and the Trusteeship Council by authorization of the General Assembly in accordance with Charter provisions. Of the remaining two principal organs, the Court and the Secretariat, it cannot be supposed that the Court would have occasion to ask itself for an opinion. However, an authorization to the Secretariat, or rather to the Secretary-General, might in certain circumstances prove of great value. For example it was early suggested that if the Secretary-General were to be made responsible for the administration of a United Nations Zone it might be appropriate to allow him to request the Court for an opinion on questions relating to the constitutional arrangements of the zone.⁵ Today with the emergence of the political functions of the Secretary-General, and the recognition that his position is much more than the administrative head of an international civil service, the desirability of his being able to address requests for advisory opinions to the Court becomes much greater. It is of course true that the Secretary-General may indirectly seek an opinion of the Court by asking the General Assembly or another authorized organ to make the request. The Headquarters Agreement between the United Nations and the United States provides that either the Secretary-General or the United States may ask the General Assembly to request an opinion on any legal question arising in the course of an arbitral proceeding concerning the interpretation or application of the Agreement. It is apparent from the terms of the Agreement that the situation is not envisaged in which the General Assembly might decline to make the request. While this indirect procedure appears suitable in the case of the Headquarters Agreement, it would not be satisfactory in all instances in which the Secretary-General might find it desirable to consult the Court.

In addition to the principal organs, the Interim Committee of the General Assembly, a subsidiary organ established under Article 22 of the Charter, is authorized by the resolutions re-establishing it to

⁵ Jenks, *The Status of International Organizations in Relation to the International Court of Justice*, 32 *TRANSACTIONS OF THE GROTIUS SOCIETY* 13 (1946).

request advisory opinions.⁶ Furthermore, nine specialized agencies have received authorization by means of an article in the agreements concluded between each organization and the United Nations. These specialized agencies authorized to request opinions are the International Labour Organization, United Nations Educational, Scientific and Cultural Organization, Food and Agricultural Organization, International Civil Aviation Organization, International Bank for Reconstruction and Development, International Monetary Fund, International Telecommunication Union, World Health Organization and the International Refugee Organization.⁷

Since the authorization to request advisory opinions granted by the General Assembly to these specialized agencies is contained in the agreements with these agencies having the status of treaties, the question occurs whether the General Assembly could unilaterally withdraw this authorization, or whether the consent of the specialized agency would be necessary. The Sixth Committee of the Assembly expressed the view at the time that some of these agreements were being negotiated that the General Assembly is competent under the Charter to revoke such authorization. This view appears rather odd, since such revocation would if effective constitute a breach of the agreement on the part of the United Nations and would give rise to the usual remedies for the violation of a treaty obligation. It would also appear that should a specialized agency request an opinion following an attempt of the Assembly to withdraw an authorization it would be for the Court itself to determine whether the revocation of authority was effective.

Although there are now no less than fourteen separate bodies authorized to request opinions, the Court has not been flooded with indiscriminate requests as some observers had feared. Thus far there have been no requests from any specialized agency, and no request from any organ of the United Nations other than the General Assembly. It is of interest to observe that whereas all requests for advisory opinions of the Permanent Court of International Justice emanated from the Council of the League of Nations, the five requests thus far made of the International Court of Justice have all come from the General Assembly.

⁶ General Assembly Resolutions 196 (III), 3 December 1948; and 295 (IV), 21 November 1949.

⁷ Additional authorizations have been approved in draft agreements to be concluded with other specialized agencies in the process of establishment.

The question of what bodies may be considered organs or specialized agencies for the purpose of Article 96 of the Charter recently arose in connection with the proposed establishment of a Human Rights Committee to assist in the implementation of the proposed Covenant of Human Rights. It was envisaged that this Committee be established by the Covenant, its members be elected by the parties thereto, and its functions be provided therein. It was not to be subject to the authority of any principal organ of the United Nations.

The Legal Department of the United Nations Secretariat gave its opinion that the Committee would be neither an organ of the United Nations nor a specialized agency and, therefore, that it could not be authorized to request an advisory opinion.⁸ The Committee clearly could not be a principal organ since these are specifically enumerated in the first paragraph of Article 7 of the Charter. There would appear to be more latitude for a difference of opinion whether the Committee might be considered a subsidiary organ. The second paragraph of Article 7 provides that such subsidiary organs as may be found necessary may be established in accordance with the Charter. Thereafter the term "subsidiary organ" is used only with regard to the General Assembly (Article 22) and the Security Council (Article 29),⁹ but Commissions set up by the Economic and Social Council under Article 68 are also considered subsidiary organs, and it would seem that the Trusteeship Council can establish such organs without express Charter authority.

It might be argued that a Committee established by a covenant which has been drafted and approved by the United Nations in implementation of the basic human rights provisions of the Charter might also be included in the organs of the United Nations. However, in view of the fact that it was to be established under an instrument separate and distinct from the Charter, and would be independent of the principal organs of the United Nations the opposite conclusion was reached.

A specialized agency as defined in Article 57 of the Charter is an agency established by intergovernmental agreement, having wide international responsibilities in economic, social, cultural, educational, health and related fields and brought into relationship with the United Nations under Article 63 of the Charter. Although literally it would be possible to fit the Committee within this definition, it would cer-

⁸ U. N. DOCUMENT E/1732, 26 June 1950.

⁹ See KELSEN, *THE LAW OF THE UNITED NATIONS* 147 (1950).

tainly have a far different character from the international organizations to which the term is now applied.

Before leaving the consideration of who may request advisory opinions it may be noted that suggestions have been made that States should be permitted to ask advisory opinions. A proposal to this effect was rejected at San Francisco.¹⁰ It is true, however, that under the contentious jurisdiction of the Court, States may bring a case for declaratory judgment.¹¹ Furthermore, it is possible for States to ask an authorized organ to request an advisory opinion and this has in fact been done on several occasions.¹² The organ will, of course, have to make the final decision and assume itself the responsibility for the request.

The voting requirements for a request for an advisory opinion are not expressly provided in the Charter, but are to be determined in accordance with the procedure of each organ or specialized agency.

In the Security Council there has thus far been no authoritative determination of the nature of the vote on a request for an advisory opinion. There are two main problems involved: first, is it a non-procedural question on which the veto is applicable; and second, if it is a non-procedural question, must a State party to a dispute abstain? The Interim Committee of the General Assembly which in 1948 studied the problem of voting in the Security Council reached the conclusion that a request for an advisory opinion was a procedural question to which the veto should not apply.¹³ It was suggested at the same time that should a permanent member seek to invoke its right of veto to prevent a request for an advisory opinion, the Council could by a procedural vote instruct the Secretary-General to transmit to the Court the text of the contested request and the records of the Council's meetings at which the question was discussed. It would then be for the Court to determine whether it was competent to proceed.¹⁴ The General Assembly in its resolution 267(III) on the problem of voting in the Security Council adopted on April 14, 1949, however,

¹⁰ Fifteenth Meeting of Committee IV/1, Doc. 701, 13 U. N. CONF. DOC. 235 (1945).

¹¹ German Interests in Polish Upper Silesia, P. C. I. J., Ser. A, No. 7, at 19 (1926).

¹² For example the Tunis-Morocco Nationality Decrees Case, P. C. I. J., Ser. B, No. 4 (1923). See 1 HUDSON, WORLD COURT REPORTS 143.

¹³ REPORTS OF THE INTERIM COMMITTEE OF THE GENERAL ASSEMBLY, 5 JAN.-5 AUGUST 1948, GENERAL ASSEMBLY OFFICIAL RECORDS, THIRD SESSION, SUPPLEMENT NO. 10, p. 14 (1948).

¹⁴ *Ibid.* See Yuen-li Liang, *Notes on Legal Questions Concerning the United Nations*, 42 AM. J. INT'L. L. 895 (1948).

did not include a request for an advisory opinion in the list of decisions deemed procedural. In the light of Security Council practice it would appear probable that requests for advisory opinions at least on certain subjects would not be considered procedural.

As to the second problem whether a party to a dispute must abstain from voting, it will be recalled that the relevant Charter provision (Article 27(3)) requires that in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting. Prima facie this provision would appear inapplicable to a decision to request an opinion as authorized by Article 96 of Chapter XIV. However, before reaching this conclusion it should be noted that at the time agreement was reached on the Yalta voting formula the provision concerning the power of the Security Council to request legal advice from the Court was in Chapter VIII, Section A of the Dumbarton Oaks proposals, the section which later became Chapter VI of the Charter. It was only as a drafting change that this provision was moved to a latter part of the Charter.¹⁵ Furthermore, the actual decision to request an advisory opinion may be taken in connection with the consideration of pacific settlement of a dispute under Chapter VI. In this event may not the subsidiary decision to request an advisory opinion be considered a decision under Chapter VI even though the authority to make the request is to be found in another chapter of the Charter?

It is suggested that the nature of the vote should be determined by the subject matter of the request, and that no blanket determination should apply to all requests for advisory opinions. On this basis it is submitted that (1) if the request is for an advisory opinion on a procedural problem the decision to make the request should be considered procedural and the veto should not be applicable; (2) if the request concerns a dispute, the pacific settlement of which is being considered under Chapter VI or under paragraph 3 of Article 52, a party to the dispute should be required to abstain from voting on the request for an advisory opinion; (3) if the request concerns the taking of enforcement action or other matter under Chapter VII the unanimous vote of the Permanent Members including a party to a dispute would be required.

This view finds support in the practice of the General Assembly. In this organ the problem which arises with regard to voting require-

¹⁵ Yuen-li Liang, *The Settlement of Disputes in the Security Council: The Yalta Voting Formula*, 24 BRITISH YEARBOOK OF INTERNATIONAL LAW 354-355 (1947).

ments is whether the decision to request an opinion is a decision on an important question which must be made by a two-thirds majority, or whether it is a decision which may be made by a simple majority (Article 18).

Under General Assembly practice the voting majority required would seem to depend upon whether the substantive question is one falling within a category of questions requiring a two-thirds majority. This at least is the conclusion which may be drawn from the President's ruling on a vote in the second part of the first Assembly on a resolution on the question of the treatment of Indians in the Union of South Africa. A proposed amendment to the draft resolution containing a request for an advisory opinion, was ruled to require a two-thirds majority following a decision by the Assembly that the main question required a two-thirds vote.¹⁶

If decisions to request advisory opinions were considered to be a category in themselves separate from the substantive question to which they appertain, they would not come within the enumeration of questions requiring a two-thirds majority in Article 18. However, the General Assembly if it so desired might by a simple majority add this category to those to be decided by a two-thirds vote. It might be argued, on the one hand, that considering the high position of the Court and the authority of its opinions all requests should be considered important questions. On the other hand it might be contended that the advisory opinion is merely preliminary to a decision by the Assembly and should therefore not be considered an important question even if the substantive question falls within a category requiring a two-thirds majority.

However, the practice followed by the Assembly of weighing the importance of the request by the importance of the substantive issue involved appears most acceptable.

Before leaving the question of voting it may be recalled that the nature of the vote in the League of Nations on a request for an advisory opinion was highly controversial, and it was never definitively resolved whether the vote might be considered procedural in which case a simple majority would suffice, or whether unanimity was required. It does appear, however, that requests were made in certain instances in the face of objection by one of the interested parties. With

¹⁶ OFFICIAL RECORDS OF THE SECOND PART OF THE FIRST SESSION OF THE GENERAL ASSEMBLY, PLENARY MEETINGS OF THE GENERAL ASSEMBLY, 23 OCTOBER-16 DECEMBER 1946, pp. 1060-1061.

the dissolution of the League this is now a moot question, and mere speculation concerning its correct solution does not appear useful in arriving at a conclusion concerning the somewhat similar problem in the United Nations.

Having discussed who may request opinions, we may now turn to the question of what may be asked. The Charter states that the General Assembly or the Security Council may request an advisory opinion on any legal question. Other authorized organs and specialized agencies may request opinions on legal questions arising within the scope of their activities. Professor Kelsen suggests that there is no difference in these criteria since implicitly the General Assembly and the Security Council can not exceed the scope of their activities.¹⁷

The question arose whether the General Assembly in authorizing other organs and specialized agencies to request advisory opinions should make a general authorization with regard to all questions within the scope of their activities, should make only special authorizations with regard to each individual question, or should adopt a middle course authorizing the requesting of opinions on certain carefully circumscribed subjects. The General Assembly in fact determined on the first solution granting broad general authorizations, but with regard to the authorization to specialized agencies it did expressly except questions concerning the mutual relationship of the agency to the United Nations or to other specialized agencies.

Another question concerning the scope of the authority to ask an advisory opinion has been suggested by the difference in wording between the Covenant of the League of Nations and the Charter of the United Nations. Article 14 of the Covenant made a distinction between a "question" and a "dispute" upon which an advisory opinion might be given.¹⁸ This distinction is not expressly retained in Article 96 of the Charter. Consequently there has been a suggestion that this omission has the effect of precluding a request for an advisory opinion

¹⁷ KELSEN, *THE LAW OF THE UNITED NATIONS* 546 (1950).

¹⁸ Article 14 of the Covenant of the League of Nations was as follows:

"The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

See Négulesco, *L'Evolution de la Procédure des avis Consultatifs de la Cour Permanente de Justice Internationale*, 57 *RECUEIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL* 1-96 (1936 III).

on a dispute.¹⁹ This suggestion is not well taken. There is no indication in the *travaux préparatoires* of such an intention, and an analysis of the Charter and of the Statute support the opposite conclusion. The term "any legal question" used in Article 96 is certainly broad enough to include legal issues in a dispute. Article 68 of the Statute, in the light of its history, implies a retention of the distinction.²⁰ This article provides that in the exercise of its advisory functions the Court is to be guided by the provisions of its Statute which apply in contentious cases to the extent to which it recognizes them to be applicable. Furthermore, the Court in drawing up its rules has in Article 83 expressly provided for the appointment of ad hoc judges if an advisory opinion is requested upon "a legal question actually pending between two or more states." Thus far, however, this rule has not been invoked before the present Court.

Another problem concerns the propriety of asking the Court questions concerning future international law. The story is still told in the corridors at Lake Success of the prominent international lawyer and statesman who suggested that the International Court of Justice might assist the General Assembly in the fulfillment of its functions with regard to the progressive development of international law and its codification. When asked how this might be accomplished under the Statute of the Court, he replied that it would be quite simple by use of the advisory jurisdiction. The General Assembly he thought might ask two questions of the Court. The first, what is international law? The Court's answer would be a codification of law. The second, what should be international law? The Court's answer would be progressive development.

This suggestion was, of course, never seriously entertained, but with regard to specific requests for opinions the question has been discussed to what extent the question must be confined to a request for an interpretation of the law as it exists, and to what extent guidance may be sought with regard to the creation of new law. It is of course unnecessary to point out to Anglo-American lawyers versed in case law that the Court by its decisions and opinions does develop international law, and to a limited degree does create new law.²¹ But

¹⁹ See separate opinion by Judge Azevedo, INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY AND RUMANIA: I. C. J. REPORTS 82 (1950).

²⁰ See HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, pp. 214-215 (1943).

²¹ See Statement of Mr. Fitzmaurice (United Kingdom) to 184th Meeting of Sixth Committee of General Assembly, 4 November 1949, OFFICIAL RECORDS OF THE FOURTH SESSION OF THE GENERAL ASSEMBLY 280-281.

it does this by accepted judicial methods—by applying established principles to novel fact situations, by analogy, by interpretation—not by legislative fiat. It would seem most inappropriate to ask the Court, the principal judicial organ of the United Nations, for an advisory opinion concerning the future development of the law, a matter falling rather within the competence of the International Law Commission. The discussion of the subject of the effect of reservations to multilateral conventions in the fifth General Assembly demonstrated the Assembly's understanding of the principle. It was agreed that specific questions concerning the application of existing law to the problems raised by the reservations to the Genocide Convention should be sent to the International Court, whereas the general problem of reservations was to be referred to the International Law Commission.²²

There remains a great breadth of discretion with regard to the type of question which may be asked of the Court. The question may vary from an abstract legal problem to a point in actual conflict between two States. The organ requesting an opinion, of course, should and does impose on itself certain limitations. The General Assembly for example, should refrain from asking purely academic or hypothetical questions not relating to a matter before the Assembly. However, it may ask an abstract question which does not directly relate to a specific dispute. The Court has in fact preferred to treat some requests as abstract questions, although they had arisen from very definite factual situations. The first advisory opinion which related to the conditions for the admission of new Members to the United Nations is perhaps the best example.²³

At the other extreme the organ requesting an opinion should not ask the Court to answer a question which primarily involves a determination of fact. The Permanent Court of International Justice in its reply to a request for an opinion in the *Eastern Carelia Case* stated:²⁴

The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts, but, under ordinary circumstances, it is certainly expedient that the

²² Report of the Sixth Committee, U. N. Doc. A/1494, 10 November 1950.

²³ The Court stated: "It has also been contended that the Court should not deal with a question couched in abstract terms. That is a mere affirmation devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise." *CONDITIONS OF ADMISSION OF A STATE TO MEMBERSHIP IN THE UNITED NATIONS: I. C. J. REPORTS 61 (1948).*

²⁴ P. C. I. J., Ser. B, No. 5, p. 28 (1923).

facts upon which the opinion of the Court is desired should not be in controversy, and it should not be left to the Court itself to ascertain what they are.

II. THE GIVING OF AN ADVISORY OPINION

Closely connected with, and in fact overlapping, the subject just discussed concerning the type of question appropriate for a request, is the problem of the competence of the Court to give an opinion on certain questions. The question of competence has been raised before the International Court of Justice in three of the five advisory proceedings. The objections to jurisdiction raised in these cases may be considered under four main headings: (1) that the question is political and not legal; (2) that the Court is not competent to interpret the Charter; (3) that the question is within the domestic jurisdiction of States (Article 2(7)); and (4) that an opinion cannot be given in the absence of the consent of the interested States.

The challenge to the Court's competence on the ground that the question was political was raised in the two cases concerning the admission of States to membership in the United Nations. The membership question in the Security Council and the General Assembly has for a number of years involved highly political issues. The admission of certain States has been prevented by the use of the veto in the Security Council, and the General Assembly has sought means of overcoming this veto. In 1947 the Assembly asked the Court for an opinion whether Members of the United Nations in voting on the application of a State for Membership were entitled to make their consent to admission dependent on conditions not expressly set forth in Article 4 of the Charter. In 1949 the Assembly asked the Court if the General Assembly could admit a State to Membership in the absence of a recommendation by the Security Council. The Court, in dismissing the objection that these were political questions, said that it could not attribute a political character to a request which, framed in abstract terms, invited it to undertake an essentially juridical task, the interpretation of a treaty provision. The Court stated that it was not concerned with the motives which inspired the request, nor with the concrete cases from which the question arose.²⁵

It is extremely difficult to separate legal from political questions. In fact in a large number of questions in public international law, and particularly in those before the United Nations, political and legal

²⁵ CONDITIONS OF ADMISSION OF A STATE, *op. cit. supra* note 23, at 61.

aspects are very closely intertwined. There does exist, however, in American case law the concept of political issues not cognizable by Courts, and there are a number of instances in which the judicial branch has declined to entertain a case because it involved a political function of the executive or the legislative branches.²⁶

If this principle were to be taken over into international judicial practice, the first admission case would have seemed appropriate for its application. The issue of a reason for a vote in a political organ, it might well be argued, is a question in which a Court should not interfere. On the other hand it may be equally well argued that if a political organ desires an advisory opinion concerning the legal aspects of even a political question the Court should not refuse to give this advice. This latter argument appears most consistent with the view taken by the present Court of the nature of advisory opinions.²⁷

In the two admission cases the Court's competence was also challenged on the ground that it was not empowered to interpret the Charter of the United Nations for other organs. This objection was recognized to be without merit and was quickly disposed of by the Court which stated that, nowhere is any provision to be found forbidding the Court, "the principal judicial organ of the United Nations" from exercising in regard to the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers.²⁸

This second objection was closely related to the first, since one of the arguments in its support was that the interpretation of the Charter is primarily a political question.

It is true that at San Francisco a Belgian proposal which would have constituted the Court as the constitutional organ for interpreting the Charter, similar to the Supreme Court of the United States, was rejected, and it was understood that each organ would be able to interpret such parts of the Charter as were applicable to its particular functions. But while the Court was not set up as the only organ for Charter interpretation, neither was it excluded from exercising an interpretative function at the request of other organs. It was expressly envisaged

²⁶ See *Coleman v. Miller*, 307 U. S. 433, 544, 557 (1939); *Miss. v. Johnson*, 4 Wall. 475 (U. S. 1866); *Kentucky v. Dennison*, 24 How. 66 (U. S. 1860).

²⁷ See text *infra* section III.

²⁸ CONDITIONS OF ADMISSION OF A STATE, *op. cit. supra* note 23, at 61; COMPETENCE OF THE GENERAL ASSEMBLY FOR THE ADMISSION OF A STATE TO THE UNITED NATIONS: I. C. J. REPORTS 6 (1950).

that the General Assembly or the Security Council might ask the International Court for an advisory opinion concerning the meaning of the Charter.²⁹

The right of the Court to interpret the Charter was also recognized in a resolution of the second session of the General Assembly in 1947. This Resolution 171(II) calling for greater use of the International Court of Justice recommended *inter alia* that United Nations organs review from time to time difficult and important questions of law "including points of law relating to the interpretation of the Charter" with a view to requesting advisory opinions of the Court.

At the opposite extreme from those arguing that no question of Charter interpretation should be sent to the Court are those who advocate that all disputes over interpretation, and particularly those involving a challenge to the competence of an organ of the United Nations, should be referred to the Court.³⁰ It would, however, seem difficult to adopt any hard and fast rule to this effect. The interpretation of a constitutional instrument such as the Charter involves an intricate interplay of political and legal considerations. At least in the early years of development the wisdom of allowing interpretation by both political and legal organs of the United Nations has proved its value.

A third ground for objection to the competence of the Court has been that of domestic jurisdiction. Article 2(7) provides that nothing contained in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the Charter. This principle, however, does not prejudice the application of enforcement measures under Article VII.

A challenge on this ground was raised in the *Peace Treaties Case* by the argument that the question of human rights was within the domestic jurisdiction of Bulgaria, Hungary and Rumania. The argument had in fact two facets. First, it was argued that the General Assembly had no competence, was acting *ultra vires* in asking the question, and that for this reason there was no valid request before the Court. Second, it was contended that the Court itself as an organ of the United

²⁹ Final Report of Committee IV/2, Doc. No. 933, 13 U.N. CONF. DOC. 709-710 (1945). See GOODRICH AND HAMBRO, CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS 547-551 (2d rev. ed. 1949).

³⁰ See Report of Special Committee of the American Society of International Law on Reference to the International Court of Justice on Questions of United Nations Competence. The conclusions were printed in 44 AM. J. INT'L L. 154-155 (1950) and the Report was discussed at the 44th Annual Meeting.

Nations subject to the prohibition of Article 2(7) was incompetent to deal with the matter. These arguments presented no difficulty in this particular case since the question was one of interpretation of treaties which could not be considered a matter of domestic jurisdiction.

It was not, therefore, necessary for the Court to develop fully its views with regard to this most controversial provision of the Charter. The problem whether the Charter has removed the subject of human rights from the field of domestic jurisdiction was thus not resolved by the Court. It may be significant, however, that the Court did note that the General Assembly had justified the adoption of its Resolution by stating that "the United Nations, pursuant to Article 55 of the Charter, shall promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."³¹ Nor did the Court consider the meaning of the word "intervene" as used in Article 2(7). Is the exercise of advisory jurisdiction an "intervention," and does it violate the provision that Members are not required to submit matters of domestic jurisdiction to settlement under the Charter? One's answer to this problem will probably be influenced by the view taken as to the nature and legal effect of an advisory opinion which will be examined in the following section of this article.

It is a favorable augury for the development of international law and organization that both the Permanent Court in the *Tunis Morocco Nationality Decrees Case* and the International Court in the *Peace Treaties Case* have refused to take a static view of the concept of domestic jurisdiction. Methods of growth of international jurisdiction are not foreclosed, nor is there an overemphasis on the principle of *domaine réservé*.

The most important challenge to the competence of the Court, however, has been based on the view that States interested in a pending question must give their consent to the request for an advisory opinion. The leading case in which this objection to jurisdiction was sustained was that of the *Status of East Carelia* decided by the Permanent Court of International Justice in 1923. This case involved a dispute between Finland and the Union of Soviet Socialist Republics concerning the autonomy of Eastern Carelia under the Treaty of Dorpat and a Declaration annexed thereto. The question was taken by Finland before the Council of the League of Nations. The Soviet Union, which at that time was not a member of the League of Nations,

³¹ INTERPRETATION OF PEACE TREATIES, *op. cit. supra* note 19, at 70.

did not recognize the competence of the Council. Nevertheless, the Council requested the Court for an advisory opinion concerning the international obligations of the U.S.S.R. The U.S.S.R. denied the competence of the Court and refused to participate in the proceedings. The Court, in declining to give an opinion, stated *inter alia*.³²

It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement 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.

The strength of this precedent was, however, somewhat weakened two years later when in the *Mosul Case*, under somewhat similar circumstances, the Court gave an advisory opinion although Turkey, a non-member of the League and a party to the dispute, objected to the proceedings.³³ The case was distinguishable from the *Eastern Carelia Case* because the advisory opinion dealt only with the authority of the Council and did not touch upon the merits of the dispute.

The International Court of Justice during the present year was faced with the same problem in the case concerning the *Interpretation of the Peace Treaties with Bulgaria, Hungary and Rumania*. These three countries are non-Members of the United Nations and refused to give their consent to the Court's proceedings. The Court held that it had the power to answer the questions, and was in fact under a duty to do so.

The case may be distinguished from the *Eastern Carelia Case* on two principal grounds. In the first place, the question before the Court concerned only the preliminary procedural issue of the applicability of the Treaty provisions for the settlement of disputes. It did not deal with the merits of those disputes. The Court placed its primary reliance on this point in differentiating the *Peace Treaties Case* from the *Eastern Carelia Case*.

³² P. C. I. J., Ser. B, No. 5, pp. 27-29 (1923).

³³ P. C. I. J., Ser. B, No. 12 (1925).

Another ground for distinction argued before the Court by the representatives of the United States and the United Kingdom, but not developed in the opinion of the court, is the different position in the international community occupied by the International Court. Mr. Cohen, speaking for the United States, pointed out that the Charter is something more than a mere treaty or convention between the parties. It is, he said, the constitution of the international community. The jurisdiction conferred by the Charter upon the Court to give an advisory opinion on any legal question is not conditioned upon the consent of States specifically concerned, be they Members or Non-Members of the United Nations.³⁴ Mr. Fitzmaurice for the United Kingdom also pointed out that the United Nations was competent to deal with disputes involving non-Members as well as Members.

It is clear that Members of the United Nations in accepting Article 96 of the Charter and Article 65 of the Statute have given their consent in advance to the exercise of advisory jurisdiction. This, as has been pointed out, is a matter specially provided for in the Charter of the United Nations in accordance with Article 36 of the Statute.³⁵ It is also submitted that the organization of the international community has advanced since the time of the *Eastern Carelia Case* so that a non-Member of the United Nations cannot urge its non-membership as a challenge to the advisory jurisdiction of the Court.

The Court, however, also chose to emphasize the difference between advisory and contentious proceedings. The Court pointed out that its opinion is given not to States, but to the organ entitled to request it and that no State can prevent the giving of an opinion which is considered desirable by the organ in order to obtain enlightenment as to the course of action it should follow. The Court further stated that its reply is only of an advisory character, and as such has no binding force.³⁶

This emphasis on the distinction between advisory and contentious jurisdiction is, in the writer's opinion, unfortunate. However, its dangers are somewhat mitigated by the Court's recognition that it is the "principal *judicial* organ" of the United Nations, and must limit its functions accordingly.³⁷

³⁴ Statement at Public Sitting of 1 March 1950.

³⁵ Hackworth, *The Court, Its Jurisdiction and Work*, 1949 ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 255-256.

³⁶ INTERPRETATION OF PEACE TREATIES, *op. cit. supra* note 19, at 71.

³⁷ *Ibid.*

The same challenge to competence based on the absence of consent of interested States may be raised before the Court in the coming year in connection with the request for an advisory opinion on the question of the effect of reservations to the Genocide Convention. In this case the questions more nearly touch the merits of disputes which might arise between the parties to the convention. The representative of the Philippines, in the Sixth Committee argued that it would be more appropriate for settlement by means of a case under the contentious jurisdiction of the Court. On the other hand, it was argued that the interest of the General Assembly as the organ in which the convention was drafted and approved, and the functions of the Secretary-General as depositary give sufficient reason to support a request for an advisory opinion.

Perhaps the question is not so much one of jurisdiction as one of propriety. The power of the Court under the appropriate articles of the Charter and Statute seems to be almost unlimited with regard to answering a request for an opinion on any legal question. However, it is recognized that the exercise of this power is under certain circumstances discretionary with the Court. In principle, the International Court said in the *Peace Treaties Case*, a reply to a request for an advisory opinion should not be refused. However, the Court in making its reply should not depart from its judicial functions.

In the exercise of its advisory jurisdiction the Court has evolved a definite procedure designed to safeguard the judicial nature of its function, and make it as nearly as practicable similar to contentious proceedings. As in contentious proceedings the Court permits both written statements and oral hearings. As has already been noted, the Court, in the exercise of its advisory function, is guided by the provisions of its statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

With regard to who may appear before the Court in advisory cases, Article 66 of the Statute provides that representatives of States entitled to appear before the Court and representatives of international organizations considered by the Court as likely to be able to furnish information on the question may submit written or oral statements to the Court. The Secretary-General of the United Nations has been represented at the oral hearings in all but one of the advisory proceedings before the International Court of Justice. This marks a departure from the policy followed by the Secretaries-General of the League of Nations. In the one case in which the Secretary-General's representa-

tive did not participate in the oral hearings, a written statement was submitted to the Court on behalf of the Secretary-General.³⁸

The international organizations which may be permitted to participate in advisory proceedings before the International Court are not confined to public international or inter-governmental organizations as are those that may present information in contentious cases under Article 34 of the Statute. Non-governmental organizations appeared occasionally in cases before the Permanent Court,³⁹ and a non-governmental organization was given permission to present a written statement in the *South-West Africa Case*.⁴⁰ The statement, however, was not received within the time limit fixed by the Court, and a request for an oral hearing was not granted.

Written and oral statements have been presented by States in all cases. In most instances there has been a direct clash of issues but this has not always been the case.

Some doubt has been raised as to the proper designation of representatives appearing in advisory cases. In those cases where the Secretary-General has presented merely an informative statement he has designated a "representative." However, in the *Reparations Case* in which he argued a particular thesis he designated an "agent" and a "counsel" as is usual in contentious proceedings. This was sometimes done by States before the Permanent Court, and it appears appropriate where the representatives do in fact serve as agent and counsel. Practice has confirmed that the "information" presented to the Court in statements in advisory proceedings may include legal argument. The statements presented on behalf of the Secretary-General have in three of the five cases consisted only of a factual and historical review of the question before organs of the United Nations. In the case concerning *Reparation for Injuries Suffered in the Service of the United Nations*, the Secretary-General considered himself an interested participant in the proceedings, and presented a statement equivalent to a brief in support of the views which he considered correct. In the *South-West Africa Case*, the Secretary-General, while not presenting an argument, did submit an analysis of the legal issues involved in the

³⁸ COMPETENCE OF THE GENERAL ASSEMBLY, *op. cit. supra* note 28.

³⁹ HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, pp. 400-402 (1943).

⁴⁰ The International League for the Rights of Man was informed by cablegram of March 3, 1950 that the Court was prepared to receive a written statement of information likely to assist the Court in its examination of legal questions put to it in the Assembly request concerning South West Africa.

question before the Court. The statements on behalf of States invariably present the views of the Government on the questions before the Court.

The question has also arisen whether summary procedure applicable in contentious proceedings may be used in advisory proceedings. The Rules of Court provide that if the Court is of the opinion that a request for an advisory opinion necessitates an early answer, it shall take the necessary steps to accelerate the procedure.⁴¹ In reply to a specific inquiry from the Interim Committee of the General Assembly in July 1948, the Court stated that it would be prepared if need be to deal with a request for an advisory opinion in even less time than that required for a judgment by summary procedure. In this connection it may be noted that in the second *Admission Case*, with the Court following its normal procedure, only a little over three months elapsed from the date of the request to the actual delivery of the advisory opinion.

III. NATURE OF ADVISORY OPINION

The exact nature and legal effect of an advisory opinion of the International Court of Justice has been the subject of considerable controversy. The subject, intrinsically difficult in itself, is rendered even more difficult by the obscurity which cloaks the concept of "binding force" in international law. With regard to advisory opinions there are a number of possible questions which arise.

May it be considered binding on the Court in the sense of *res judicata* as a judgment is, or in the sense of *stare decisis* which a judgment is not? May it be considered binding on the organ requesting the opinion or upon States interested in the outcome in the sense that they would feel under obligation to accept and observe the opinion? Is it enforceable under Article 94 of the Charter or by other means?

It would appear that there is a preponderance of opinion, although certainly no concensus, on at least two points with regard to the nature of advisory opinions. The first point is that the opinion is authoritative in the sense that it comes from the highest authority on international law and commands great respect. This concept of "authoritative," however, can not be identified with that of "binding force." Some of those scholars most insistent that advisory opinions can have no binding force, are equally insistent that the opinions are authorita-

⁴¹ Rules of Court, Article 82, paragraph 2.

tive.⁴² The authoritative nature of an opinion was thoroughly discussed in the Sixth Committee during the Fourth Session of the General Assembly in 1949 in connection with the resolution accepting the advisory opinion on *Reparation*. In this resolution the Assembly declined to state expressly that the opinion was authoritative, but only because it deemed it unnecessary to do so. The report of the Sixth Committee explained that "it was not intended to cast doubt upon the authority of the Court's opinion."⁴³

The same General Assembly which declined to expressly state that the *Reparation* opinion was authoritative, did, in the preamble to the resolution requesting an advisory opinion on the *Interpretation of the Peace Treaties*, state that "it is important for the Secretary-General to be advised *authoritatively* concerning the scope of his authority under the Treaties of Peace."⁴⁴

The second point on which we may now say there is a prevailing view, particularly in the light of the Court's statement in the *Peace Treaties* case, is that advisory opinions do not, at least in the formal sense, possess "binding force."⁴⁵

Even if these points were to be universally accepted, however, they would not go very far toward answering the problem of the status of advisory opinions in international law. The terms "authoritative" and "binding force" do not convey a precise meaning. Since there is greater understanding of the position of a judgment of the Court, an analysis of the status of an opinion in comparison with a judgment may be useful in finding content for what are otherwise empty concepts.

From the viewpoint of *stare decisis* in the Anglo-American tradition binding force of Court holdings has never in principal at least existed in international law. In fact the Statute of the International Court of Justice expressly negates any such effect of a judgment. Article 59 provides that the decision of the Court has no binding force except between the parties and in respect of that particular case. Certainly an advisory opinion will not have greater weight than a judgment in this respect. However, neither does it appear to have lesser weight. International jurisprudence bears witness that the advisory

⁴² See for example HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942*, p. 523 (1943).

⁴³ OFFICIAL RECORDS OF THE FOURTH SESSION OF THE GENERAL ASSEMBLY, PLENARY MEETINGS OF THE GENERAL ASSEMBLY, ANNEX 200 (1949).

⁴⁴ General Assembly Resolution 294 (IV), 22 October 1949.

⁴⁵ *INTERPRETATION OF PEACE TREATIES, op. cit. supra* note 19, at 71.

opinions and the judgments of the Permanent Court of International Justice are cited with equal authority and respect. While the concept of *stare decisis* is not recognized as a principle, as it is in Anglo-American law, the Court will not lightly depart from the legal reasoning of its prior decisions. Mr. Fitzmaurice, representing the United Kingdom, in explaining the weight which he considered the International Law Commission would give to an opinion of the Court, stated at the 224th meeting of the Sixth Committee of the General Assembly on October 18, 1950 that "the advisory opinions of the Court had great weight but they were on the same level as decisions of any Court. In the case in hand, the effect of the opinion would be that the Court's view would enter into the general corpus of legal pronouncements and opinions on the subject."⁴⁶

From the viewpoint of *res judicata* a judgment of the International Court of Justice has binding force. This is true by implication from Articles 59 and 60 of the statute, from express undertakings in Article 94 of the Charter and by virtue of general international law. May the concept of *res judicata* be applicable to an advisory opinion? Let us suppose for example a case similar to that involving the Tunis Morocco nationality decrees, where an actual dispute existed between two States and these States had agreed to respect an advisory opinion of the Permanent Court. It would seem that this might be an instance in which the Court would hold its opinion to be final and binding should one or the other party attempt to reopen the case.

Let us suppose next a similar situation with the exception that there is no agreement to be bound by the opinion. Suppose also that after the giving of an opinion there is an attempt to bring the identical question to the Court by way of application for judgment by the State against whose interest the advisory opinion was given. Formally the Court would probably be in a position to entertain the case but from a practical viewpoint, its judgment in all likelihood would be exactly the same as its opinion. It is true, however, that this might depend on the extent to which there were full hearings of the issues in the advisory proceedings.

In a number of other cases in which advisory opinions are given, the concept of *res judicata* is not applicable since there are no parties even by analogy. But suppose the fifth session of the General Assembly should ask an opinion on a question not involving an actual issue pending between two or more States. Suppose further that after the

⁴⁶ U. N. Doc. A/C.6/SR.224, p. 14.

Court gives its opinion, the sixth session is not satisfied with the conclusion and asks exactly the same question of the Court. Will the Court entertain it a second time or merely say we have already answered your question and see no reason to reexamine our opinion? The very fact that these suppositions seem so unreal suggests that the finality of advisory opinions is not greatly different from the finality of a judgment.

Having examined the several aspects of the question with regard to the effect on the Court itself, we may next consider the extent to which an advisory opinion may be considered obligatory on the organ which has made the request. One view which has been expressed is that the opinion is to be considered as resolving the legal issues while leaving the organ free to make a political decision for itself. But could such a political decision be in contradiction with the legal opinion? It is, of course, possible that the opinion expressed is that the organ has power to do an act, but that organ making its political decision chooses not to do it. This would certainly be within the discretion of the organ and would not be contradictory to the opinion. But suppose the opinion were that the organ had no power to do a given act, can the organ making a political decision decide to do it anyway? It does not seem likely to this writer that a responsible organ in the United Nations would decide to do so.

Finally, we may examine whether there is an obligation on an interested State. There may, of course, be instances where States have agreed in advance to be bound by advisory opinions. In these cases the opinions are binding obligations by virtue of the agreement apart from the question of the effect of the advisory opinion itself. What must be considered here is whether there is any obligation in the absence of such agreement.

An advisory opinion of the International Court of Justice is a statement by the highest authoritative body on international law in the world as well as by the principal judicial organ of the United Nations. Can it be said that a State is free to disregard that statement of what the law is? Is it free to set up its own opinion of law against that of the Court? Or to say that while the Court's opinion may be the law it is not obliged to follow it? It would be very difficult to reply affirmatively to either of these questions. It has been suggested that while there is an obligation it is moral rather than legal. This suggestion is difficult to follow since the opinion of the Court is an opinion of law and not an opinion of morals.

Finally we arrive at the question whether an advisory opinion is enforceable. This in turn raises a previous question as to what extent a judgment of the International Court is enforceable. Article 94 of the Charter of the United Nations provides that "if any party fails to perform the obligations incumbent upon it under a judgment the other party may have recourse to the Security Council which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." The present writer has elsewhere expressed the view that Article 94 gives to the Security Council a power of enforcement additional to the authority of the Security Council under Chapters 6 and 7.⁴⁷ If this interpretation should prevail, direct enforcement procedures would be provided for judgments which are not provided for advisory opinions. There are others, however, who hold (and this at least at one time was the official position of the United States) that Article 94 does not enlarge the powers of the Security Council, but that its enforcement of a judgment can only be exercised in accordance with the conditions necessary for action under Chapters 6 and 7. If this second interpretation should be accepted by the Council, then enforcement of a judgment could only be made following a determination that failure to comply with such judgment constituted a threat to the peace, breach of the peace or act of aggression. But if non-observance of an advisory opinion were also found to be a threat to the peace, breach of the peace or act of aggression, the Security Council would be equally free to adopt enforcement measures under Chapter 7 quite apart from Article 94. In fact, this is one of the reasons which weighs heavily in favor of the interpretation that Article 94, if it is to have meaning, must by itself give enforcement powers to the Security Council.

Considering the above analysis of the comparative status of opinions and judgments, it may be concluded that advisory opinions, with the single important exception of enforcement under Article 94, have, substantially the same weight and legal effect as a judgment. The Permanent Court of International Justice in the *Eastern Carelia Case* stated that answering a question would be substantially equivalent to deciding a dispute, and the International Court of Justice in the *Peace Treaties Case*, did not repudiate this statement. On the contrary, it gives implicit approval.⁴⁸ In the light of these conclusions, the state-

⁴⁷ Sloan, *Enforcement of Arbitral Awards in International Agencies*, 3 THE ARBITRATION JOURNAL (N.S.) 145-146 (1948).

⁴⁸ INTERPRETATION OF PEACE TREATIES, *op. cit. supra* note 19, at 72.

ment of the Court that an advisory opinion "has no binding force" should not be given a significance beyond the context in which it was made. While in a formal sense it may be true that an opinion does not have the binding force of a judgment, practically, it does, as an authoritative statement of law, have almost the same legal effect.⁴⁹

One other point requires mention before leaving the subject of the nature of a legal opinion. It has been suggested that an advisory opinion is merely the equivalent of advice of counsel. This view fails to take into consideration the essentially judicial character of the advisory jurisdiction of the International Court of Justice. Extreme care has been taken to preserve this judicial character of the proceedings. The opinions given are not the opinions of the individual judges but of the Court as a judicial organ. They are given only after opportunity for full hearing to all interested states and organizations, and after careful deliberation by a full court. In these circumstances, an opinion of the principal judicial organ of the United Nations and world's highest court is a judicial finding of law and not advice of counsel.

IV. RECEPTION OF ADVISORY OPINIONS

The preceding discussing of the nature of advisory opinions was based largely on considerations of theory and principle. The conclusion, however, that an advisory opinion has substantially the same legal effect as a judgment was born out by the experience of the League of Nations and the Permanent Court. Advisory opinions found general acceptance, and while in some instances political settlements were

⁴⁹ Politis stated to the Assembly of the League of Nations in 1928: "Advisory opinions, being in reality no longer such, were accordingly equivalent in the eyes of the Council, of public opinion and of the interested parties to a judgment." LEAGUE OF NATIONS OFFICIAL JOURNAL, RECORDS OF THE 9TH ASSEMBLY, FIRST COMMITTEE (1928), Special Supplement, No. 65, p. 47. A Committee of the Permanent Court in 1927 stated: "In reality, where there are in fact contending parties, the difference between contentious cases and advisory cases is only nominal. The main difference is the way in which the cases come before the Court . . . So the view that advisory opinions are not binding is more theoretical than real." P. C. I. J., Ser. E, No. 4, p. 76; Goodrich writes: "In certain respects, the great majority of the advisory opinions of the Permanent Court have a closer resemblance to the declaratory judgments of national law than to the advisory opinions of national law," *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, 32 AM. J. INT'L L. 756 (1938); see also Charles de Visscher, *Les Avis Consultatifs de la Court Permanente de Justice Internationale*, 26 RECEUIL DES COURS, ACADEMIE DE DROIT INTERNATIONAL 23 *et seq.* (1929 I); *but see* HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, pp. 511-513 (1943).

reached which were not entirely based on the Court's holdings, the opinions were considered decisive of the legal issues involved.⁵⁰

To what degree is this conclusion also supported by the experience of the United Nations and the International Court for Justice? Thus far the International Court has delivered advisory opinions in five cases, and there is no case in which the requesting organ has rejected the opinion or failed to guide its action thereby.

In the first case the Court at the request of the General Assembly gave its opinion that no State is *juridically* entitled to make its consent to the admission of a new Member to the United Nations dependent on conditions not expressly provided for by Article 4, paragraph 1 of the Charter.⁵¹ It further held that a State may not subject its affirmative vote on an applicant State to the condition that other States be admitted at the same time. This opinion was tacitly accepted by the third session of the General Assembly in 1948, and Resolution 197 (III) recommended that each member of the Security Council and of the General Assembly, in exercising its vote on the admission of new Members should act in accordance with the opinion of the Court.

The opinion, however, while accepted by most States had no practical effect since the U.S.S.R. did not recognize it as an opinion of the Court, and continued to exercise its veto in the Security Council without regard to the opinion. This course of action was based on the argument of Mr. Vishinsky that in view of statements in the two concurring opinions, the minority opinion supported by six judges should in fact have been the majority opinion supported by eight.

In the second case the Court gave its advisory opinion to the General Assembly that the United Nations had the capacity to bring an international claim against a responsible government with a view to obtaining reparation for injury suffered by agents in the service of the United Nations.⁵² The fourth session of the General Assembly in 1949 authorized the Secretary-General to bring claims in accordance with proposals based on the opinion of the Court.⁵³ The Secretary-General has successfully negotiated a settlement with Israel of the United Nations claim for reparation for the assassination of Count Bernadotte.⁵⁴

⁵⁰ See Goodrich, *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, 32 AM. J. INT'L L. 738-758 (1938); HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942*, pp. 513-522 (1943).

⁵¹ CONDITIONS OF ADMISSION OF A STATE, *op. cit. supra* note 23, at 65.

⁵² REPARATION FOR INJURIES SUFFERED IN THE SERVICE OF THE UNITED NATIONS: I. C. J. REPORTS 187-188 (1949).

⁵³ General Assembly Resolution 365 (IV), 1 December 1949.

⁵⁴ Report of the Secretary-General, U. N. Doc. A/1347, 5 Sept. 1950.

Other claims for injuries suffered by United Nations agents in Palestine are being initiated and there is no indication of a refusal to recognize the capacity of the United Nations to bring these claims as affirmed by the Court.

Three opinions were delivered by the Court in 1950 and are being considered at the fifth session of the Assembly. At the present writing committee action has been taken on only one of these, the *Peace Treaties Case*. The Court answered three questions asked by the General Assembly. In the first phase of the case it gave its opinion that there were disputes between Bulgaria, Hungary and Rumania on the one hand and certain Allied and Associated Powers signatories to the Peace Treaties on the other; and that Bulgaria, Hungary and Rumania were under an obligation to appoint representatives to the treaty commissions for the settlement of disputes. In the second phases of the case the Court said that if one party fails to appoint a representative to the treaty commissions, the Secretary-General of the United Nations is not authorized to appoint the third member upon the request of the other party.⁵⁵

Although this third answer was not in accord with the hopes of many Members of the General Assembly, the Assembly tacitly accepted the opinion and based its resolution thereon. The answer to the first and second questions were in accordance with the position taken before the Court by the United States and the United Kingdom, while the answer to the third question was opposed to their position. The United States and the United Kingdom accepted the answers as a whole and respecting the opinion did not press a request for the appointment of the third member. On the other hand Bulgaria, Hungary and Rumania at no time recognized the right of either the Assembly or the Court to consider the question, and refused to appoint their representatives to the commissions in accordance with the opinion. The General Assembly, relying on the opinion of the Court, condemned "the wilful refusal of the Governments of Bulgaria, Hungary and Rumania to fulfil their obligation under the provisions of the Treaties of Peace to appoint representatives to the treaty commissions which obligation has been confirmed by the International Court of Justice."⁵⁶

The opinions in the cases concerning the *International Status of*

⁵⁵ INTERPRETATION OF PEACE TREATIES, *op. cit. supra* note 19, at 77, 230.

⁵⁶ Resolution adopted by the General Assembly at its 303rd Plenary Meeting on 3 November 1950, U. N. Doc. A/1486.

*South West Africa*⁵⁷ and the *Competence of the General Assembly for the Admission of a State to the United Nations*⁵⁸ have not as yet been considered by the Assembly at this writing.

With regard to the opinion which it appears will be requested by the fifth session concerning the effect of reservations to the Genocide Convention, an early draft of the resolution would have indicated acceptance in advance of the opinion by requesting the Secretary-General to follow the procedure to be described by the Court.⁵⁹ The necessity for such a provision was removed before a vote was taken because sufficient ratifications and accessions were received to bring the Convention into force without a determination of the effect of reservations.

Thus the experience of the United Nations to date, while far from conclusive, would appear to support the conclusion that an advisory opinion does have substantially the same legal effect as a judgment.

V. CONCLUSION

Advisory jurisdiction for thirty years has proved an extremely useful and flexible experiment in international adjudication. Before concluding this article there are two aspects which call for special mention.

1. Advisory jurisdiction has offered a means of access to the Court for international organizations which are denied the right to be parties in contentious proceedings proper. Now that it is firmly established that international organizations do have international personality with the right to assert claims under international law, the desirability of their being able to participate in cases before the Court is important. Pending the amendment to Article 34 of the Statute, advisory jurisdiction offers an available means by which disputes to which an international organization is a party may be adjudicated by the International Court. There are a number of international instruments providing for the request for an advisory opinion in a dispute in which the United Nations or a specialized agency is a party, and containing an agreement to be bound by the advisory opinion.⁶⁰ This agreement to accept the opinion as binding removes all doubts concerning its legal effect.

⁵⁷ I. C. J. REPORTS 128 (1950).

⁵⁸ I. C. J. REPORTS 4 (1950).

⁵⁹ Proposed amendments by France to United States draft resolution, U. N. Doc. A/C.6/L.118, 5 Oct. 1950.

⁶⁰ CONVENTION ON PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS § 30; HEADQUARTERS AGREEMENT BETWEEN THE UNITED NATIONS AND THE UNITED STATES § 21; CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANIZATION, Art. 37, par. 2; CHARTER OF THE INTERNATIONAL TRADE ORGANIZATION, Art. 96. See Hambro, *Some Observations*

2. Advisory jurisdiction represents a step in the development of international law and international organization toward the universal jurisdiction of the Court. Judge McNair, writing in the *British Year Book of International Law*, for 1926 based his argument that absolute unanimity was required in a vote in the League of Nations on a request for an advisory opinion, on the view that the opinion would in substance dispose of a matter at issue between the parties and that it was difficult to believe that obligatory jurisdiction had crept in under cover of the Council's power to request an advisory opinion.⁶¹ In the United Nations, however, there is no question of surreptitious interpretation. It was known at the time that Article 96 was drafted authorizing the General Assembly to request advisory opinions that such requests could be made by a majority vote. Acceptance of the Charter was acceptance in advance by all Member States of the exercise of advisory jurisdiction on any legal question at the request of the General Assembly, even though a State might oppose the request in the Assembly. It is further submitted that in view of the position of the Charter in the international community, non-Members can not urge their non-membership to prevent the giving of an advisory opinion by the Court.

on the *Compulsory Jurisdiction of the International Court of Justice*, 25 BRITISH YEAR BOOK OF INTERNATIONAL LAW 155-157 (1948).

⁶¹ McNair, *The Council's Request for an Advisory Opinion from the Permanent Court of International Justice*, 7 THE BRITISH YEAR BOOK OF INTERNATIONAL LAW 12 (1926).