§ 6 Justification of the Eastern Carelia doctrine: the Court's judicial function

As illustrated in the previous chapters, the ICJ derives its power to refuse certain requests for advisory opinions from its duty to act in accordance with and protect its judicial function. In its *Chagos* advisory opinion, the ICJ found:

> "The discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court's judicial function as the principal judicial organ of the United Nations."[947]

Likewise, in several earlier advisory opinions the ICJ referred to the Court's duty to "remain faithful to the requirements of its judicial character".[948]

The Eastern Carelia doctrine can be seen as a result of the dual character of the ICJ. On the one hand the Court is a principal organ of the UN.[949] As an organ of the UN, the Court has a duty to promote the activities of the organization.[950] As part of this duty, the Court renders any advisory opinion requested of it by an authorized organ in order to assist that organ in its functions within the organization.[951] On the other hand, the

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947 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (113, para. 64), citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136 (156-157), paras. 44-45; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010, p. 403 (415-416), para. 29.

948 *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports 1956, 77 (84); *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative*, Advisory Opinion, ICJ Reports 1960, 150 (153); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16 (27, para. 41); *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (21, para. 23).

949 See Article 7 para. 1 UNC: "There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat."

950 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (71).

951 Ibid.

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ICJ is also the UN's principal *judicial* organ,[952] which imposes certain limits on the ICJ's duty to participate in the activities of the UN.[953] Being a judicial organ, the Court must ensure that all of its activities comply with its "judicial character"[954] or "judicial function".[955] The Court's judicial function thus limits the Court's duty to cooperate with other UN organs. When deciding whether or not to give an advisory opinion the ICJ is thus guided by two competing duties stemming from its dual character as an organ of an international organization and as a court: a *duty to give* any advisory opinion requested by an authorized UN organ and a *duty to refuse to give* any advisory opinion that is incompatible with the Court's judicial function.

The Eastern Carelia doctrine is based on the premise that there is a tension between the Court rendering advisory opinions on inter-state disputes without the consent of the relevant states and the Court's judicial function. The Court expressed this tension in its *Western Sahara* opinion:

> "In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent."[956]

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952 See Article 92 UNC: "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

953 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (71); *S. Rosenne*, The law and practice of the International Court, 1920-2005, 4th ed. 2006, 142.

954 *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative*, Advisory Opinion, ICJ Reports 1960, 150 (153); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16 (27, para. 41); *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (25, para. 33).

955 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (156-157, paras. 44-45); *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403 (415-416, para. 29); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (113, para. 64).

956 *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (24-25, para. 33).

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At the heart of the Eastern Carelia doctrine lies the concern that the advisory opinion procedure could be abused to circumvent the principle of consensual dispute settlement as it is codified for the Court's contentious procedure in Article 36 ICJ Statute. Judge *Donoghue* warned against such a negative relationship between the Court's advisory and contentious procedures in the *Chagos* case, when she voiced the concern that the advisory opinion procedure was becoming "a fall-back mechanism to be used to overcome the absence of consent to jurisdiction in contentious cases."[957] Judge *Donoghue* advocated in favor of strengthening the distinction between the two procedures in order to safeguard their integrity.[958] Integrity in this sense means exclusivity.

The aim of this chapter is to examine the persuasiveness of the Court's Eastern Carelia doctrine. In particular, the chapter seeks to assess the Court's claim that advisory opinions on inter-state disputes are in tension with the Court's judicial function and the principle of consensual dispute settlement. As illustrated above, the ICJ uses the terms "judicial function" and "judicial character" without defining them as if their meaning was apparent. However, considering that the Court derives from its judicial function certain limits of its advisory procedure, and thus limits of the right of the requesting UN organ to receive an answer from the Court, a clearer concept of the terms "judicial function" and "judicial character" is needed.

To approach the two terms, it may be illustrative to examine similar discussions about the role of the judiciary in domestic legal systems. ICs like the ICJ have been created long after the creation of domestic courts. Domestic concepts of courts and their function within domestic legal systems has preceded and informed the creation of ICs. While one must be careful not to blindly transfer legal concepts from municipal law to international law,[959] it nevertheless seems illustrative to start the analysis of the term "judicial function" by examining similar discussions in domestic legal systems (*infra* A.). The chapter then examines different understand-

957 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Dissenting Opinion Donoghue, ICJ Reports 2019, 95 (266, para. 23).

958 Ibid.

959 Emphasizing the difference in cogency between municipal law and international law, *H. Lauterpacht* argues that analogies to private law should be limited to "general principles of private law recognised by the main systems of jurisprudence", see *H. Lauterpacht*, Private law sources and analogies of international law, 1927, 84–85; see also *G. I. Hernández*, The International Court of Justice and the judicial function, 2014, 44.

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ings of the term "judicial function" used by the ICJ (*infra* B.). Following this, the chapter turns to the question of whether the giving of advisory opinions may undermine the Court's judicial function by circumventing the principle of consensual settlement of disputes. To this end, the chapter examines the scope of the consent requirement as it applies to the Court's contentious procedure (*infra* C.). It then seeks to answer the question whether the giving of an advisory opinion on an inter-state dispute without the consent of the disputing states constitutes a circumvention of this consent requirement (*infra* D.). In order to answer this question, the chapter compares the Eastern Carelia doctrine with the Monetary Gold doctrine.

A. The role of courts under domestic legal systems

Article 92 of the German Basic Law (*Grundgesetz*) contains the central provision on the role of the judiciary in the German legal system. It stipulates:

> "The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law and by the courts of the *Länder*."[960]

The meaning of the key term "judicial power" ("*rechtsprechende Gewalt*") is contested in German scholarship and case law.[961]

I. The concept of "judicial power" in Germany

Many prominent legal commentators define the term judicial power by reference to certain characteristic features of courts. *Stern*, for example, defines judicial power "as the legal judgment of facts in specially regulated proceedings leading to the final binding decision in application of the

960 Article 92 Basic Law, translated by Professor Christian Tomuschat, Professor David P. Currie, Professor Donald P. Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

961 *A. Voßkuhle*, Rechtsschutz gegen den Richter, 1993, 69 et seq.; *C. Möllers*, Gewaltengliederung, 2005, 98; *H. Schulze-Fielitz*, in: H. Dreier (ed.), Grundgesetz Kommentar, 2018: Art. 92, para. 25; *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 121.

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applicable law by an uninvolved (state) organ, the judge".[962] According to *Böckenförde*, judicial power includes "the handling of a case by an uninvolved, neutral body ("independent third party") and that its independent decisions, which are aimed at legal force, are not made according to political or other considerations of expedience, but (solely) in accordance with the applicable law (law and justice)".[963] *Schulze-Fielitz* provides an extensive definition of judicial power:

> "The exercise of judicial power presupposes (1) a special decision-making procedure regulated by law, establishes (2) specific facts on a case-by-case basis, assesses (3) this against the background of uncertain, because contested or violated law and decides (4) a dispute in a final and binding manner solely by applying the applicable law by (5) an independent (neutral) state body that is not involved in the initial dispute."[964]

In its early case law, the German Federal Constitutional Court (FCC) similarly identified a set of minimum requirements of judicial power, without, however, providing a comprehensive definition of the term.[965] Accordingly, the "judicial power" requires *inter alia* that decisions are rendered by an uninvolved third party[966], that the law is applied by an independent, legally competent body[967] and that certain requirements for the composition of the court and the procedure are respected[968].[969]

In a landmark decision in 1967, the FCC adopted the so-called "substantive" or "material" concept of judicial power.[970] Accordingly, the term judi-

962 *K. Stern*, Das Staatsrecht der Bundesrepublik Deutschland, 1980, vol. II, 898, translated by the author.
963 *E.-W. Böckenförde*, Verfassungsfragen der Richterwahl, 1974, 87, translated by the author.
964 *H. Schulze-Fielitz*, in: H. Dreier (ed.), Grundgesetz Kommentar, 2018: Art. 92, para. 26, translated by the author.
965 *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 126.
966 FCC, order of the first senate of 29 April 1954 – 1 BvR 328/52 – BVerfGE 3, 377 (381) – *Schwerbeschädigtenschutz*; FCC, order of the first senate of 9 November 1955 – 1 BvL 13/52, 1 BvL 21/53 – BverfGE 4, 331 (346) – *Soforthilfegesetz*.
967 FCC, order of the first senate of 21 October 1954 – 1 BvL 9/51, 1 BvL 2/53 – BverfGE 4, 74 (93) – *Ärztliches Berufsgericht*.
968 Ibid.
969 *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, 121 et seq.
970 *C. Möllers*, Gewaltengliederung, 2005, 99; *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 125.

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cial power stipulates certain substantive guarantees, in particular a constitutional guarantee that the judiciary has a certain set of core competences, irrespective of an express allocation in the Basic Law or statutes.[971] These core competences include the traditional areas of judicial activity, namely deciding civil law disputes and criminal adjudication.[972] In adopting a material concept of judicial power, the FCC emphasized the departure of the Basic Law from the formalistic approach of the Imperial Constitution of Weimar (*Weimarer Reichsverfassung*), which did not contain such substantive guarantees and did not reserve certain tasks to the judiciary.[973]

The extensive case law of the FCC on the matter, which sometimes focused on certain minimum characteristics of the judiciary, sometimes on the organizational composition of a court and sometimes emphasized the tasks allocated to a court, has led to some confusion in legal scholarship.[974] Several scholars have tried to derive from the case law of the FCC a single comprehensive definition of the term judicial function.[975] However, as *Payandeh* points out, the case law, and the ensuing debate in legal scholarship, conflate two separate, albeit related, questions under the concept of judicial power: the tasks of the judiciary on the one hand (*What do the courts do?*) and the functional elements and essential characteristics of the judiciary (*How do the Courts operate?*) on the other.[976] The "substantive" or "material" concept of judicial power focuses on the "what", while the approaches focusing on the characteristics and composition of the judiciary focus on the "*how*".[977] As *Payandeh* explains, Article 92 of the Basic Law combines both elements of the debate:

> "A meaningful distinction and separation of the judicial power from the other two powers presupposes, on the one hand, that certain state tasks and institutions must be constitutionally assigned to the third power and are barred from being exercised by the other two powers. (...) At the

971 FCC, judgment of the second senate of 7 and 8 March 1967 – 2 BvR 375, 53/60 and 18/65 – BVerfGE 22, 49 (75 et seq.) – *Verwaltungsstrafverfahren*; FCC, judgment of the second senate of 5 December 2000 – 2 BvF 1/00 – BVerfGE 103, 111 (138) – *Wahlprüfung Hessen*.

972 FCC, judgment of the second senate of 7 and 8 March 1967 – 2 BvR 375, 53/60 and 18/65 – BVerfGE 22, 49 (78) – *Verwaltungsstrafverfahren*.

973 *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 144.

974 Ibid., 137 et seq.

975 Ibid., para. 148.

976 Ibid., para. 148.

977 Ibid., para. 150.

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> same time, there must also be differentiation criteria between the judicial power and the other two state powers in functional terms – in terms of organization, activity, procedure and decision-making effect. For the separation of powers serves not only to divide sovereign power between different organs and officials, but is also justified by the functional characteristics of the respective powers: The judicial power is granted a special status under constitutional law and certain tasks are assigned to it, not only because it differs from the other two powers in the first place, but also and precisely because of certain essential characteristics of the judicial exercise of sovereign power."[978]

In summary, the term "judicial power" as used in Article 92 of the Basic Law refers to two related, but distinct concepts: the tasks assigned to the judiciary and the essential (functional) characteristics for fulfilling these tasks. Both shall briefly be examined below.

II. Characteristics and tasks of domestic courts

1. Characteristics of domestic courts

With *Payandeh*, the core characteristics of judicial power under the German Basic Law can be summarized as "the legally binding and final decision of an individual case by a neutral third party according to the standard of law in a special procedure."[979] This short definition entails five dimensions of judicial power: Characteristics concerning the decision-making body, the subject-matter of the decision, the standard of the decision, the decision-making procedure and the effects of the decision.[980]

a) Decision-making body

A first characteristic of judicial power is that judicial decisions are made by an uninvolved, neutral and impartial decision-making body.[981] The de-

978 Ibid., para. 154.
979 Ibid., para. 189, translated by the author.
980 Ibid., para. 169.
981 With further references, see Ibid., para. 170.

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cision-making body must be independent,[982] it must not be affected by the decision and must have no personal interest in the outcome of the proceedings.[983]

b) Subject-matter of the decision

The subject-matter of judicial activity is often described as dispute-settlement.[984] However, to equate judicial activity with the settlement of disputes is both over- und under-inclusive.[985] It is over-inclusive in the sense that non-judicial forms of dispute settlement, such as political or administrative forms of dispute-settlement are included.[986] It is under-inclusive in that there are many forms of judicial activity which do not concern dispute-settlement, yet clearly fall within the purview of judicial power.[987] These include for example the administration of criminal justice, the issuing of judicial orders in criminal proceedings, or the judicial review of statutes.[988] It thus seems more persuasive to dispense with the element of dispute-settlement as an essential characteristic of the judicial power.[989] Instead, the essential characteristic of the judicial power is the decision of individual cases.[990]

982 Ibid., para. 170.
983 *A. Voßkuhle*, Rechtsschutz gegen den Richter, 1993, 105 et seq.
984 With further references, see *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 170.
985 Critical *C. Möllers*, Gewaltengliederung, 2005, 100; *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 176.
986 *C. Möllers*, Gewaltengliederung, 2005, 100.
987 Ibid., 100; *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 176.
988 *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 176.
989 With further references, see Ibid., para. 177.
990 *C. Möllers*, Gewaltengliederung, 2005, 99–100; *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 177.

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c) Standard of decision-making

Another characteristic of judicial power is that the law forms the only reference point for judicial reasoning.[991] This means that courts must apply legal methods and base their decisions on legal standards.[992] A consequence of this is that courts are prohibited from deciding cases based on expediency or political considerations and from pursuing independently set purposes.[993]

d) Decision-making procedure

The decision-making of courts must follow special procedures which are established in advance and which ensure the fair administration of justice.[994] Typical procedural principles include equality of arms between the parties and the publicity of the proceedings.[995] The goal of these procedures is to ensure the neutral administration of justice.[996] As part of this neutrality, courts are typically prohibited from initiating proceedings on their own accord but rely on an application from the outside.[997]

e) Effects of the decision

A final characteristic of judicial power concerns the effects of judicial decisions. Decisions rendered by a court are binding for the parties of the individual case. This means that the parties are under an obligation to comply with the decision and, at the same time, have an obligation not

991 *C. Möllers*, Gewaltengliederung, 2005, 95; *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 181.
992 *C. Möllers*, Gewaltengliederung, 2005, 95; *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 181.
993 *A. Voßkuhle*, Rechtsschutz gegen den Richter, 1993, 79 et seq.; *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 182.
994 *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 183.
995 Ibid., para. 184.
996 Ibid., para. 183.
997 *C. Möllers*, Gewaltengliederung, 2005, 96–97; *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 184.

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to deviate from it.[998] Additionally, organs of the legislative and executive branches cannot overrule or annul decisions of the judiciary.[999] Even other judicial bodies have very limited powers to amend or overturn judicial decisions.[1000] Importantly, the legal effects of court decisions are not limited to the immediate parties to a case. Instead, they exert authority beyond the individual case.[1001] The legal nature of such "judicial precedents" beyond the individual case is disputed in German legal scholarship.[1002] Some commentators argue that judicial precedents may be binding as a form of customary law,[1003] or constitute a legal source *sui generis*[1004]. A strong current in German legal scholarship ascribes judicial precedents only factual effects and deny them any normative force altogether.[1005] Another approach claims that judicial precedents possess normative force insofar, as they exert authority in legal discourse which creates an obligation to take such precedents into account.[1006]

998 *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 186.

999 FCC, order of the second senate of 28 November 1957 – 2 BvL 11/56 – BVerfGE 7, 183 (188) – *Zeugenvernehmung Verwaltungsverfahren; M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 186; cf. *C. Möllers*, Gewaltengliederung, 2005, 95–96.

1000 *C. Möllers*, Gewaltengliederung, 2005, 186.

1001 Ibid., 188.

1002 For an analysis of the debate, see *M. Payandeh*, Judikative Rechtserzeugung, 2017, 111 et seq.; *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 188.

1003 For a legal historic account of the development of the customary law approach to precedents, see *H. Weller*, Die Bedeutung der Präjudizien im Verständnis der deutschen Rechtswissenschaft, 1979, 101 et seq.; *Röhl* argues that the separation of powers prohibits judges from creating laws, however, judicial precedents may gradually become customary law over time, see *K. F. Röhl*, Allgemeine Rechtslehre, 1995, 571 et seq.

1004 *W. Fikentscher*, Methoden des Rechts, 1977, vol. IV, 313 et seq.; *H. W. Kruse*, Das Richterrecht als Rechtsquelle des innerstaatlichen Rechts, 1971, 6 et seq. *Kruse* defines judicial precedents or *Richterrecht* as "those norms which courts have formed intra legem" (translated by the author), ibid., 10. He bases the power of judges to create such legal norms on abstract legal terms [*unbestimmte Rechtsbegriffe*] which authorize judges to develop legal standards, see ibid., 7.

1005 *J. Esser*, Richterrecht, Gerichtsgebrauch und Gewohnheitsrecht, in: J. Esser/H. Thieme (eds.), Festschrift für Fritz von Hippel zum 70. Geburtstag, 1967, 95 (113–114); *K. Larenz*, Methodenlehre der Rechtswissenschaft, 6. ed. 1991, 429 et seq.

1006 *M. Payandeh*, Judikative Rechtserzeugung, 2017, 134 et seq.; *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, para. 188.

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2. Tasks of domestic courts

As stated above, the term "judicial power" not only refers to the necessary characteristics of a court, it also entails certain tasks reserved for the judiciary.[1007] The prevailing view is that Article 92 of the Basic Law guarantees an effective judiciary that has the necessary resources and organizational structure to perform essential judicial functions.[1008] There is no fixed list of tasks that are necessarily allocated to the judiciary.[1009] This means that the tasks which a judiciary must perform may vary across different legal systems and the determination of such tasks requires an interpretation of the respective constitution and statutes.[1010] Additionally, certain tasks may be part of the catalogue of judicial tasks due to legal tradition or because the intensity of the intervention in individual rights requires an act of the judiciary.[1011] According to *Payandeh*, the tasks which the German constitution allocates exclusively to the judiciary are the final and binding decision of disputes in the area of civil law,[1012] the decision over questions of conviction or acquittal, the determination of guilt and sentencing in criminal proceedings,[1013] the assessment of the legality of acts of public authority[1014] and the preventive legal protection against unlawful legal acts[1015]. Constitutionally permissible but not mandatory tasks are, for example, judicial administration[1016] and the participation in amicable dispute resolution mechanisms[1017].

III. Advisory procedures as a challenge to the judicial function of domestic constitutional courts

Heated discussions on the compatibility of advisory procedures with the judicial function are not limited to the international level. Domestic courts have also had to grapple with the question of whether and – if so – how

1007 *M. Payandeh*, in: W. Kahl/C. Waldhoff/C. Walter (eds.), Bonner Kommentar zum Grundgesetz, June 2020: Art. 92, 208 et seq.
1008 Ibid., para. 210.
1009 Ibid., para. 212.
1010 Cf. Ibid., para. 213.
1011 Ibid., para. 213.
1012 Ibid., para. 239.
1013 Ibid., para. 245.
1014 Ibid., para. 248.
1015 Ibid., para. 249.
1016 Ibid., para. 251.
1017 Ibid., para. 250.

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to reconcile the function of rendering binding judgments with the function of providing non-binding advisory opinions. Examples of two domestic courts which have had to navigate this challenge and which have reached different conclusions are the Supreme Court of the United States of America (SCOTUS) and the Federal Constitutional Court of Germany (FCC).

1. US Supreme Court

The opposition towards judicial advisory opinions in the United States dates back to the country's founding, in particular to an exchange of correspondences between Thomas Jefferson, then Secretary of State under President Washington and Supreme Court of the United States (SCOTUS) Chief Justice Jay.[1018] On 18 July 1793, Jefferson wrote a letter to the SCOTUS asking for advice on a number of legal questions concerning the rights and obligations of the United States under the Franco-American Treaty of 1778 in the context of the recent Franco-British war.[1019] The US President's cabinet followed up with a list of 29 questions which it sent to the SCOTUS.[1020] On 8 August 1793, Chief Justice Jay responded on behalf of the SCOTUS in a consequential and famous letter to US President Washington. The letter reads in relevant part:

> "The lines of separation drawn by the Constitution between the three departments of the government – their being in certain respects checks upon each other – and our being judges of a court in the last resort – are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to; especially as the power given by the Constitution to the President calling on the heads of departments for opinions, seems to have been purposely as well as expressly limited to the executive departments."[1021]

1018 *E. A. Young*, The Supreme Court and the constitutional structure, 2012, 80–81; *C. Burset*, 74 Vanderbilt Law Review 3 (2021), 621 (628 et seq.).

1019 The letter by Thomas Jefferson is printed in *E. A. Young*, The Supreme Court and the constitutional structure, 2012, 80–81.

1020 Ibid., 81.

1021 The response letter by the US SC is printed in Ibid., 82.

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The categorical rejection by Chief Justicy Jay to give advisory opinions has become a precedent which (barring certain exceptions) the SCOTUS Justices have observed to this day.[1022]

Jay's letter contains several constitutional arguments for why the SCOTUS refused to give the requested advisory opinion.[1023] The reference to the "extrajudicial" nature of the requested legal opinion may be read as a reference to Article III Section 2 of the US Constitution which limits the powers of the federal judiciary to adjudicate "cases" and "controversies".[1024] In later judgments, the SCOTUS interpreted this passage restrictively to only mean actual disputes which involve competing parties.[1025] The purpose of Article III Section 2 is to limit the possibility of judicial law-making to the necessary extent and thus create a clear distinction between the judiciary and the legislative branch.[1026] It seems that the SCOTUS in its letter to the US President considered advisory opinions to constitute neither cases, nor controversies in the sense of Article III Section 2.[1027] The letter's reference to the SCOTUS being "a court in the last resort" may be a reference to the principle that federal court judgments must be final and non-reversible by any other branch.[1028] If the SCOTUS were to issue non-binding advisory opinions, the US President could review and even ignore the opinions. This – it could be argued – would effectively make the SCOTUS a subordinate officer of the executive branch which would constitute a breach of the separation of powers.[1029] While the precedent is still being observed as good

1022 *D. P. Currie*, The Constitution in the Supreme Court, 1985, 12.

1023 *Currie* identified six different constitutional arguments, see Ibid., 13; for an overview of the constituional law debate over the correspondence, see *C. Burset*, 74 Vanderbilt Law Review 3 (2021), 621 (628 et seq.).

1024 *D. P. Currie*, The Constitution in the Supreme Court, 1985, 12–13; *L. Yackle*, Advisory Opinions, in: D. S. Tanenhaus (ed.), Encyclopedia of the Supreme Court of the United States, 2008, 34 (34).

1025 *L. Yackle*, Advisory Opinions, in: D. S. Tanenhaus (ed.), Encyclopedia of the Supreme Court of the United States, 2008, 34 (34).

1026 Ibid., 34.

1027 Cf. *D. P. Currie*, The Constitution in the Supreme Court, 1985, 12.

1028 Ibid., 13; Cf. *L. Yackle*, Advisory Opinions, in: D. S. Tanenhaus (ed.), Encyclopedia of the Supreme Court of the United States, 2008, 34 (34).

1029 *D. P. Currie*, The Constitution in the Supreme Court, 1985, 13; Cf. *L. Yackle*, Advisory Opinions, in: D. S. Tanenhaus (ed.), Encyclopedia of the Supreme Court of the United States, 2008, 34 (34); *Burset* argues that the rejection must be seen in a broader context of many different Common Law countries rejecting the institution of judicial advisory proceedings, see *C. Burset*, 74 Vanderbilt Law Review 3 (2021), 621 (630 et seq.).

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law, several SCOTUS Justices have nonetheless given unofficial advice to the federal government over the years.[1030]

If one transferred the terminology used above to describe "judicial power" to the advisory procedure of the SCOTUS, one could say that the SCOTUS mostly focused on the (alleged) incompatibility of an advisory procedure with the characteristics of a court. The letter referred to the necessary finality of court decisions and the independence from the executive, both of which concern the characteristics of the court rather than its tasks.

2. Federal Constitutional Court of Germany

In contrast to the SCOTUS, the FCC was initially expressly given an advisory function by the federal law: Section 97 Federal Constitutional Court Act. Under the FCC's advisory procedure, the Federal President and, by joint submission, the Bundestag, the Bundesrat and the Federal Government could request an advisory opinion from the FCC "on a specific constitutional question".[1031] Like the ICJ, the FCC has had to deal with challenges to its advisory procedure on the grounds that the procedure was alien to its nature ("*wesensfremd*") as a court.[1032] The FCC's second advisory opinion presented an opportunity for the court to address these challenges.

a) The FCC's advisory opinion in the context of German rearmament

The FCC's second advisory opinion is set in the context of one of the most controversial projects of post-war German politics: German rearmament

1030 *D. P. Currie*, The Constitution in the Supreme Court, 1985, 12; *J. R. Gundersen*, Advisory Opinions, in: K. L. Hall (ed.), The Oxford Companion to the Supreme Court of the United States, 2, 2005, 21 (21).

1031 Section 97 Federal Constitutional Court Act old version read:
"(1) The Bundestag, the Bundesrat and the Federal Government may, by joint submission, request the Federal Constitutional Court to issue a legal opinion on a specific constitutional question.
(2) The Federal President has the same right.
(3) The legal opinion is issued by the plenary session of the Federal Constitutional Court." (translated by the author).

1032 Cf. *M. Hilf*, 30 Zeitschrift für Rechtspolitik 7 (1997), 270 (270).

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and the creation of the European Defence Community (EDC).[1033] In 1952, in an effort to combine German rearmament and Western integration, the German Federal Republic pursued plans to create the EDC consisting of Germany, the Benelux countries, France and Italy. The FCC found itself in the midst of this controversy when both the opposition and the government factions in the Bundestag as well as the Federal President initiated a total of three judicial proceedings: On 31 January 1952, the opposition in the German Bundestag, the social-democratic faction, seized the first senate of the FCC with an abstract judicial review (*abstrakte Normenkontrolle*) of a hypothetical federal law which would allow the participation of Germans in an armed force, or obligate Germans to perform military service. Being opposed to German rearmament, the social-democratic faction intended to use the FCC to block any law by which the Bundestag consents to the creation of the EDC.[1034] However, on 30 July 1952 the FCC ruled the request inadmissible, as the abstract judicial review procedure does not apply to hypothetical federal laws or legislative drafts.[1035] With the opposition being intent on resubmitting its application once a law has been passed in the Bundestag, the Chancelor Adenauer feared that the first senate of the FCC, which was mostly made up of left-leaning judges and thus mistrusted by Adenauer, could veto this "key element"[1036] of his agenda.[1037] Chancelor Adenauer and his Minister of Justice Dehler therefore convinced the German Federal President Theodor Heuss to request an advisory opinion from the plenary session.[1038] On 10 June 1952, after the German Federal Government had signed the "Treaty establishing the European Defence Community", alongside several other supplementary treaties, President Heuss requested an advisory opinion by the plenary session of the FCC on the compatibility of these treaties with the German Basic Law. To make matters even more complicated, on 6 December 1952, the governing factions in the Bundestag filed a constitutional complaint between government bodies (*Organstreitverfahren*) before the second senate of the

1033 On the debates surrounding the EDC and the conflict it created between the Adenauer government and the FCC, see *O. W. Lembcke*, Hüter der Verfassung, 2007, 175 et seq.

1034 Ibid., 176.

1035 FCC, judgment of the first senate of 30 July 1952 – 1 BvF 1/52 – BVerfGE 1, 396 – *Deutschlandvertrag*.

1036 *O. W. Lembcke*, Hüter der Verfassung, 2007, 180.

1037 Ibid., 176.

1038 *F. Burmeister*, Gutachten des Bundesverfassungsgerichts zu völkerrechtlichen Verträgen, 1998, 169.

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FCC. The second senate was largely made up of conservative judges at the time and Chancelor Adenauer thus hoped for an outcome in his favor.[1039] The request asked the second senate to declare that the Bundestag minority violated the rights of the Bundestag and the Bundestag majority by denying that the EDC treaty laws can be passed by a simple majority.[1040]

The FCC found itself in a complicated situation: on the one hand it had to prevent its procedures from being instrumentalized for political gains, on the other hand it had to ensure that an advisory opinion rendered by the plenary session would not be ignored by the second senate in a later decision.[1041] On 8 December 1952, the FCC therefore decided to move forward with the advisory procedure before the plenary session. It also ruled that any advisory opinion rendered by the plenary session binds both senates in any future proceedings. Because of this order and after being asked to do so by Chancelor Adenauer,[1042] President Heuss withdrew his request for an advisory opinion on 10 December 1952 stating that "the character of an advisory opinion and its fundamental essence seems to me to be nullified by this decision of the Federal Constitutional Court."[1043] Despite the withdrawal, the FCC decided to continue the proceeding, finding that the request raised questions which were of fundamental importance beyond the case at hand.[1044]

b) Content of the advisory opinion

The FCC addressed the incompatibility of an advisory procedure with the judicial function of a court. In addressing this issue, the FCC distinguished between ordinary courts and constitutional courts. The FCC conceded that, in general, it is the function of a court to decide legal disputes between disputing parties and as such the issuing of advisory opinions

1039 *O. W. Lembcke*, Hüter der Verfassung, 2007, 176.

1040 This request was later ruled inadmissible by the FCC, see FCC, judgment of the second senate of 7 March 1953 – 2 BvE 4/52 – BverfGE 2, 143 – *EVG-Vertrag*.

1041 *F. Burmeister*, Gutachten des Bundesverfassungsgerichts zu völkerrechtlichen Verträgen, 1998, 170.

1042 *O. W. Lembcke*, Hüter der Verfassung, 2007, 187.

1043 FCC, order of the plenary session of 8 December 1952 – 1 PBvV 1/52 – BVerfGE 2, 79 (83) – *Plenargutachten Heuß*.

1044 Ibid., 98.

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is fundamentally alien to the judicial function.[1045] However, a constitutional court, which exclusively adjudicates constitutional law, cannot be judged by the same yardstick as an ordinary civil or criminal court.[1046] The FCC found that this was not only true when the proceeding concerned abstract questions of constitutional law:

> "Even where it [the FCC] decides on violated rights or alleged obligations, it is less in the service of enforcing subjective rights than in the service of the objective preservation of constitutional law."[1047]

Based on the fundamental difference in the function of constitutional courts and ordinary courts, the FCC found that the issuing of advisory opinions is not incompatible with the judicial function of the FCC.[1048] Because it is the FCC's function to uphold the constitutional law, the FCC recognized a duty to issue a requested advisory opinion if the jurisdictional requirements are fulfilled.[1049] The FCC further held that it may not reject a request for an advisory opinion merely because the same matter may arise before the court by means of its contentious procedures.[1050]

The second important question addressed by the FCC concerned the legal nature of FCC advisory opinions. The FCC held in its order of 8 December 1952 that advisory opinions issued by the plenary session bind the two senates in future proceedings. The FCC based its power to develop a rule on the relationship between its advisory opinion procedure and its judgment procedures on the implied powers doctrine: The FCC held that the legislator, when creating the rules governing the procedures of the FCC, could not envision all potential scenarios.[1051] As a consequence, the procedural rules enshrined in the Basic Law and the Federal Constitutional Court Act are necessarily incomplete.[1052] In order to function properly, the

1045 The FCC referred to the decision of the US Supreme Court to reject a request for an advisory opinion made by the US President, see ibid., 86.

1046 Ibid.

1047 Ibid. Translated by the author, the German original reads: "Auch da, wo es über verletzte Rechte oder behauptete Pflichten entscheidet, steht es weniger im Dienste subjektiver Rechtsverfolgung als im Dienste objektiver Bewahrung des Verfassungsrechts."

1048 Ibid., 87. So also *F. Giese*, 78 Archiv des öffentlichen Rechts 3/4 (1952/1953), 389 (394–395).

1049 FCC, order of the plenary session of 8 December 1952 – 1 PBvV 1/52 – BVerfGE 2, 79 (87) – *Plenargutachten Heuß*.

1050 Ibid.

1051 Ibid., 84.

1052 Ibid.

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FCC must fill these gaps.[1053] One of these gaps concerned the relationship between the FCC's advisory procedure and its contentious procedures.

In assessing the legal nature of its advisory opinions, the FCC distinguished between the "external" and "internal" binding force of its advisory opinions. Externally, FCC advisory opinions are not binding on their addressees and they lack enforceability.[1054] Internally, however, the FCC held that they bind the two senates of the FCC.[1055] The FCC based its finding *inter alia* on the opinions' authority. An FCC advisory opinion "is not a mere summary of the opinions of the individual judges".[1056] Instead, such an opinion "emanates from the court as such and has its authority".[1057] While advisory opinions lack binding force, their "material content" is the same as that of FCC judgments.[1058] Consequently, no organ of the state (including the FCC itself) can afford to act in contradiction to an advisory opinion of the FCC.[1059] This "internal" binding force can become "external"

1053 Ibid.

1054 Only "decisions" in accordance with Section 31 para. 1 Federal Constitutional Court Act have external binding force, ibid., 88.

1055 Ibid., 91.

1056 Ibid., 87, translation by the author.

1057 Ibid., translation by the author.

1058 Ibid., 89. The FCC derived the "internal" binding force of its advisory opinion also from a teleological interpretation of Section 16 para. 1 Act on the Federal Constitutional Court, according to which the plenary session can decide over divergences in interpretation between the two senates and acts as a "tie-breaker" when a senate wishes to deviate from the legal opinion contained in a decision of the other senate, see ibid., 90. Approving of the FCC's argumentation, see *F. Giese*, 78 Archiv des öffentlichen Rechts 3/4 (1952/1953), 389 (397–398). See however the dissenting opinion by Judge Willi Geiger in which he criticizes the teleological interpretation and argues that Section 16 Act on the Federal Constitutional Court only applies to resolve controversies that have already arisen between the two senates and not to prevent such controversies, see *W. Geiger*, Abweichende Meinungen zu Entscheidungen des Bundesverfassungsgerichts, 1989, 9–10. On the dissenting opinion of Judge Geiger, see *F. Burmeister*, Gutachten des Bundesverfassungsgerichts zu völkerrechtlichen Verträgen, 1998, 173.

1059 FCC, order of the plenary session of 8 December 1952 – 1 PBvV 1/52 – BVerfGE 2, 79 (89) – *Plenargutachten Heuß*. See, however, Judge Willi Geiger who argued in his dissenting opinion that advisory opinions – by definition – can only persuade and not bind the court or any other addressee. To ascribe any more legal effects to advisory opinions would change their legal nature from an opinion to a judgment, see *W. Geiger*, Abweichende Meinungen zu Entscheidungen des Bundesverfassungsgerichts, 1989, 10–11.

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binding force, if an applicant initiates a judgment procedure on a question already dealt with by the advisory procedure.[1060]

c) Removal of the FCC advisory procedure

After the FCC issued its second advisory opinion in December of 1954, the relationship between the FCC and the federal government came under severe pressure, with government officials calling the opinion "a legal *nullum*".[1061] The FCC received no more requests for advisory opinions,[1062] and a larger debate arose concerning the need for reforming the FCC.[1063] Important commentators called for the FCC advisory procedure to be abandoned, arguing that such a procedure was alien to the judicial function and lead to bias among the judges which could create "problematic prejudicial ties".[1064] Even the judges of the FCC eventually joined the call to discontinue its advisory procedure, arguing that the advisory procedure was "a task alien to the nature of the constitutional court".[1065] The FCC also feared that the non-binding nature of its advisory opinions could prove detrimental to the reputation of the court, if state organs or other

1060 This point was raised by the FCC as well, see FCC, order of the plenary session of 8 December 1952 – 1 PBvV 1/52 – BVerfGE 2, 79 (91) – *Plenargutachten Heuß*. Based on this, *Burmeister* called the distinction between "internal" and "external" binding force "bloße Makulatur" (i.e., mere paper waste), see *F. Burmeister*, Gutachten des Bundesverfassungsgerichts zu völkerrechtlichen Verträgen, 1998, 174.

1061 See on this Ibid., 172–175; *O. W. Lembcke*, Hüter der Verfassung, 2007, 186–192.

1062 The FCC issued its last advisory opinion on 16 June 1954, however, the request had been made prior to the publication of the second advisory opinion, see FCC, order of the plenary session of 16 June 1954 – 1 PBvV 2/52 – BVerfGE 3, 407 – *Baugutachten*.

1063 Discussions focused mainly on the division of jurisdiction between the two senates, the constitutional complaint procedure (Verfassungsbeschwerde) and the election of judges, however, the advisory procedure was also subject of the broader discussion, see *F. Burmeister*, Gutachten des Bundesverfassungsgerichts zu völkerrechtlichen Verträgen, 1998, 175.

1064 *R. Thoma*, 6 (new series) Jahrbuch des öffentlichen Rechts (1957), 161 (185).

1065 Unpublished memorandum of the FCC to the Federal Ministry of Justice, cited in *W. Geiger*, Zur Reform des Bundesverfassungsgesetzes, in: T. Maunz (ed.), Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung, 1956, 211 (216), translated by the author.

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courts decided to ignore them.[1066] The advisory opinion procedure was thus eventually abolished without replacement in 1956.[1067]

d) Relevance for the ICJ's advisory procedure

The FCC's advisory opinion raises several interesting aspects worth considering when analyzing the ICJ's advisory function. The FCC initially rejected claims about the incompatibility of its advisory procedure with its judicial function by emphasizing the different task which a constitutional court (like the FCC) and ordinary civil and criminal courts perform. The FCC held that it was not the FCC's task to settle bilateral disputes, but to answer questions of constitutional law.[1068] As will be elaborated in more detail, the ICJ could be said to combine the functions of ordinary courts and constitutional courts. Its functions include the settlement of bilateral disputes (see Art. 38 para. 1 ICJ Statute), but also the stabilization of normative expectations and the development of international law.[1069] The FCC also focused on the "authority" of its pronouncements, thus a question of the characteristics of the court. The FCC based the "internal" binding force of its advisory opinion *inter alia* on the institutional authority of the court, not the reception or acceptance of the advisory opinion itself.[1070] FCC advisory opinions derive their authority from the fact that they are issued by the full court in plenary session and as such represent not the individual opinions of the judges involved, but that of the entire court. As will be elaborated below, this content-independent "institutional authority" is also of critical importance for ascribing authority to ICJ advisory opinions. They, just like FCC advisory opinions, are expressly given by the full court and

1066 Ibid.

1067 Art. 1 No. 19 Act amending the Act on the Federal Constitutional Court of 21 July 1956 (*Gesetz zur Änderung des Gesetzes über das Bundesverfassungsgericht*), Federal Law Gazette 1956, Part I, p. 662. Various state constitutional courts also had advisory opinion procedures. However, these were gradually abolished over the following decades, see on this *F. Burmeister*, Gutachten des Bundesverfassungsgerichts zu völkerrechtlichen Verträgen, 1998, 177, footnote 90.

1068 This is why the FCC famously held that it is not the highest court of appeal ("*Superrevisionsgericht*"), see FCC, order of the first senate of 14 March 1967 – 1 BvR 334/61 – BverfGE 21, 209 (216) – *Auslegung einfachen Rechts*; FCC, order of the first senate of 20 December 1978 – 1 BvR 385/77 – BVerfGE 53, 30 (53) – *Mülheim-Kärlich*.

1069 See *infra* in this Chapter Section B.II.

1070 So also *O. W. Lembcke*, Hüter der Verfassung, 2007, 186.

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likewise represent the opinion of the Court. It is the particular authority of ICJ advisory opinions which raises the challenges of the Eastern Carelia doctrine to begin with.

IV. Interim conclusions

The discussions about the "judicial power" in Article 92 Basic Law have shown that one must carefully distinguish between two related, yet separate concepts: the characteristics of courts (i.e., which qualities do courts possess and how do courts operate?) and the tasks of courts (i.e., what is it that (only) courts may do?). Clearly, the two questions influence each other. Courts possess certain characteristics in order to fulfil the tasks which they have been allocated. Characteristics and tasks can thus be understood as two sides of the same coin. Nevertheless, one must be careful to distinguish between the two questions so as not to risk conceptual confusion. The distinction between characteristics and tasks may also help to understand the concept of "judicial function" used by the ICJ. As will be shown below, different commentators have understood the term "judicial function" along these two dimensions: characteristics which the ICJ as a court of justice must possess and must adhere to (in particular procedural requirements) and certain tasks which the ICJ must perform and must not undermine (in particular its dispute-settlement function).

B. The ICJ's judicial function

The way in which legal scholarship has defined the term "judicial function" is similar to the two dimensions of the term "judicial power" examined above. The term "judicial function" was similarly understood in two ways: first, to denote certain judicial characteristics which an IC as a court of justice must possess and adhere to (*infra* I.), and secondly, to describe the tasks assigned to an IC (*infra* II.).

Keith and *Amerasinghe* focus on the characteristics of the ICJ as a court of justice.[1071] *Keith* defined the Court's judicial character from a procedu-

1071 *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 153 et seq.; *C. F. Amerasinghe*, Reflections on the Judicial Function in International Law, in: T. M. Ndiaye/R. Wolfrum/C. Kojima (eds.), Law of the sea, environmental law, and settlement of disputes, 2007, 119 (122 et seq.).

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ral perspective.[1072] In order to safeguard the Court's judicial character, the Court must act in accordance with certain judicial procedures. These procedures apply equally to the Court's contentious and advisory opinion procedure.[1073] *Amerasinghe* equated the Court's judicial function with certain necessary characteristics of a court of justice like impartiality and independence.[1074]

Other writers like *Tomuschat*,[1075] *Wittich*,[1076] *Ebobrah*,[1077] as well as *von Bogdandy* and *Venzke*[1078] focus on the tasks of the judicial organ to define that organ's judicial function.

Finally, *Hernández* examines both the characteristics of the ICJ as a court of justice and its tasks when referring to the Court's judicial function.[1079]

I. Defining "judicial function" as judicial characteristics

Keith approached the Court's judicial character by reference to the rules applicable to the Court's contentious procedure.[1080] According to *Keith*, to act judicially in advisory proceedings means that the ICJ must substantially follow the same procedures which the ICJ Statute has established for its contentious procedure.[1081] A statement by the PCIJ in its *Eastern Carelia* opinion can be read in this way:

1072 *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 153 et seq.

1073 Ibid., 153 et seq.

1074 *C. F. Amerasinghe*, Reflections on the Judicial Function in International Law, in: T. M. Ndiaye/R. Wolfrum/C. Kojima (eds.), Law of the sea, environmental law, and settlement of disputes, 2007, 119 (122 et seq.).

1075 Cf. *C. Tomuschat*, International Courts and Tribunals (last updated 2019), in: A. Peters/R. Wolfrum (eds.), The Max Planck Encyclopedia of Public International Law, 2008 (35).

1076 *S. Wittich*, The Judicial Functions of the International Court of Justice, in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), International law between universalism and fragmentation, 2008, 981 (985–986)

1077 *S. T. Ebobrah*, International Human Rights Courts, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013, 225.

1078 *A. v. Bogdandy/I. Venzke*, 26 LJIL 1 (2013), 49 (52).

1079 *G. I. Hernández*, The International Court of Justice and the judicial function, 2014, 41 et seq.

1080 *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 153 et seq.

1081 Ibid., 154–155.

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> "The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."[1082]

By comparing the Court's advisory practice with its contentious practice, *Keith* highlights three core characteristics of any judicial procedure: publicity of the proceedings, equality of the parties, and sufficient access to information by the Court.[1083] To ensure that the ICJ's advisory opinion procedure conforms to these characteristics, the Court has progressively assimilated its advisory opinion procedure with its contentious procedure.[1084]

Such an assimilation between the Court's contentious and advisory opinion procedure is also envisioned by Article 68 ICJ Statute which stipulates:

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

However, as *Keith* points out, the assimilation of the two procedure predates the creation of Article 68 which is why Article 68 recognized rather than caused the practice of the Court.[1085] The Court has assimilated the two procedures in relation to all three characteristics identified by *Keith* (publicity, equality of the parties, and access to information). The Court first passed rules on the publicity of the advisory proceedings in 1926 when it amended its Rules of the Court which were later incorporated into the PCIJ Statute.[1086] The position of interested states which are affected by an underlying dispute on which the Court is asked to give an advisory opinion was also assimilated to the position of States Parties to contentious proceedings.[1087] States are informed by the Registrar of the Court of the initiation of advisory proceedings, they can under certain circumstances appoint a judge *ad hoc* and can participate in the proceedings by submitting written and oral statements, which the Court has to take into account

1082 *Status of Eastern Carelia*, Advisory Opinion, PCIJ Series B 1923, 7 (29).
1083 *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 155 et seq.
1084 Ibid., 157, 181.
1085 With further references, see Ibid., 191.
1086 Ibid., 156–157.
1087 Ibid., 157–185.

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before issuing the advisory opinion.[1088] *Keith* identifies certain remaining differences between the two procedures including the number of rounds of written and oral statements.[1089] Whereas in contentious proceedings states usually present several rounds of memorials and counter-memorials and address the Court on several occasions during oral proceedings, in advisory proceedings states usually submit one written statement, sometimes followed by a written comment and have one occasion to present oral arguments.[1090]

The Court has not yet assimilated how it deals with preliminary objections to its jurisdiction. In contentious proceedings, the Court holds separate proceedings in which it decides upon preliminary objections, thereby protecting the right of the parties to the dispute not to plead on the merits of the case until the Court has established its jurisdiction.[1091] In advisory proceedings, the Court decides upon preliminary matters and the merits of a case jointly. In situations when advisory proceedings concern actual disputes between states, a similar approach to contentious proceedings may be appropriate. Some states have tried to assert their right not to plead on the merits until the jurisdiction of the Court is established by limiting their written statement to matters of jurisdiction and admissibility.[1092] However, even where particularly affected states did not make submissions on the

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1088 Ibid., 157–185; *M. Giles Samson/D. Guilfoyle*, The Permanent Court of International Justice and the "Invention" of International Advisory Jurisdiction, in: C. J. Tams/M. Fitzmaurice (eds.), Legacies of the Permanent Court of International Justice, 2013, 41 (50–51).

1089 *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 181.

1090 Ibid., 181. See, however, Art. 66 para. 4 ICJ Statute which provides for a second round of written submissions in which states and organizations may comment on previous submissions. The Court often fixes the time-limits for the first and second round of written submissions within the same order, see for example *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, Order of 17 October 2008, ICJ Reports 2008, p. 409 (410); *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Order of 29 April 2010, ICJ Reports 2010, p. 298 (301); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Order of 14 July 2017, ICJ Reports 2017, p. 282 (283).

1091 Ibid., 193.

1092 See for example ICJ Pleadings, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Written Statement of Israel, para. 1.2. However, Israel has prefaced its arguments on the jurisdiction and admissibility of the request for an advisory opinion with extensive factual information on which the

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merits of the advisory proceeding, the Court always decided the substantive questions. These attempts therefore merely meant that those states forgoe on their opportunity to present their written statements on the merits.

As *Keith* pointed out, the Court's practice shows that it has "constantly and consistently assimilated nearly every facet of its advisory procedure to its contentious procedure."[1093] When critics invoke the potential incompatibility of the Court's advisory activity with its judicial function, their criticism is thus likely not directed at the way the advisory procedure is structured. It is a more fundamental critique which concerns the relationship between the Court's advisory procedure and its contentious procedure. The critique may thus relate to the second meaning of the term judicial function which refers to the different tasks the Court performs by means of the two procedures.

II. Defining "judicial function" as judicial tasks

Writers like *Tomuschat*[1094], *Wittich*[1095], *Ebobrah*[1096], *von Bogdandy* and *Venzke*[1097] define the concept of judicial function by reference to the tasks which ICs perform or are designed to perform.

Court relied in its deliberation of the merits of the case. In 2023, Israel similarly refused to make a statement on the merits in the *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* case. Instead, Israel gave a short written statement in which it criticized the framing of the submitted question and emphasized that it did not give its consent to the proceedings, see ICJ Pleadings, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Written Statement of Israel. Nevertheless, Israel provided the Court with 170 pages of material on the admissibility of the request and on the merits of the case.

1093 *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 195.

1094 Cf. *C. Tomuschat*, International Courts and Tribunals (last updated 2019), in: A. Peters/R. Wolfrum (eds.), The Max Planck Encyclopedia of Public International Law, 2008 (35).

1095 *S. Wittich*, The Judicial Functions of the International Court of Justice, in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), International law between universalism and fragmentation, 2008, 981 (985–986).

1096 *S. T. Ebobrah*, International Human Rights Courts, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013, 225.

1097 *A. v. Bogdandy/I. Venzke*, 26 LJIL 1 (2013), 49 (52).

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Wittich identifies three different meanings of the term judicial function:[1098] First, the professional or official position of a person, i.e. the capacity in which the person acts. Secondly, the performance of a particular task or activity for which an institution is particularly suited, used, or created. Thirdly, a series of interrelated actions that contribute to a larger action and thus serve a higher purpose. Function thus encompasses the powers, competences and specific tasks of the judiciary as distinguished from the executive and the legislature.[1099] In particular, the first and second definition indicate a consideration that not only takes into account the *ex ante* attribution of tasks, for example in the Court's constituent instrument, but also the actual practice of the court.

Approaches like the ones by *Ebobrah*[1100] as well as *von Bogdandy* and *Venzke*[1101] similarly take into consideration the tasks the respective court actually performs. According to these approaches, not only those tasks that are defined in advance are relevant when considering the functions of a judicial organ, but also the tasks actually performed by the court as well as other contributions of the respective institution.[1102] Consequently, a court may fulfil a number of different functions.[1103]

In her dissenting opinion to the *Chagos* advisory opinion, Judge *Donoghue* applied a formalistic approach to the functions of the ICJ and distinguished between two functions: an advisory function and a contentious function.[1104] However, the Court majority has not limited the Court's judicial function to its contentious function. The Court has pointed out on several occasions that it exercises a uniform judicial function regardless of the type of procedure. For example, in its *Northern Cameroons* decision the ICJ held:

1098 *Wittich* derives his definition from the use of the term "function" in the Vienna Convention on Diplomatic Relations (VCDR), see *S. Wittich*, The Judicial Functions of the International Court of Justice, in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), International law between universalism and fragmentation, 2008, 981 (985–986).

1099 Ibid., 986.

1100 *S. T. Ebobrah*, International Human Rights Courts, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013, 225.

1101 *A. v. Bogdandy/I. Venzke*, 26 LJIL 1 (2013), 49 (52).

1102 Ibid., 52.

1103 Ibid., 52.

1104 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Dissenting Opinion Donoghue, ICJ Reports 2019, 95 (266, para. 23).

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> "[B]oth the Permanent Court of International Justice and this Court have emphasized the fact that the Court's authority to give advisory opinions must be exercised as a judicial function. [...] in both situations [i.e., advisory opinion and contentious procedures], the Court is exercising a judicial function."[1105]

When the ICJ uses the term "judicial function", it thus refers to more than its contentious function. Rather, it refers to the entirety of its "judicial tasks" which it fulfills through both procedures. By exercising its powers in connection with its advisory procedure and its contentious procedure, the Court performs various different tasks. These include settling disputes, stabilizing normative expectations, developing the law, and controlling the exercise of powers of other actors.[1106]

1. Primary judicial task: Dispute settlement

The settlement of international legal disputes is one of the principal functions of the ICJ.[1107] It is the only function expressly enshrined in the ICJ Statute. Article 38 para. 1 ICJ Statute states that the Court's "function is to decide in accordance with international law such disputes as are submitted to it". Article 33 UNC names the judicial settlement of disputes as one means of settling a "dispute, the continuance of which is likely to endanger the maintenance of international peace and security". Article 33 UNC emphasizes, judicial dispute settlement in the UN system is functionally linked to the maintenance of international peace and security. This connection il-

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1105 *Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections)*, Judgment, ICJ Reports 1963, 15 (30); see also *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports 1948, 57 (61); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, Dissenting Opinion Gros, ICJ Reports 1971, 16 (331, para. 17).

1106 For an overview of the different functions, see *J. E. Alvarez*, What are International Judges for?: The Main Functions of International Adjudication, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013, 158.

1107 *LaGrand (Germany v. United States of America)*, Provisional Measures, Order of 3 March 1999, ICJ Reports 1999, p. 9 (15, para. 25); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43 (90, para. 116).

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lustrates the special importance of the ICJ's dispute settlement function,[1108] which the Court's predecessor, the PCIJ, has even described as the "true function of the Court".[1109]

While Article 33 UNC places judicial dispute settlement alongside other methods of dispute resolution, Article 36 para. 3 UNC states that "legal disputes should as a general rule be referred by the parties to the International Court of Justice".

The ICJ's dispute settlement function rests on two supporting functions, the Court's law-finding function and its fact-finding function.[1110] Since these supporting functions are necessary for the Court to exercise its primary, expressly conferred dispute settlement function, the supporting functions can be understood as an expression of the implied powers doctrine.

a) First supporting task: law-finding task

According to Article 38 para. 1 ICJ Statute, the Court's function is to settle disputes "in accordance with international law". To apply international law, the ICJ must first identify the applicable law. The ICJ emphasized its law-finding function in the *Northern Cameroons* case by stating that its function was "to state the law".[1111] The law-finding function is of decisive importance, particularly in the area of customary international law, but also regarding the clarification of oftentimes vague treaty provisions.[1112]

However, the ICJ also found that finding the law is not an end in itself. The overall task remains the settlement of the inter-state disputes. In the *Northern Cameroons* case the ICJ thus found that its decision "must have some practical consequence in the sense that it can affect existing legal

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1108 So also *S. Wittich*, The Judicial Functions of the International Court of Justice, in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), International law between universalism and fragmentation, 2008, 981 (990).

1109 Case Concerning the Payment of Various Serbian Loans Issued in France, Judgment, PCIJ Series A, 1929, 19.

1110 *J. E. Alvarez*, What are International Judges for?: The Main Functions of International Adjudication, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013, 158 (166 et seq.).

1111 *Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections)*, Judgment, ICJ Reports 1963, 15 (33); see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226 (237, para. 18).

1112 *S. Wittich*, The Judicial Functions of the International Court of Justice, in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), International law between universalism and fragmentation, 2008, 981 (991–992).

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rights or obligations of the parties, thus removing uncertainty from their legal relations."[1113]

b) Second supporting task: Fact-finding task

The process of judicial decision making depends on the establishment of facts to which the Court then applies the law. The Court's Statute, Rules, and Practice Directions contain different modes of gathering factual evidence to establish the facts of a case.

First and foremost, the Court relies on the participating states to provide relevant information. In contentious proceedings, the parties to the proceedings are responsible to produce the necessary factual evidence.[1114] When contentious proceedings are commenced, the ICJ makes an order (Article 48 ICJ Statute) to fix the time limit within which the parties may produce documents in support of their submissions (Article 43 para. 3 ICJ Statute). Beyond this time limit, the Court may refuse to accept any further oral or written evidence unless all parties consent to the introduction of the evidence (Article 52 ICJ Statute). After written proceedings are closed, the Court will only authorize the production of new documents by a party if the other parties consent or if the Court considers the production necessary and justified (Article 56 Rules of the Court, Practice Directions IX). The parties may not only produce documents to support their claims, they may also call upon experts and witnesses (Article 63 Rules of the Court) which are examined by the parties and questioned by the Court (Article 65 Rules of the Court). Apart from the parties to the dispute, other states that have a legal interest which may be affected by the decision in the case (Article 62 Statute) and, if the case concerns the construction of a multilateral treaty, the States Parties to that treaty (Article 63 ICJ Statute), may also produce evidence before the Court. The ICJ may also on its own accord entrust an individual, body, bureau, commission, or organization to make

1113 *Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections)*, Judgment, ICJ Reports 1963, 15 (34), emphasis added. Because its decision could not bring about such practical effects, the Court could not decide the merits of the case, see Ibid. (38).

1114 Critical of the ICJ's dependence on the parties to the dispute to provide the relevant facts and the Court's tendency to circumvent this problem by finding that the particular facts are not decisive for a decision on the legal questions at hand, see *T. M. Franck*, Fact-Finding in the I.C.J., in: R. B. Lillich (ed.), Fact-finding before international tribunals, 1992, 21 (31).

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an inquiry or produce an expert opinion on a specific subject (Article 50 ICJ Statute, Article 67 Rules of the Court)[1115] as well as make site visits to obtain evidence (Article 66 Rules of the Court).[1116]

In advisory opinion proceedings, states may similarly participate by submitting written and oral statements. To this effect, the Registrar will notify all states entitled to appear before the Court[1117] of the request for an advisory opinion (Article 66 para. 1 ICJ Statute). The Registrar further notifies all such states and international organizations which the Court considers to be likely to furnish information on the question that the ICJ received. They may submit written and oral statements on the matter within a certain time limit fixed by the Court (Article 66 para. 2 ICJ Statute).[1118] International non-governmental organizations may also submit written statements. However, such statements do not become part of the case file but are treated like publications in the public domain (Practice Direction XII).

There is, however, a crucial difference between the ICJ's capacity to ascertain the facts of a case in contentious proceedings and in advisory proceedings. The difference boils down to the burden of proof.[1119] For contentious proceedings, the ICJ has held that "it is the duty of the party

1115 On the distinction between inquiry and expert opinion, see *C. J. Tams/J. Devaney*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Art. 50, para. 4.

1116 The Court made use of its power to order site visits only once thus far: In the *Gabčíkovo-Nagymaros* case the Members of the Court visited a number of locations along the Danube river and received technical explanations on the project, see *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1998, 7 (14, para. 10). On the topic of site visits by the ICJ, see *S. Rosenne*, Visit to the Site by the International Court, in: E. Yakpo/T. Boumedra (eds.), Liber amicorum Judge Mohammed Bedjaoui, 1999, 461.

1117 These include all UN Member States and states falling under Article 35 para. 2 UNC.

1118 Often these two notifications occur at the same time, see *A. Paulus*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Art. 66, para. 20.

1119 Emphasizing this difference between contentious and advisory proceedings, see *C. Greenwood*, Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice, in: J. Grote Stoutenburg/G. Gaja (eds.), Enhancing the rule of law through the International Court of Justice, 2014, 63 (68–70); see also *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, Separate Opinion Nolte, Publication pending in ICJ Reports 2024, 1 (2, para. 5).

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which assert certain facts to establish the existence of such facts."[1120] This principle has been consistently upheld by the Court[1121] and applies to the assertions of facts both by the Applicant and the Respondent state. If a party asserts a fact but fails to prove it, the ICJ can render a judgment based on the burden of proof.

Advisory proceedings have no parties and consequently the Court cannot rely on the burden of proof to facilitate the determination of the facts of a case.[1122] Nevertheless, the ICJ must ensure that it has in each case sufficient information to issue an advisory opinion lest the Court acts in contradiction to its judicial function.[1123] Considering that the Court cannot recur on the burden of proof in advisory proceedings, in theory the Court should be much more likely to render a *non liquet* decision in advisory proceedings than in contentious proceedings. However, as the Court held in its *Wall* opinion, the Court does not rely exclusively on the interested states for information.[1124] Instead, the Court may also rely on reports by international organizations (oftentimes the UNSG provides the Court with detailed studies of the submitted questions) and special rapporteurs, or the submissions of other states.[1125] The reason why the ICJ may have a more liberal recourse to other sources of information to establish the facts of a case lies in the different function of advisory proceedings in contrast to contentious proceedings.[1126] Advisory proceedings seek not to settle international disputes, but to provide legal guidance to the requesting UN organ

1120 Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, ICJ Reports 2010, 14 (71, para. 162).

1121 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, 392 (437, para. 101); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, 43 (128, para. 204); Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore), Judgment, ICJ Reports 2008, 12 (31, para. 45); Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, ICJ Reports 2009, 61 (86, para. 68).

1122 *C. Greenwood*, Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice, in: J. Grote Stoutenburg/G. Gaja (eds.), Enhancing the rule of law through the International Court of Justice, 2014, 63 (69).

1123 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (161, para. 56).

1124 Ibid. (161-162, para. 57).

1125 Ibid.

1126 *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, Separate Opinion Nolte, Publication pending in ICJ Reports 2024, 1 (1-2, paras. 4-5).

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on the legal questions submitted to the Court. As such, the Court needs to establish the facts of the case only to the extent as is necessary for answering the submitted question. As Judge *Nolte* stated in his Separate Opinion in the recent *Policies and Practices of Israel in the Occupied Palestinian Territories* case:

> "In contentious proceedings, the Court "decide[s] ... disputes" in a binding and final manner. These proceedings are retrospective: their contribution to the peaceful settlement of disputes consists in ending a dispute by making a binding determination that is endowed with legal certainty and finality, the *res judicata* effect. In contrast, advisory proceedings are consultative and prospective: the Court gives an advisory opinion on a legal question to provide guidance for the requesting organ's future conduct. The conclusions of the Court in advisory opinions are not the end but the beginning of a process that seeks to establish and maintain peace through law. (...) The particular purpose of advisory proceedings explains why the factual assessment in this Advisory Opinion has a different focus and depth than factual determinations made in contentious proceedings. This does not mean that the standard of proof in advisory proceedings is lower. However, it is different from that in contentious proceedings, where the burden of adducing evidence lies with the parties. In advisory proceedings the Court will examine the facts only to the extent necessary for its response to the legal question posed, and it will draw legal conclusions only to the extent permitted by those facts."[1127]

The difference in function between advisory proceedings (consultative and prospective) and contentious proceedings (determinative and retrospective) also means that the Court's factual findings in advisory proceedings cannot be considered to be as conclusive as factual assessments in contentious proceedings. As Judge *Nolte* stated:

> "In cases involving very broad requests, such as the present one, the function of advisory opinions to provide guidance to the requesting organ justifies a particularly broad and merely illustrative approach to the factual assessment. However, this broad focus, together with the principle of consent to jurisdiction, precludes such assessment from having the conclusive effect attributed to factual assessments for the purpose of determining State responsibility in contentious proceedings."[1128]

1127 Ibid. (2, para. 5).
1128 Ibid.

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Judge *Nolte* limits his claim about the non-conclusiveness of factual assessments in advisory proceedings to "cases involving very broad requests". However, the fact that the Court cannot invoke the burden of proof seems in itself to justify the claim that the Court's factual assessments in advisory proceedings are less conclusive than in contentious proceedings.

2. Other judicial tasks

a) Stabilizing normative expectations

The ICJ fulfils another (closely related) function by clarifying the factual and legal parameters of a case: the stabilization of normative expectations.[1129] When states bring their international dispute before the ICJ, this can be seen as an expression of the parties' dissent regarding their mutually applicable obligations and rights. At least one party questions the validity or applicability of a certain obligation under international law or the existence of exceptions in a specific case. Because of this expression of doubt, the respective legal obligation may dilute. Does the state claim that the obligation does not apply because its legal or factual conditions are not fulfilled? Or because the state can invoke a ground for justification? Or does the obligation simply have a different legal consequence than the opposing party claims? It is the ICJ's task to remove this legal uncertainty.[1130] By clarifying the legal and factual situation and reducing the uncertainty between the parties, the ICJ puts the parties in a position to form a strengthened expectation about their bilaterally applicable legal rights and obligations.[1131] Overall, the ICJ thus achieves a stabilization of the normative expectations

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1129 On this, see *S. Wittich*, The Judicial Functions of the International Court of Justice, in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), International law between universalism and fragmentation, 2008, 981 (992–993); *A. v. Bogdandy/I. Venzke*, 26 LJIL 1 (2013), 49 (54–55).

1130 The ICJ describes the reduction of legal uncertainty as an essential element of its judicial function, see *Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections)*, Judgment, ICJ Reports 1963, 15 (34); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43 (101, para. 139).

1131 *S. Wittich*, The Judicial Functions of the International Court of Justice, in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), International law between universalism and fragmentation, 2008, 981 (992).

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of the parties.[1132] The stabilizing effect even extends beyond the parties of a case.[1133] Third states can derive from a decision of the ICJ the permissible conduct in a given circumstance.[1134] They know that they would likely receive a similar judgment by the ICJ (or by another IC) if they act in an identical fashion.[1135] The judgments of the ICJ may also influence other ICs. While there is no hierarchy between courts, the ICJ enjoys a considerable authority which is why other ICs need to consider the ICJ's dicta lest they risk losing authority themselves.[1136]

In the *Application for Review* advisory opinion, the ICJ indicated that it fulfils its function of stabilizing normative expectations not only in contentious proceedings but also in advisory proceedings. The Court emphasized the importance of its advisory opinions for guiding the activities of international organizations such as the UN.[1137] By clarifying the legal relations between the UNGA and a subsidiary body of the UNGA, the ICJ assisted the UN in placing its activities on a secure legal footing.[1138] Advisory opinions of the Court can be a particularly helpful tool to fill gaps in the constituent instruments of international organizations.[1139]

b) Law-making

The Court's law-making function counts among its more controversial, but nonetheless essential functions.[1140] While the dispute settlement function

1132 Ibid., 992.

1133 *S. D. Murphy*, International Judicial Bodies for Resolving Disputes Between States, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013, 182 (197).

1134 Ibid., 197.

1135 Ibid., 197.

1136 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 3, Ch. 27, § 377A.

1137 *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1982, 325 (347, para. 45).

1138 Ibid.

1139 Cf. *S. D. Murphy*, International Judicial Bodies for Resolving Disputes Between States, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013, 182 (199–200).

1140 On the law-making functions of ICs, see *M. Cappelletti*, 8 MULR 1 (1981), 15; *C. G. Weeramantry*, 10 LJIL 2 (1997), 309; *A. E. Boyle/C. Chinkin*, The making of international law, 2007, 263 et seq.; *S. Wittich*, The Judicial Functions of the International Court of Justice, in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), International law between universalism and fragmentation, 2008, 981 (994 et seq.);

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is expressly conferred upon the ICJ by Article 38 para. 1 ICJ Statute, the law-making function lacks a clear legal foundations. What is more, the states signatories to the Court's constituent instrument did not intend to confer upon the ICJ a legislative function.[1141] It is thus not surprising that the ICJ explicitly denied that it even had such a law-making function in its *Nuclear Weapons* advisory opinion. The ICJ found:

> "Finally, it has been contended by some States that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity. It is clear that the Court cannot legislate […] [The Court] states the existing law and does not legislate."[1142]

Nevertheless, the ICJ implicitly acknowledged its law-making function immediately afterwards:

> "This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend."[1143]

Part of the legal literature interpreted the passage "note its general trend" as an implicit recognition of the function of the ICJ to further develop the law.[1144] Individual judges of the ICJ were much more explicit. Judge *Alvarez*, for example, stated in the 1950 *Admissions* case:

> "the Court was entrusted with a mission which was not conferred – at any rate not in express terms – on the Permanent Court of International Justice, namely the *development* and consequently the *creation* of law. […] The common view that international law must be created solely by States is, therefore, not valid to-day – nor indeed has it ever been. In truth, alongside of conventional law there is customary law, and above

A. v. Bogdandy/I. Venzke, 26 LJIL 1 (2013), 49 (55 et seq.); *A. v. Bogdandy/I. Venzke*, In wessen Namen?, 2nd ed. 2014, 25 et seq.; *Christian J Tams*, The ICJ as a 'Law-Formative Agency': Summary and Synthesis, in: C. J. Tams/J. Sloan (eds.), The development of international law by the International Court of Justice, 2014.

1141 *J. E. Alvarez*, What are International Judges for?: The Main Functions of International Adjudication, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013, 158 (159–160).

1142 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226 (237, para. 18).

1143 Ibid.

1144 *S. Wittich*, The Judicial Functions of the International Court of Justice, in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), International law between universalism and fragmentation, 2008, 981 (995).

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> all the doctrines of jurists, who not only have the opportunity of establishing custom, but have formulated rules which have been respected by States. In future, it is to the General Assembly of the United Nations, to the International Court of Justice and to the jurists that we shall look, more than to anyone, for the creation of the new international law."[1145]

In the same vein, Judge *Tanaka* stated in the 1964 *Barcelona Traction* case:

> "The more important function of the Court as the principal judicial organ of the United Nations is to be found not only in the settlement of concrete disputes, but also in its reasoning, through which it may contribute to the *development of international law*."[1146]

Numerous commentators argue that the ICJ is not only engaged in "law-finding", but also in "law-making".[1147] The ICJ acts as a law-maker primarily by shaping the international legal discourse.[1148] Due to its singular reputation among states, international organizations, other ICs, and international lawyers, the ICJ's pronouncements have enormous persuasive power.[1149] The decisions of the ICJ do not formally bind the ICJ nor other ICs in later proceedings.[1150] Nevertheless, the ICJ, other ICs, states, and international legal scholars rely on *dicta* of the Court to prove or disprove legal arguments.[1151]

1145 *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, Dissenting Opinion Alvarez, ICJ Reports 1950, 4 (12–13), emphasis in original.

1146 *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Preliminary Objections)*, Judgment, Separate Opinion Tanaka, ICJ Reports 1964, 6 (65), emphasis added.

1147 *C. G. Weeramantry*, 10 LJIL 2 (1997), 309 (312); *S. Wittich*, The Judicial Functions of the International Court of Justice, in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), International law between universalism and fragmentation, 2008, 981 (995); *A. v. Bogdandy/I. Venzke*, 26 LJIL 1 (2013), 49 (56); *A. v. Bogdandy/I. Venzke*, In wessen Namen?, 2nd ed. 2014, 25; *A. Kulick*, 27 Int. Community Law Rev. 1-2 (2025), 33 (41).

1148 *C. G. Weeramantry*, 10 LJIL 2 (1997), 309 (309 et seq.); *A. v. Bogdandy/I. Venzke*, 26 LJIL 1 (2013), 49 (56).

1149 Cf. *C. G. Weeramantry*, 10 LJIL 2 (1997), 309 (311); *A. v. Bogdandy/I. Venzke*, 26 LJIL 1 (2013), 49 (57).

1150 See Article 59 ICJ Statute: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

1151 Cf. *C. G. Weeramantry*, 10 LJIL 2 (1997), 309 (311); *A. v. Bogdandy/I. Venzke*, 26 LJIL 1 (2013), 49 (57). On the authority of the ICJ, see *infra* in this Chapter Section D.II.2. and 3.

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It is important to note that *judicial* law-making is different from *legislative* law-making.[1152] Judicial law-making is a process in which ICs, in the course of their judicial proceedings, fill gaps within existing rules of international law and thereby develop the law.[1153] In contrast, an organ engaged in legislative law-making creates new legal rules within their law-making capacity.[1154] The scope of judicial law-making in contrast to legislative law-making is thus significantly narrower. Additionally, judicial law-makers cannot act on their own accord and in pursuance of their own agenda. The ICJ can thus only act as a judicial law-maker after it has been seized by the parties to a dispute or – in the case of an advisory opinion – by an authorized organ and it must act impartially and in the interest of the law without any political agenda.[1155] The Court's dictum in the *Nuclear Weapons* opinion, in which it emphasized that it was not a legislator while accepting to a certain extent its law-making capacity,[1156] can be read as emphasizing exactly this difference between legislative and judicial law-making.

The Court's Registry expressly recognized in a recent publication that the ICJ is actively involved in the development of international law:

> "A judgment of the Court does not simply decide a particular dispute, but inevitably also contributes to the development of international law. Fully aware of this, the Court takes account of these two objectives in preparing and drafting its judgments."[1157]

The ICJ contributes to the development of the law in different ways.[1158] One important area of this concerns rules on procedure.[1159] Because the UNC and the ICJ Statute govern the Court's procedure only fragmentedly,

1152 *M. Cappelletti*, 8 MULR 1 (1981), 15.
1153 *D. Akande*, 9 EJIL 3 (1998), 437 (465).
1154 Ibid., 465.
1155 *M. Cappelletti*, 8 MULR 1 (1981), 15 (31–32); *D. Akande*, 9 EJIL 3 (1998), 437 (465).
1156 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226 (237, para. 18).
1157 Handbook of the International Court of Justice, 6th edition 2018, pp. 77–78, accessible under https://www.icj-cij.org/public/files/publications/handbook-of-the-court-en.pdf.
1158 *Weeramantry* distinguishes between 12 different ways in which the ICJ contributes to the development of the law, see *C. G. Weeramantry*, 10 LJIL 2 (1997), 309 (313 et seq.).
1159 According to *Amerasinghe*, this power to establish procedural rules is inherent in the judicial function of a court and thus not strictly a question of law making, see *C. F. Amerasinghe*, Reflections on the Judicial Function in International Law, in: T.

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the Court must fill these gaps through legal interpretation.[1160] One way the Court does this is by deducing concrete rules from general principles of law. The Court for example found that in a case in which the facts continue to develop, general principles of judicial process require the Court to consider all facts that occur until the end of the oral proceedings on the merits.[1161] Although the ICJ claims that it merely applies general principles, in applying these principles the Court clarifies and develops their precise scope.

In principle, the Court's potential for judicial law-making is wider under its advisory jurisdiction than under its contentious jurisdiction. An authorized organ could ask the ICJ for an advisory opinion on any legal question. However, the Court has been reluctant to make broad findings on the law in its advisory capacity as the *Nuclear Weapons* advisory opinion demonstrated.

c) Control

One may add another function: the Court's function to control compliance with international law.[1162] Whereas the dispute resolution function focuses on the relationship between certain parties, the control function focuses on the objective interest of the international community in the compliance with international law.[1163] However, the Court's procedures are far from an ideal compliance control mechanism, in particular when it comes to the conduct of organs of international organizations.[1164] The Court cannot act on its own accord but always requires proceedings to be initiated by some other actor. International organizations cannot be parties to contentious

M. Ndiaye/R. Wolfrum/C. Kojima (eds.), Law of the sea, environmental law, and settlement of disputes, 2007, 119 (127).

1160 According to C. F. Amerasinghe, this power to establish procedural rules is inherent in the judicial function of a court and thus not strictly a question of law making, see Ibid., 127.

1161 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, Judgment, ICJ Reports 1986, 14 (39, para. 58).

1162 *S. Wittich*, The Judicial Functions of the International Court of Justice, in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds.), International law between universalism and fragmentation, 2008, 981 (996).

1163 Ibid., 996.

1164 *S. Schmahl*, Die Internationalen und die Supranationalen Organisationen, in: W. Vitzthum/A. Proelß (eds.), Law of Nations, 8th ed., 2019, 319 (para. 179).

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proceedings and states cannot initiate advisory proceedings concerning the conduct of international organizations.[1165] The organs themselves will most likely only request an advisory opinion from the Court when they are convinced that their conduct is lawful.[1166] Nevertheless, the ICJ has demonstrated its willingness to judicially review the lawfulness of the actions taken by other UN organs.[1167]

III. Interim conclusions

The ICJ's judicial function can be understood to refer to both the Court's characteristics as a court of justice as well as the tasks which are assigned to it and which it must fulfil. The Court and legal commentators often refer to the Court's "dispute-settlement function", i.e., its task to settle international disputes, as the element of the Court's judicial function which stands most at odds with the Court's advisory jurisdiction. The following sections examine the argument that giving an advisory opinion on a matter that is the subject of an international dispute without the consent of the disputing states undermines the Court's dispute settlement function by circumventing the consent requirement of the contentious procedure. To this end, it is necessary to first define the scope of the consent requirement.

C. Scope of the consent requirement in contentious procedures

According to Article 36 ICJ Statute, the "jurisdiction of the Court" in contentious proceedings is subject to the consent of the parties to the case. The consent requirement thus protects states against the exercise of jurisdiction by the ICJ without their consent. To determine the scope of the consent

1165 Ibid., para. 179.

1166 Ibid., para. 179.

1167 With respect to the UNGA, see *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151; with respect to the UNSC, see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, ICJ Reports 1998, 115; on the relationship between the ICJ and the UNSC, see *R. J. St. MacDonald*, 31 Canadian Yearbook of International Law/Annuaire canadien de droit international (1994), 3; *V. Gowlland-Debbas*, 88 Am. j. int. law 4 (1994), 643; *J. E. Alvarez*, 90 Am. j. int. law 1 (1996), 1.

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requirement, it is thus necessary to determine what the ICJ Statute means when it states that the "jurisdiction of the Court" is subject to consent.

I. Defining the term jurisdiction

The term "jurisdiction" has different meanings depending on the context in which it is used. In particular, one can distinguish between jurisdiction of states (1.), jurisdiction clauses in human rights instruments (2.) and jurisdiction of ICs (3.).

1. Jurisdiction of states

The traditional context in which the term "jurisdiction" was used concerns the jurisdiction of states. States have the sovereign power to create rules to regulate the behavior of persons.[1168] This power entails two different dimensions: the power to create rules (jurisdiction to prescribe) and the power to enforce such rules (jurisdiction to enforce).[1169] A state exercises these powers through its executive, legislative, and judicial bodies.[1170] These powers both result from and are limited by the sovereign equality of states.[1171] The sovereign equality of states dictates that a state may not exercise its jurisdiction over matters which lie in the exclusive jurisdiction of another state.[1172] The term jurisdiction therefore not only refers to the power of a state but also to the delimitation of powers *between* states.[1173] The distinction between a state's *jurisdiction to prescribe* and its *jurisdiction to enforce* is essential for this delimitation. A state's *jurisdiction to enforce* is strictly territorial in the sense that a state may not enforce its laws on

1168 *M. Milanović*, 8 HRLR 3 (2008), 411 (420); *M. N. Shaw*, International law, 7. ed. 2014, 469; *C. Ryngaert*, Jurisdiction in international law, 2. ed. 2015, 5; *M. N. Shaw*, International law, 8th ed. 2017, 469; *C. Staker*, Jurisdiction, in: M. D. Evans (ed.), International law, 5th ed., 2018 (289).

1169 *M. N. Shaw*, International law, 8th ed. 2017, 469; M Milanović names the adjudicatory jurisdiction as a third dimension, *M. Milanović*, 8 HRLR 3 (2008), 411 (420).

1170 *M. N. Shaw*, International law, 7. ed. 2014, 469.

1171 Cf. *C. Ryngaert*, Jurisdiction in international law, 2. ed. 2015, 6, 37.

1172 Cf. *M. N. Shaw*, International law, 8th ed. 2017, 471.

1173 *A. Peters*, 48 AVR 1 (2010), 1 (3); this is why *Ryngaert* refers to the rules governing jurisdiction as "do not obligations", see *C. Ryngaert*, Jurisdiction in international law, 2. ed. 2015, 22.

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the territory of another state without that state's consent.[1174] Whether such a territorial limitation also exists for a state's *jurisdiction to prescribe* is disputed.[1175] In its landmark decision in the *Lotus* case, the PCIJ held that a state may enact laws that extend to matters outside its territory and enforce such laws within its territory.[1176] Restrictions on the jurisdiction to prescribe could only result from a prohibitive rule of international law, which did not exist for the subject-matter of the *Lotus* case.[1177] The debate between an extensive, extraterritorial understanding of the jurisdiction to prescribe and the "permissive principles approach", which places the power to exercise jurisdiction under a reservation of prior permission, continue to dominate discussions about the extent of a state's jurisdiction to prescribe until today.[1178] The ICJ has yet to decide this question.[1179]

2. Jurisdiction clauses in human rights treaties

In inter-state relations, the term jurisdiction is thus used to delimit the exercise of sovereign powers between states. In contrast, jurisdiction clauses in human rights treaties concern the applicability of human rights obligations under a treaty *vis-à-vis* the respective treaty party.[1180] Jurisdiction in this sense is used to determine when human rights obligations are triggered.[1181] A fundamental condition for the exercise of jurisdiction over persons is the factual (rather than legal) exercise of power over persons. As *Milanović* put it:

1174 *M. Milanović*, 8 HRLR 3 (2008), 411 (420).

1175 *C. Ryngaert*, Jurisdiction in international law, 2. ed. 2015, 29 et seq.

1176 *S.S. "Lotus" (France v. Turkey)*, Judgment, PCIJ Series A 1927, 4 (18–19). The *Lotus* case concerned a legal dispute between France and Turkey over the legality of Turkey's prosecuting the French officer of the watch in Turkish courts after the French mail steamer "Lotus" collided with a Turkish collier on the high seas, resulting in the deaths of eight Turkish seamen and passengers. A key question in the case was whether Turkey needed a positive permission under international law to exercise criminal jurisdiction over the French officer (France's position) or whether it could exercise its criminal jurisdiction unless there was a conflicting prohibitive rule under international law (Turkey's position), see ibid., 18.

1177 Ibid. (19).

1178 *C. Ryngaert*, Jurisdiction in international law, 2. ed. 2015, 29-30, 34-38.

1179 Ibid., 30.

1180 *M. Milanović*, 8 HRLR 3 (2008), 411; *C. Ryngaert*, Jurisdiction in international law, 2. ed. 2015, 22 et seq.

1181 *M. Milanović*, 8 HRLR 3 (2008), 411 (416).

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> "[...] [T]he notion of jurisdiction in human rights treaties relates essentially to a question of fact, of actual authority and control that a state has over a given territory or person. 'Jurisdiction', in this context, simply means actual power, whether exercised lawfully or not – nothing more, and nothing less."[1182]

Jurisdiction clauses in human rights treaties also allocate responsibilities between different addresses of human rights obligations.[1183]

3. Jurisdiction of international courts and tribunals

The first two notions of jurisdiction focus on the state, either regarding the delimitation of its powers vis-à-vis other states or regarding the applicability of human rights obligations. There are relevant connections between the jurisdiction of states and the jurisdiction of ICs. For example, if certain treaty obligations under IHRL do not apply to a state because the matter falls outside a treaty's jurisdictional scope, the IC that has jurisdiction to interpret that treaty will also lack jurisdiction *ratione materiae* over the matter.[1184] At the same time, there are also important differences. One concerns procedure: Questions of jurisdiction of ICs are dealt with in advance before dealing with the substance of a dispute. Questions of jurisdiction of states, however, concern the substance or merits of the case.[1185] Another difference concerns the conceptual basis of jurisdiction: states have jurisdiction to act because they are sovereign.[1186] ICs, on the other hand, can only act insofar as they have been authorized by a subject of international law.[1187]

1182 Ibid., 435–436.

1183 Particularly in the context of the extraterritorial application of human rights obligations, questions of delimitating responsibilities arise, see *W. Vandenhole*, The 'J' Word, in: S. Allen/D. Costelloe/M. Fitzmaurice/P. Gragl/E. Guntrip (eds.), The Oxford handbook of jurisdiction in international law, 2019, 413.

1184 *M. Milanović*, 8 HRLR 3 (2008), 411 (416).

1185 Ibid., 416–417.

1186 *R. Kolb*, Le Droit International Comme Corps de «Droit Privé» et de «Droit Public» (Volume 419), Collected Courses of the Hague Academy of International Law, 2021 (270, para. 245).

1187 *R. Kolb*, The International Court of Justice, 2013, 200; with respect to the similar status of international organizations, *Kolb* refers to an "inverted Lotus principle": "le principe de spécialité tend à corseter les compétences de l'Orginsation en un principe du Lotus inversé: ce qui n'est pas permis est interdit; ce qui n'est pas conféré n'est pas acquis.", see *R. Kolb*, Le Droit International Comme Corps de

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Any power they exercise must be attributed to them in an act of voluntary and collective self-restraint of states.[1188] It is this attribution of powers that is entailed by the term "jurisdiction of ICs". Jurisdiction, in other words, is what enables ICs to operate in the first place. Consequently, *Balasko* defined jurisdiction of ICs as "the legal capacity, conferred by the explicit common will of two or more States, of an international jurisdictional body, regularly constituted, to investigate and judge disputes arisen or arising between these States."[1189]

Some authors define jurisdiction of ICs more narrowly as the judicial power to decide a matter with final and binding force.[1190] However, this definition can be criticized for excluding the advisory jurisdiction,[1191] which the ICJ regularly includes when referring to the term 'jurisdiction'.[1192]

The ICJ has so far decided not to expand on the general meaning of the word "jurisdiction".[1193] However, the Court has elucidated the concept to some extent when it described the ILO Administrative Tribunal's jurisdiction as its power "to examine the complaints submitted to it and to

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«Droit Privé» et de «Droit Public» (Volume 419), Collected Courses of the Hague Academy of International Law, 2021 (273, para. 248).

1188 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 2, Ch. 9, § 148.

1189 *A. Balasko*, Causes de nullité de la sentence arbitrale en droit international public, 1938, 139 (cited in: G. Abi-Saab, Les exceptions préliminaires dans la procédure de la Cour internationale, 58; translated from the French original: "l'aptitude juridique légale, attribuée par la volonté explicite commune de deux ou plusieurs Etats [sic], d'un organe international d'ordre juridictionnel, régulièrement constitué, pour instruire et pour juger des litiges nés ou à naître entre ces mêmes Etats [sic]").

1190 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 2, Ch. 9, § 148; similarly defined by Black's Law Dictionary as the "legal power and authority of a court to make a decision that binds the parties to any matter properly brought before the court", H. C. Black, B. A. Garner (eds.), Black's law dictionary, 2007.

1191 With further references *G. Abi-Saab*, Les exceptions préliminaires dans la procédure de la Cour internationale, 1966, 55–57.

1192 See for example *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (148-156, §§ 24-42); *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403 (412-415, §§ 18-28); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (112-113, §§ 55-62).

1193 *Nottebohm (Liechtenstein v. Guatemala)*, Preliminary Objections, Judgment, ICJ Reports 1953, 111 (121).

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adjudicate on the merits of the claims set out therein".[1194] The jurisdiction of an IC can thus be defined as the legal power, attributed by states, to be seised of a matter, examine it and make judicial pronouncements on it.

While the ICJ has used the terms 'jurisdiction' and 'competence' interchangeably,[1195] some authors argue in favor of a distinction between the two terms. *Balasko* and *Fitzmaurice* differentiate between the abstract and the concrete, with 'jurisdiction' describing the entirety of powers given to an IC and 'competence' describing the powers regarding a particular case.[1196] *Abi-Saab* uses the term jurisdiction to describe the judicial activity and the judicial powers, and the term competence to describe the scope of application of this activity and of these powers.[1197] The majority of legal doctrine, however, does not ascribe great importance to the distinction between the terms jurisdiction and competence.[1198]

II. Jurisdictional regime of the ICJ Statute

The ICJ Statue refers to the term jurisdiction only in Articles 36 and 37 in connection with the Court's contentious procedure.[1199] Jurisdiction thus refers to the power of the ICJ to decide inter-state legal disputes in a manner that is binding on the parties by means of the contentious proce-

1194 *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports 1956, 77 (87).

1195 See for example *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States) (Preliminary Question)*, Judgment, ICJ Reports 1954, 19 (28); with further references *G. Abi-Saab*, Les exceptions préliminaires dans la procédure de la Cour internationale, 1966, 58.

1196 *A. Balasko*, Causes de nullité de la sentence arbitrale en droit international public, 1938, 139 (cited in: G. Abi-Saab, Les exceptions préliminaires dans la procédure de la Cour internationale, 58-59); *G. G. Fitzmaurice*, 29 British Yearbook of International Law (BYIL) 1 (1952), 1 (41–42).

1197 *G. Abi-Saab*, Les exceptions préliminaires dans la procédure de la Cour internationale, 1966, 60–61.

1198 *R. Kolb*, The International Court of Justice, 2013, 211; *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 2, Ch. 9, § 149; *M. M. Aljaghoub*, The Advisory Function of the International Court of Justice 1946 - 2005, 2006, 36–37.

1199 The Statute uses the word jurisdiction exclusively in Art. 36 and Art. 54, which in turn refers to Art. 36 and 37. The French term *compétence* is also used in Art. 2, but this does not refer to the powers of the Court, but to the qualifications of the judges.

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dure.[1200] Legal doctrine distinguishes between several overlapping layers of the ICJ's jurisdiction. Firstly, one can distinguish between general and special jurisdiction. Secondly, one can distinguish between abstract and concrete jurisdiction. Lastly, one can distinguish along the parameters of personal, material, temporal, and spatial jurisdiction.

1. General and special jurisdiction

The general jurisdiction of the ICJ refers to the fundamental limits of the Court's activity.[1201] It states what the Court can and cannot do.[1202] These limits are drawn by the UNC, the ICJ Statute and the Rules of the Court. The limitation of the Court's powers is an expression of the collective will of the Member States of the Court's constituent instrument and cannot be modified by the parties to the proceedings.[1203] Examples of these basic jurisdictional limits include that only states have access to the Court's contentious procedure (Article 34 para. 1 ICJ Statute) and that these states must either be Member States of the ICJ Statute (Article 35 para. 1 ICJ Statute) or must fulfil special requirements determined by the UNSC (Article 35 para. 2 ICJ Statute).[1204] Another example of the general jurisdiction of the Court is that judgments of the ICJ are final and unappealable (Article 60 ICJ Statute). General jurisdiction in contentious proceedings thus regulates the outer limits of the ICJ's dispute settlement function.

However, the general jurisdiction does not regulate which specific disputes the Court may decide. The power of the Court to decide a specific dispute between two or more parties in a binding manner is referred to

1200 *C. Tomuschat*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Art. 36 ICJ Statute, para. 7.

1201 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 59–60; *H. W. Thirlway*, The international court of justice, in: M. D. Evans (ed.), International law, 5th ed., 2018 (579).

1202 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 59–60; *H. W. Thirlway*, The international court of justice, in: M. D. Evans (ed.), International law, 5th ed., 2018 (579).

1203 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 59–60; *H. W. Thirlway*, The international court of justice, in: M. D. Evans (ed.), International law, 5th ed., 2018 (579).

1204 *H. W. Thirlway*, The international court of justice, in: M. D. Evans (ed.), International law, 5th ed., 2018 (579–580).

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as the Court's special jurisdiction.[1205] It is only through the attribution of special jurisdiction that the ICJ acquires the power to adjudicate on the legal position of a state. This attribution of power is dependent on prior consent of the state that is subject to the Court's decision.[1206] The special jurisdiction consists of two elements, the abstract and the concrete jurisdiction.[1207]

2. Abstract and concrete jurisdiction

The abstract and the concrete jurisdiction are sub-categories of the Court's special jurisdiction. One can thus also speak of the abstract-special and the concrete-special jurisdiction. The abstract-special jurisdiction governs which disputes (*ratione materiae* and *ratione tempore*) between which states (*ratione personae*) the ICJ may decide.[1208] The scope of abstract-special jurisdiction is determined by the relevant jurisdictional title.[1209] Article 36 ICJ Statute names three types of jurisdictional titles: first, the submission of a dispute by special agreement of the parties (*compromis*) (Article 36 para. 1 Alt. 1 ICJ Statute), secondly, compromissory clauses in international treaties[1210] or treaties for the peaceful settlement of disputes (Article 36 para. 1 Alt. 2, 37 ICJ Statute) and thirdly, the optional clause (or compulsory jurisdiction) (Article 36 para. 2 ICJ Statute). The third of these titles was supposed to create a network among all states so that on a voluntary basis a system of compulsory international jurisdiction would be

1205 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 59–60.

1206 Ibid., 65.

1207 Ibid., 66.

1208 Cf. Ibid., 66.

1209 Ibid., 66; *H. W. Thirlway*, The international court of justice, in: M. D. Evans (ed.), International law, 5th ed., 2018 (579).

1210 An example of a treaty-based abstract special jurisdiction title of the ICJ can be found in Art. XXI para. 2 of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, according to which the ICJ has the power to decide any dispute between the US and Iran over the interpretation or application of the Treaty, see *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, 3 (26 et seq., paras. 50 et seq.).

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established.[1211] However, this expectation was dampened by the reluctance of states to submit declarations under Article 36 para. 2 ICJ Statute and the widespread use of reservations.[1212] A fourth jurisdictional title can be found in Article 38 para. 5 of the Rules of the Court: *forum prorogatum*. According to the principle of *forum prorogatum*, an otherwise lacking abstract-special jurisdiction of the ICJ is established if the respondent state agrees to continue the proceedings by performing procedural acts.[1213] While the jurisdictional titles in Article 36 ICJ Statute require prior consent of both parties, *forum prorogatum* is characterized by prior consent of the Applicant state and consent of the Respondent state only after the initiation of proceedings.[1214]

Yet, the ICJ cannot act based on its abstract-special jurisdiction alone. While the abstract-special jurisdiction indicates who the parties of potential proceedings are and which generally defined dispute they could bring before the Court, it does not authorize the Court to act in specific proceedings. The abstract-special jurisdiction must therefore be concretized. This is the domain of the concrete-special jurisdiction.[1215] The concrete-special jurisdiction is the focalization of the Court's powers to a concrete case with concrete parties which bring before the Court a concrete dispute.[1216] This focalization occurs by way of seisin the Court, i.e., by the initiation of

1211 *C. Tomuschat*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Art. 36 ICJ Statute, 71.

1212 Ibid., 72.

1213 *Y. Ronen*, Forum Prorogatum (last updated 2020), in: A. Peters/R. Wolfrum (eds.), The Max Planck Encyclopedia of Public International Law, 2008 (1, 9); see also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, ICJ Reports, 177 (203-206, paras. 60-64); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 2006, 6 (18-19, paras. 19-22).

1214 *Y. Ronen*, Forum Prorogatum (last updated 2020), in: A. Peters/R. Wolfrum (eds.), The Max Planck Encyclopedia of Public International Law, 2008 (5, 9); see also Art. 38 para. 5 Rules of the Court.

1215 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 66; cf. *H. W. Thirlway*, The international court of justice, in: M. D. Evans (ed.), International law, 5th ed., 2018 (581).

1216 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 66; cf. *H. W. Thirlway*, The international court of justice, in: M. D. Evans (ed.), International law, 5th ed., 2018 (581).

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the proceedings by both or one of the parties.[1217] The seisin occurs in one of two ways: by submission of a joint special agreement or by unilateral written application (Article 40 para. 1 ICJ Statute).[1218] According to the first variant, the establishment of the abstract-special jurisdiction and the establishment of the concrete-special jurisdiction take place in a single step. The disputing states conclude a special agreement after the dispute has arisen, in which they agree on the subject matter of the dispute and agree to accept a judgment of the Court as binding.[1219] The proceedings are then initiated by the transmission of this special agreement to the Court's Registrar.[1220] Whether the transmission is to be made by all parties jointly or unilaterally is determined by the special agreement. Under this variant, the parties have more extensive control over their proceedings, but at the same time it presupposes a high degree of inter-state cooperation, which is why only few proceedings have been initiated so far under Article 40 para. 1 variant 1 ICJ Statute have been initiated so far.[1221] Proceedings are therefore much more frequently initiated by means of a written application under Article 40 para. 1 variant 2 ICJ Statute. In this case, the subject-matter of the proceedings is unilaterally determined by the Applicant and can only be extended but not restricted by the Respondent by submitting a counter-claim (Article 80 Rules of Court) or an extension of the claim by the Applicant.[1222]

1217 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 66; cf. *H. W. Thirlway*, The international court of justice, in: M. D. Evans (ed.), International law, 5th ed., 2018 (581).

1218 *S. Yee*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Art. 40, paras. 18–19.

1219 *H. W. Thirlway*, The international court of justice, in: M. D. Evans (ed.), International law, 5th ed., 2018 (581).

1220 Ibid., 581.

1221 *S. Yee*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Art. 40, para. 22.

1222 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 66–67.

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3. Personal, material, temporal, and spatial jurisdiction

Another categorization concerns the personal, material, temporal, and spatial jurisdiction of the ICJ.[1223] These categories cut across the categories of general and special, as well as abstract and concrete jurisdiction.[1224]

The personal jurisdiction (*jurisdiction ratione personae*) determines who may be a party in proceedings before the Court.[1225] At the level of general jurisdiction, the Court's jurisdiction *ratione personae* is limited to states that are either members of the ICJ Statute or fulfil the requirements of Article 35 para. 2 ICJ Statute (*general jurisdiction ratione personae*). At the level of special jurisdiction, the jurisdictional title must extend to the parties of the proceedings (*abstract-special jurisdiction ratione personae*), and it must be these parties that initiate proceedings before the Court (*concrete-special jurisdiction ratione personae*).

The material jurisdiction (*jurisdiction ratione materiae*) determines what the subject of the proceedings may be.[1226] At the level of general jurisdiction, material jurisdiction requires that the proceedings have as their object the resolution of a dispute (*general jurisdiction ratione materiae*). At the level of special jurisdiction, the questions to be decided by the ICJ must be covered by the jurisdictional title (*abstract-special jurisdiction ratione materiae*) and must have been requested by the parties in the context of the initiation of proceedings (*concrete-special jurisdiction ratione materiae*).

The temporal jurisdiction (*jurisdiction ratione temporis*) determines when certain acts must have occurred, i.e., it relates to the temporal scope of the Court's jurisdiction.[1227] One reading of the temporal jurisdiction of the Court concerns the rule that all jurisdictional prerequisites must have existed at the relevant point in time and must continue to exist.[1228] This reading, however, does not add any analytical clarity as it is already an intrinsic characteristic of the respective jurisdictional prerequisite (or any prerequisite for that matter) that it must be fulfilled at the relevant point

1223 Ibid., 81 et seq.; *R. Kolb*, The International Court of Justice, 2013, 214–215.
1224 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 81.
1225 *R. Kolb*, The International Court of Justice, 2013, 214.
1226 Ibid., 214.
1227 Ibid., 214.
1228 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 83–84.

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in time.[1229] Instead, the jurisdiction *ratione temporis* concerns a potential limitation of the Court's jurisdiction to disputes, facts, events, etc. that have occurred before or after a certain point in time.[1230] These limitations may only extend to the Court's special jurisdiction and not to the Court's general jurisdiction as the UNC and the Statute of the Court do not limit the Court's temporal jurisdiction in any way.[1231]

The spatial jurisdiction (*jurisdiction ratione loci*) determines where certain acts must have occurred.[1232] Just like for the Court's temporal jurisdiction, there are no general limits to the Court's spatial jurisdiction,[1233] but there may be limits to the Court's special spatial jurisdiction. The jurisdictional title attributing abstract-special jurisdiction may exclude or be limited to certain geographical areas (*abstract-special jurisdiction ratione loci*). Likewise, the parties may limit the concrete dispute they bring before the Court to certain areas (*concrete-special jurisdiction ratione loci*).

Germany's declaration of compulsory jurisdiction under Article 36 para. 2 ICJ Statute illustrates how states may limit all four jurisdictional sub-categories.[1234] First, Germany limited the Court's *temporal* jurisdiction to "all disputes arising after the present declaration, with regard to situations or facts subsequent to this date". Secondly, Germany limited the Court's *material* jurisdiction by excluding "any dispute which relates to, arises from or is connected with the deployment of armed forces abroad, involvement in such deployments or decisions thereon". Thirdly, Germany limited the Court's *spatial* jurisdiction by excluding any disputes which "relates to, arises from or is connected with the use for military purposes of the territory of the Federal Republic of Germany, including its airspace, as well as maritime areas subject to German sovereign rights and jurisdiction". Finally, Germany limited the Court's *personal* jurisdiction by excluding "any dispute in respect of which any other Party to the dispute has accepted the compulsory jurisdiction of the International Court of Justice only in

1229 Cf. Ibid., 84.

1230 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012, 99 (118-119, paras. 42-44); *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 84.

1231 *R. Kolb*, The International Court of Justice, 2013, 214.

1232 Ibid., 214.

1233 Ibid., 214. *Kolb* argues that the ICJ's jurisdiction could therefore extend to disputes with states on other planets if they fulfilled the conditions of Art. 35 UNC.

1234 For the text of Germany's declaration recognizing the jurisdiction of the Court as compulsory, see https://www.icj-cij.org/en/declarations/de, last accessed on 6 May 2024.

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relation to or for the purpose of the dispute or where the acceptance of the Court's compulsory jurisdiction on behalf of any other Party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court".

III. Exercise of jurisdiction limited to binding decisions

Having laid out the jurisdictional parameters of the ICJ Statute, the question arises in which cases the ICJ exercises its jurisdiction over a state. The crucial question is whether only the rendering of a binding decisions constitutes an exercise of jurisdiction over a state which requires that state's consent[1235] or whether any consideration of and judicial pronouncements on the rights and obligations of a state by the Court constitutes an exercise of jurisdiction.[1236] The distinction between binding decisions and other judicial pronouncements is of little relevance in the context of the ICJ's contentious proceedings: The ICJ may only deal with a case in the context of contentious proceedings, if it can conclude the proceedings by rendering a binding decision.[1237] However, this distinction is crucial in the context of advisory proceedings.[1238]

1235 *A. Orakhelashvili*, 3 The Law and Practice of International Courts and Tribunals (2003), 501 (503); *S. Rosenne*, The law and practice of the International Court, 1920-2005, 4th ed. 2006, 524; *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 112, 127.

1236 Raising this distinction, see *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 105.

1237 Ibid., 105; see also *Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections)*, Judgment, ICJ Reports 1963, 15 (33–34): "The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function."

1238 A similar question arises in cases where judicial decisions concern third parties, especially in the context of the so-called Monetary Gold doctrine. On the Monetary Gold doctrine, see *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 105 et seq.

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1. Binding decisions as an exercise of jurisdiction

The ICJ has consistently emphasized that the jurisdiction of the Court to issue advisory opinions is not subject to state consent.[1239] The ICJ explained its position with the non-binding nature of its advisory opinions:

> "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. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take."[1240]

Thus, according to the ICJ, the Court exercises jurisdiction over a state only if it issues a binding decision. As advisory opinions are not binding, they do not constitute an exercise of jurisdiction over a state regardless of the content of the advisory opinion and thus do not depend on prior consent.

2. The elements of a binding decision: Binding force and res judicata

Finding that only binding decisions are subject to state consent, the question arises what constitutes a binding decision. The binding nature of ICJ decisions can be separated into two related concepts: the decision's binding force and its *res judicata* effect.[1241] Binding force and *res judicata*, which constitute general principles of law,[1242] serve two overarching pur-

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1239 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (71); *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (20, para. 21); *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities*, Advisory Opinion, ICJ Reports 1989, 177 (189-190, para. 33); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (157-158, para. 47).

1240 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (71).

1241 For a detailed account of the principles of binding force and res judicata, see *R. Kolb*, The International Court of Justice, 2013, 760–775.

1242 Ibid., 762.

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poses: justice and legal security.[1243] The peaceful resolution of a dispute not only lies in the interest of the parties, but also of the broader international community which has an interest in keeping the peace.[1244] The settlement of disputes can therefore be considered a "public good".[1245] Neither a final and peaceful end to the dispute nor any certainty in the legal relations between the disputing States could be achieved if the decisions of the Court were subject to constant review by the parties.

a) Binding force

For the ICJ, the binding force of its decisions follows from Article 94 UNC and Article 59 ICJ Statute.[1246]

Article 94 UNC states:

> "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

Article 59 ICJ Statute stipulates:

> "The decision of the Court has no binding force except between the parties and in respect of that particular case."

The negative formulation of Article 59 ICJ Statute, which originates from the wording of Article 84 para. 1 of the 1907 Hague Convention,[1247] emphasizes three aspects of the binding force: the limitation of the binding force of the decision to the parties to the case, the inapplicability of the common law doctrine of *stare decisis* in international law, and the fact that the Court does not perform a legislative function.[1248] The ICJ rephrased Article 59 in positive terms in its *Bosnian Genocide* case:

1243 Ibid., 762–763.

1244 *C. P. Romano/K. J. Alter/Y. Shany*, Mapping International Adjudicative Bodies, the Issues, and Players, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013 (5).

1245 Ibid., 5.

1246 On the concept of binding force see *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, 30 et seq.; *R. Kolb*, The International Court of Justice, 2013, 761 et seq.

1247 *R. Kolb*, The International Court of Justice, 2013, 763.

1248 Ibid., 763–764.

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"Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that the parties are bound by the decision of the Court in respect of the particular case."[1249]

The term 'decision of the Court' as used in Article 59 ICJ Statute is understood broadly and includes several different kinds of judicial pronouncements.[1250] These include final decisions on the merits of a case, decisions on preliminary objections,[1251] and orders (such as provisional measures).[1252] Article 59 ICJ Statute and Article 94 UNC deliberately use the term 'decision' rather than 'judgment'. The term 'judgment' is used in Article 95 of the Rules of the Court to describe the entirety of the judicial pronouncement which is delivered in contentious proceedings. 'Judgment', in other words, refers to the judicial document, which includes all the elements listed in Article 95 of the Rules.

The term 'decision' as employed by Article 59 ICJ Statute and Article 94 UNC, on the other hand, refers to a narrower sub-set of the judgment or order which contains the obligations of the parties.[1253] This sub-set includes only the operative provisions of the judgment (also known as *dispositif*) and to a limited extent the reasons supporting the operative provisions.[1254] The operative provisions of a judgment are relatively short and succinct

1249 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43 (90, para. 115).

1250 See *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, paras. 35–40.

1251 *South-West Africa (Liberia v. South Africa)*, Judgment, ICJ Reports 1966 (36–37); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43 (101, para. 138).

1252 *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, 466 (502-503, para. 102); *Jadhav (India v. Pakistan)*, Provisional Measures, Order, ICJ Reports 2017, 231 (245, para. 59); while provisional measures are binding, they do not become res judicata, see *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 40.

1253 *R. Kolb*, The International Court of Justice, 2013, 768.

1254 *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports 1956, 77 (87); *Interhandel (Switzerland v. United States of America)*, Judgment, ICJ Reports 1959, 6 (28); *Right of Passage over Indian Territory (Portugal v. India) (Merits)*, Judgment, ICJ Reports 1960, 6 (32); *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3 (18, para. 43); *S. Rosenne*, The law and

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determinations of the existence of claims, rights, and duties of the parties. The judges vote on each operative provision individually and the outcome of the vote is listed in the judgment in accordance with Article 95 Rules of the Court.[1255]

While the operative provisions are binding, the underlying reasoning of the Court is only binding to the extent that it is necessary for the understanding or implementation of the operative provisions.[1256] Excluded from the binding force of the decision is thus any part of the reasoning which is not necessary for the understanding or implementation of the operative provisions, that is "peripheral or subsidiary matters"[1257] as well as *obiter dicta* which have no direct bearing on the operative provisions at all.[1258]

According to Article 59 ICJ Statute, the decision of the Court is only binding on the parties of the case (*inter partes* effect of ICJ decisions). Only states may be parties to the contentious proceedings before the ICJ, Article 34 para. 1 ICJ Statute. This excludes all international organizations and their organs (including the UN), as well as private individuals, companies, and NGOs.[1259] States that are not parties to the case as well as international organizations are not bound by a decision of the Court. They may, however, agree to be bound by the decision on their own accord. The binding force

practice of the International Court, 1920-2005, 4th ed. 2006, 1536; *R. Kolb*, The International Court of Justice, 2013, 767.

1255 Cf. *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 41.

1256 *Polish Postal Service in Danzig*, Advisory Opinion, PCIJ Series B 1925, 6 (29–30); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43 (95, para. 126); *R. Kolb*, The International Court of Justice, 2013, 767; *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 41.

1257 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43 (95, para. 126).

1258 *R. Kolb*, The International Court of Justice, 2013, 767; *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 42.

1259 *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 50.

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in such a case results not from the ICJ Statute or the UNC but from the separately concluded agreement.[1260]

The *inter partes* effect of ICJ decisions as enshrined in Article 59 ICJ Statute protects third states from being bound by a decision which they have neither initiated nor otherwise contributed to. There are, however, several exceptions to the strict *inter partes* effect of ICJ decisions.[1261] Certain decisions on treaty interpretation and territorial or maritime delimitation create 'objective results' which third parties may not ignore.[1262] Another exception to the *inter partes* effect concerns the intervention of third states in line with Articles 62 and 63 ICJ Statute.[1263] A third potential context in which the protection provided by Article 59 ICJ Statute is insufficient concerns cases in which the subject-matter of the proceedings before the Court necessarily relates to the rights of a third state not party to the proceedings.[1264] Although not bound by the judgment, the third state's legal interests may be particularly affected. This situation has entered the jurisprudence of the Court under the name of the *Monetary Gold doctrine*[1265] and will be examined more closely and compared to advisory opinions on pending bilateral disputes in the next section.

According to Article 59 ICJ Statute, a decision of the ICJ has binding force only "in respect of that particular case". This means that the Court can only decide the case that is presented to it by the parties and not render decisions on the legal relations of the parties merely on occasion of the case. What constitutes the "case" in the sense of Article 59 ICJ Statute is

1260 *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 50; *R. Kolb*, The International Court of Justice, 2013, 764.

1261 See *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, 52 et seq.

1262 Ibid., para. 59.

1263 Ibid., paras. 60–63.

1264 Ibid., paras. 64–66.

1265 *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States) (Preliminary Question)*, Judgment, ICJ Reports 1954, 19 (32–33); for an extensive analysis of the Monetary Gold doctrine, see *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016.

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determined by the claims and potential counter-claims of the parties.[1266] In other words, *stare decisis* does not apply to ICJ decisions.[1267]

b) Res judicata

While *res judicata* is not identical with the concept of binding force, it is closely related to it.[1268] Whereas the decision's binding force describes the obligations which follow from the decisions for the parties of the case, *res judicata* concerns the fate of the decision itself.[1269] *Res judicata*, as enshrined in Articles 59, 60, and 61 ICJ Statute, means that decisions of the Court are 'final'. This entails two things[1270]: first, the decision may no longer be overturned, modified or suspended by the parties to the proceedings (*res judicata* in the formal sense).[1271] In general, a decision becomes *res judicata* in the formal sense either immediately after the decisions of the Court has been rendered if there is no legal remedy available to the parties or once the time limit to exercise a legal remedy has lapsed.[1272] In the case of the ICJ, there is no appeals procedure (Article 60 ICJ Statute), however, there is a revision procedure in case decisive, previously unknown facts emerge (Article 61 para. 1 ICJ Statute). The application for revision must be made within six months of the discovery of the new fact (Article 61 para. 4 ICJ Statute). After ten years, a decision may no longer be revised (Article 61 para. 5 ICJ Statute). Secondly, the decision which is *res judicata* cannot form the subject-matter in subsequent proceedings between the same parties (*res judicata* in the material sense).[1273]

1266 *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 68.

1267 *R. Kolb*, The International Court of Justice, 2013, 763.

1268 On the difference between binding force and res judicata see Ibid., 761–762; *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 40.

1269 *R. Kolb*, The International Court of Justice, 2013, 761.

1270 See Ibid., 761.

1271 Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43 (90, para. 115).

1272 *R. Kolb*, The International Court of Justice, 2013, 761.

1273 Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ

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The extent of the application of *res judicata* is determined by the "triple identity test".[1274] *Res judicata* thus only prevents the Court from being seised in subsequent proceedings if the subsequent proceedings are identical to the previous ones in terms of the parties, the relief sought, and the cause of action.[1275]

3. Advisory opinions on inter-state disputes as an intervention in domestic matters?

One could argue that by requesting an advisory opinion on an inter-state dispute as well as by rendering the requested opinion, the requesting UN organ and the ICJ "intervene in matters which are essentially within the domestic jurisdiction" of the affected states or "require the Members to submit such matters to settlement under the present Charter" in the sense of Article 2 para. 7 UNC.[1276] Article 2 para. 7 UNC codifies the customary[1277] principle of non-intervention as it concerns the activities of the UN *vis-à-vis* its Member States.[1278] To successfully base a consent requirement

Reports 2007, 43 (90, para. 115); *R. Kolb*, The International Court of Justice, 2013, 761.

1274 *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, Dissenting Opinion Anzilotti, PCIJ Series A, 1927, 23; *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 31; *J. H. Fahner*, Two Takes on Chagos: Reconciling the Advisory Opinion with the Res Judicata Effect of the UNCLOS Arbitral Award, in: T. Burri/J. Trinidad (eds.), The International Court of Justice and decolonisation, 2021, 71 (79).

1275 Or as *Anzilotti* put it "persona, petitum, causa petendi", see *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, Judgment, Dissenting Opinion Anzilotti, PCIJ Series A, 1927, 23; see also *Trail Smelter Arbitration (United States of America v. Canada)*, Award, UNRIAA, Vol. III (1941), 1905 (1952).

1276 Art. 2 para. 7 UNC stipulates:
"Nothing contained in the present 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 present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

1277 See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, Judgment, ICJ Reports 1986, 14 (106, para. 202).

1278 The principle of non-intervention is "part and parcel of customary international law", see Ibid. The principle of non-intervention between states is enshrined in Art. 2 para. 1 UNC, see *A. von Arnauld*, Völkerrecht, 5. ed. 2023, 150, para. 357.

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on Article 2 para. 7 UNC, the request for an advisory opinion and/or the ensuing rendering of the opinion would thus need to qualify as an intervention in matters which are essentially within the domestic jurisdiction of the affected Member States.

a) Intervention

It is contested which actions qualify as an intervention in the sense of Article 2 para. 7 UNC.[1279] One may generally distinguish between a narrow and a wide interpretation of the term "intervention".[1280] According to the narrow interpretation of Article 2 para. 7 UNC, only "dictatorial interferences" such as the use of force or similar forms of "imperative pressure" qualify as an intervention.[1281] Taken to an extreme, this view excludes any discussions, studies, enquiries and recommendations from the purview of Article 2 para. 7 UNC.[1282] This view has attracted criticism as it would leave almost no scope of application for Article 2 para. 7 UNC since most UN organs may only make recommendations.[1283] *H. Lauterpacht* therefore adhered to a modified version of this view arguing that only a certain kind of recommendation may qualify as an intervention which is "calculated to exercise direct pressure, likely to be followed by measures of enforcement, upon a State in a matter which is essentially within the domestic jurisdiction of a State".[1284]

A wide interpretation of the term "intervention" includes all actions by which the UN exerts pressure on states and restricts their choice of a political, economic, social and cultural system and the formulation of foreign policy.[1285] According to this view, any substantive discussion and recom-

1279 *G. Nolte*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 2(7), 10 et seq.

1280 Ibid., para. 10.

1281 *H. Kelsen*, The law of the United Nations, 2. ed. 1951, 770.

1282 *H. Lauterpacht*, The international protection of human rights, 1947, 19.

1283 With further references, see *G. Nolte*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 2(7), para. 10.

1284 *L. Oppenheim/H. Lauterpacht*, International Law, 7. ed. 1948, 378.

1285 *G. Nolte*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 2(7), para. 20 citing *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, Judgment, ICJ Reports 1986, 14 (108).

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mendation can amount to an intervention.[1286] This wide interpretation of Article 2 para. 7 UNC is guided by developments regarding the customary principle of non-intervention as it concerns inter-state relations.[1287]

The ICJ has found in its 1986 *Nicaragua* judgment that the "element of coercion (...) defines, and indeed forms the very essence of, prohibited intervention". However, similarly to the discussions on the term "to intervene" in Article 2 para. 7 UNC, the exact definition of coercion is contested.[1288] The most extreme example of coercion is the threat or use of force.[1289] However, conduct below the threshold of force may also constitute coercion, since otherwise the principle of non-intervention would have no scope of application distinct from the prohibition of the threat or use of force. The UNGA defined the element of coercion in its 1970 "Friendly Relations Declaration" broadly:

> "No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of another State. (...) No State may use or encourage the use of economic, political or any other type of measure to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind."[1290]

The UNGA used similarly broad terms in its 1974 "Charter of Economic Rights and Duties of States":

> "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights."[1291]

1286 Ibid., para. 21.

1287 Ibid., para. 19.

1288 See on this *W. Heintschel von Heinegg*, § 55. Vom ius ad bellum zum ius contra bellum, in: V. Epping/W. Heintschel von Heinegg (eds.), Völkerrecht, 7th edition, 2018 (paras. 48-51); *A. von Arnauld*, Völkerrecht, 5. ed. 2023, 151-157, paras. 363-379.

1289 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, Judgment, ICJ Reports 1986, 14 (107-107, para. 205).

1290 UNGA resolution 2625(XXV) of 24 October 1970, UN doc. A/RES/2625(XXV) (Friendly Relations Declaration).

1291 UNGA resolution 3281 (XXIX) of 12 December 1974, UN doc. A/RES/3281(XXIX) (Charter of Economic Rights and Duties of States), Art. 32.

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Examples of activities which fall below the threshold of force but which are sufficiently coercive to constitute a prohibited intervention include actions directed at regime change such as the financing, training and provision of weapons to insurgents,[1292] the violation of a state's territorial integrity,[1293] and economic coercion[1294].

Recent developments thus point towards a more flexible understanding of the term "intervention".[1295] In particular discussions and recommendations on a matter may in principle amount to a prohibited intervention.[1296] However, such discussions and recommendations only constitute a prohibited intervention if they concern matters which are essentially within the domestic jurisdiction of the state in question.

b) In matters essentially within the domestic jurisdiction

The term "domestic jurisdiction" is not an absolute concept. It does not refer to certain matters which are *per se* beyond the reach of international law.[1297] Instead, "domestic jurisdiction" is a relative term which refers to those matters which – considering the law at the time – are not governed by rules of international law.[1298] As the PCIJ held in its *Nationality Decrees* advisory opinion:

> "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations."[1299]

1292 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, Judgment, ICJ Reports 1986, 14 (124, para. 242); *A. von Arnauld*, Völkerrecht, 5. ed. 2023, 152-154, paras. 366-369.

1293 *A. von Arnauld*, Völkerrecht, 5. ed. 2023, 154-155, paras. 371-375.

1294 Ibid., 156-157, para. 378.

1295 *G. Nolte*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 2(7), 21 et seq.

1296 Ibid., para. 22.

1297 *J. Crawford*, Brownlie's Principles of Public International Law, 9. ed. 2019, 439; *G. Nolte*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 2(7), para. 30.

1298 *J. Crawford*, Brownlie's Principles of Public International Law, 9. ed. 2019, 439; *G. Nolte*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 2(7), para. 30.

1299 *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, PCIJ Rep Ser. B No. 4 (1923), 7 (24).

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Advisory opinions may only be requested on questions of international law which arise within the requesting organ's scope of activities.[1300] As such, their subject-matter is inherently international in nature and thus not "essentially within the domestic jurisdiction" of affected states. Therefore, while the request for an advisory opinion may in general be an action which could constitute an intervention, this intervention can by definition not occur within a state's domestic jurisdiction. Non-binding judicial pronouncements on a state's international obligations, such as advisory opinions, are thus not subject to any consent requirement.[1301]

4. Sovereign equality of states

Some critics of the Court's application of its advisory procedure to inter-state disputes have based their criticism not on Article 2 para. 7 UNC, but on the principle of sovereign equality of states.[1302] This raises the question what, if anything at all, can one derive from the principle of sovereign equality of states for the question at hand. Before the creation of the UNC, legal discourse focused on the principle of "sovereignty" which initially entailed a defensive right of states vis-à-vis other states. In this vein, Arbitrator *Huber* stated in the 1928 *Island of Palmas* case that

> "[s]overeignty in the relations between states signifies independence. Independence in regard to a portion of the globe which is the right to exercise therein, to the exclusion of any other state, the functions of a state."[1303]

Sovereignty in this sense operates as a shield which protects a state's internal order from outside interference.[1304] Influential concepts such as

1300 See *supra*: § 5 Section C.I.2.

1301 So also *M. M. Aljaghoub*, 24 ALQ 2 (2010), 191 (199 et seq.).

1302 See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, Separate Opinion Azevedo, ICJ Reports 1950, 79 (84); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, Dissenting Opinion Zoričić, ICJ Reports 1950, 98 (99 et seq.); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, Dissenting Opinion Krylov, ICJ Reports 1950, 105 (109).

1303 *Island of Palmas (Netherlands v. United States of America)*, Award, UNRIAA, 1928, Vol. II, 829 (838).

1304 *B. Fassbender*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 2(1), para. 11.

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Triepel's separation between domestic and international law[1305] built on this understanding of sovereignty.[1306] Under contemporary international law, the principle of sovereignty is inextricably linked with the principle of equality of states.[1307] In relation to domestic court proceedings, the principle of equality entails that

> "the courts of one State are not competent to question the validity of the acts of another State insofar as those acts purport to take effect within the sphere of validity of the latter State's national legal order."[1308]

It becomes immediately apparent that this notion is not easily transferred to the question at hand. The ICJ is not a domestic court and the legal questions presented to it do not concern a state's national legal order but exclusively its international obligations.

Through the creation of the UNC, the principles of sovereignty and equality of states merged to form the principle of sovereign equality as enshrined in Article 2 para. 1 UNC. The principle of sovereign equality has experienced its most important concretization through the 1970 UNGA *Friendly Relations Declaration*,[1309] which is treated as an authoritative statement on the content of the principle of sovereign equality of states.[1310] It states on the principle of sovereign equality:

> "All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.
>
> In particular, sovereign equality includes the following elements:
>
> (a) States are judicially equal;
> (b) Each State enjoys the rights inherent in full sovereignty;
> (c) Each State has the duty to respect the personality of other States;

1305 See *Heinrich Triepel*, Völkerrecht und Landesrecht, 1899.

1306 *B. Fassbender*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 2(1), para. 11.

1307 On the emergence of the notion of sovereign equality in the 1943 Moscow Declaration, see *H. Kelsen*, 53 Yale Law Journal 2 (1944), 207; on the principle of equality of states, see *B. Fassbender*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 2(1), 15 et seq.

1308 *H. Kelsen*, 53 Yale Law Journal 2 (1944), 207 (209).

1309 UNGA resolution 2625(XXV) of 15 December 1970, UN doc. A/RES/2625(XXV).

1310 *B. Fassbender*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 2(1), para. 35.

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> (d) The territorial integrity and political independence of the State are inviolable;
> (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
> (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States."[1311]

While certain elements of this definition seem relatively clear like the concept of "territorial integrity", other elements such as "the rights inherent in full sovereignty" are just as indeterminate as the original term. What becomes apparent, however, is that sovereign equality entails a balance between rights and duties. On the one hand, states are judicially equal. This could support the argument for an extensive understanding of consent requirements in international judicial proceedings involving the rights and obligations of states. On the other hand, each state, as part of its sovereign equality, "has the duty to comply fully and in good faith with its international obligations". An advisory opinion which clarifies the international obligations of a state may arguably help a state fulfil this element of its sovereign equality of states.

Kelsen argued that the only purpose of the principle of sovereign equality is to prevent "the possibility that new obligations might be imposed upon an unwilling State".[1312] *Kelsen's* understanding of the principle of sovereign equality helps illustrate the reason for the existence of consent requirements in contentious proceedings, as the parties to the proceedings are legally bound by the outcome of the proceedings. The situation is, of course, drastically different for advisory proceedings, in which no "new obligations", as *Kelsen* put it, are created.

IV. Interim conclusions

The principle of consensual dispute settlement protects states against the exercise of jurisdiction by an IC against their will. The term jurisdiction of ICs refers to a multitude of related concepts which describe the parameters of how ICs may operate. However, the ICJ only exercises jurisdiction over a state if it decides over the legal rights and obligations of the respective state in a binding manner, i.e., with binding force and *res judicata* effect.

1311 UNGA resolution 2625(XXV) of 15 December 1970, UN doc. A/RES/2625(XXV).
1312 *H. Kelsen*, 53 Yale Law Journal 2 (1944), 207 (213).

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Considering that the consent principle protects states against the exercise of jurisdiction against their will and considering that only binding judicial decisions constitute an exercise of jurisdiction over a state, the question arises how the issuing of a non-binding advisory opinion on an inter-state dispute can be considered a circumvention of the consent requirement to judicial dispute settlement. This is the subject of the next section.

D. Advisory opinions as a circumvention of the contentious procedure's consent requirement

The ICJ has continuously reaffirmed that the exercise of its advisory jurisdiction does not depend on the consent of states.[1313] The advisory opinion is given to the requesting organ and as such a state's lack of consent does not *per se* hinder the Court from exercising its advisory jurisdiction.[1314] At the same time, the ICJ has also emphasized that the giving of an advisory opinion on the subject-matter of a pending dispute without the consent of the disputing states may constitute a circumvention of the principle of consensual dispute settlement. While being non-binding, could advisory opinions have other legal or non-legal effects which may affect the States Parties to a dispute in a similar manner as a binding Court decision? It is conceivable that they have such important effects that the issuing of an advisory opinion on a pending bilateral dispute without the consent of one of the parties to the dispute could be seen as a circumvention of the contentious procedure's strict jurisdictional requirements. This would deplete the contentious procedure's consent requirement of its protective function thereby harming the integrity of the contentious procedure.[1315] The idea that an advisory opinion while not binding for the disputing states could nevertheless negatively affect their legal interests resembles

1313 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (71); *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (20, para. 21); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (157-158, para. 47).

1314 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (71).

1315 This idea builds on Thienel's explanation of the Monetary Gold doctrine's legal basis, see *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary-Gold-Doktrin, 2017, 207.

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another important (yet often criticized[1316]) ICJ doctrine: the *Monetary Gold doctrine*.[1317]

I. Circumvention of state consent in contentious matters: The Monetary Gold doctrine

According to the Monetary Gold doctrine, the ICJ will not decide an inter-state dispute, despite having jurisdiction to do so, if deciding the dispute would necessarily require the Court to make a judicial pronouncement on the rights and obligations of a third state that has neither participated in nor consented to the proceedings.[1318] Even though the Monetary Gold doctrine concerns the Court's contentious procedure, it may provide a useful comparison to the Eastern Carelia doctrine.[1319] In both contexts, the Court hesitates to issue a judicial pronouncement on the rights and obligations of a state without its consent despite the fact that the respective judicial pronouncement would have no binding force for the state in question: due to the *inter partes* effect of decisions in contentious matters and the non-binding nature of advisory opinions. This section examines the Monetary Gold doctrine as it has evolved in the ICJ's case law and assesses its underlying rationale. The aim is to assess whether the Court's reasoning in the context of the Monetary Gold doctrine also applies to the Eastern Carelia doctrine.

1316 Arguing that the Monetary Gold doctrine should be abandoned because it conflicts with the Court's obligation to decide cases brought before it by the parties, see *Z. Mollengarden/N. Zamir*, 115 Am. j. int. law 1 (2021), 41.

1317 See for example *Kolb*, who argues that the Eastern Carelia doctrine is an application of the Monetary Gold doctrine to advisory proceedings, see *R. Kolb*, The International Court of Justice, 2013, 1073.

1318 For a detailed study of the Monetary Gold doctrine, see *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016; see also *C. M. Chinkin*, Third parties in international law, 1993, 199 et seq.; *A. Orakhelashvili*, 2 Journal of International Dispute Settlement 2 (2011), 373.

1319 Cf. *C. F. Amerasinghe*, Jurisdiction of International Tribunals, 2003, 528, although *Amerasinghe* regards the Eastern Carelia doctrine as a matter of jurisdiction (or competence) rather than admissibility, see Ibid., 529.

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1. Content of the Monetary Gold doctrine

The case which lends its name to the Monetary Gold doctrine is the *Monetary Gold removed from Rome in 1943* case.[1320] In that case, the ICJ was asked to decide upon the rightful ownership of 2.4 tons of gold which were seized in Germany after World War II, and which previously belonged to the Albanian national bank in Rome. After the war, all the gold which was stolen by Nazi Germany was pooled and managed by the United States, the United Kingdom and France. The three states established a "Tripartite Commission for the Restitution of Monetary Gold" to decide upon the use of seized gold to satisfy claims for restitution.[1321] When Italy and Albania were in dispute about the rightful ownership of the 2.4 tons of gold previously owned by the Albanian national bank, the Tripartite Commission declared that it lacked jurisdiction to decide upon the matter. Instead, the Commission asked an arbitrator to decide the dispute, who then sided with Albania.[1322] However, at the time Albania owed damages to the United Kingdom following the *Corfu Channel* case.[1323] The arbitrator therefore decided that the gold had to be paid out directly to the United Kingdom as payment for the damages Albania owed to the United Kingdom.[1324]

Following the arbitrator's decision, Italy initiated proceedings against the UK, the USA and France before the ICJ. Italy argued that the gold belonged to Italy as reparation for the nationalization of the Albanian national bank which predominantly belonged to Italian investors. Despite bringing the case before the ICJ, Italy argued that the Court lacked jurisdiction as it was asked to decide upon the international responsibility of Albania without Albania's consent.[1325] The United Kingdom argued that Italy could not make

1320 *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States) (Preliminary Question)*, Judgment, ICJ Reports 1954, 19.

1321 See ICJ Pleadings, *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, Written statement of the United States of America, 86.

1322 Ibid., 86–87.

1323 *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, ICJ Reports 1949, 4.

1324 See ICJ Pleadings, *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, Written statement of the United States of America, 86 (87).

1325 ICJ Pleadings, *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, Written statement of Italy, 16 (20–21).

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preliminary objections if it was the one that initiated the proceedings.[1326] The United States argued that Albania's legal interests were sufficiently protected by the *inter partes* effect of the Court's decisions under Article 59 ICJ Statute and that the right of third states to intervene (Article 62 ICJ Statute) showed that the ICJ Statute in principle allowed proceedings which affect third states.[1327] The Court sided with Italy, finding that deciding the case at hand was tantamount to deciding the dispute between Italy and Albania. The ICJ found that the right to intervene under Article 62 ICJ Statute provided insufficient protection in situations in which "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision."[1328]

Similarly, while Article 59 ICJ ensured that the decision would only bind the parties to the proceedings, it did not sufficiently protect Albania's legal interests. The Court held:

> "Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it."[1329]

Although the US had previously rejected Italy's arguments in the *Monetary Gold* case, it adopted them in the *Nicaragua* case in 1984.[1330] The case concerned allegations by Nicaragua against the United States of violating *inter alia* the principle of non-intervention and the prohibition of the threat or use of force.

At the Preliminary Objections stage of the proceedings, the USA argued that the Court could not rule on its international responsibility for its activities in Nicaragua because the decision would also affect the legal

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1326 ICJ Pleadings, *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, Written statement of the United Kingdom, 77 (80–81).

1327 ICJ Pleadings, *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, Written statement of the United States of America, 86 (92, 94).

1328 *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States) (Preliminary Question)*, Judgment, ICJ Reports 1954, 19 (32).

1329 Ibid. (33).

1330 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility)*, Judgment, ICJ Reports, 392.

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interests of Honduras, Costa Rica and El Salvador.[1331] These countries were not parties to the case, but Nicaragua claimed the US operated from their territories.[1332] While the United States' argument was similar to Italy's arguments thirty years earlier, the Court rejected it. In doing so, the Court specified its earlier judgment and decided that it will only decline to exercise its jurisdiction

> "where the legal interests of a third State would not only be affected by a decision, but would form the very subject-matter of the decision. Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute."[1333]

In essence, the Court decided that the rights and obligations of Honduras, Costa Rica, and El Salvador did not form the subject-matter of the proceedings between Nicaragua and the United States.

This "subject-matter test" was further fleshed out in the 1992 *Phosphates in Nauru* case.[1334] The case concerned a dispute between Nauru and Australia over Australia's exploitation of phosphate deposits in Nauru between 1919 and 1967. During this time, Nauru was administered by Australia, New Zealand and the United Kingdom first as a mandate territory under the League of Nations, then as a trust territory under the United Nations. The three administering powers jointly exploited the island's phosphate resources through an "Administering Authority". Australia argued that the Court could not rule on its international responsibility because to do so would require the Court to also rule on the international responsibility of New Zealand and the United Kingdom, since all three states acted jointly

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1331 ICJ Pleadings, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Counter-Memorial of the United States of America, 86–90.

1332 Ibid.

1333 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility)*, Judgment, ICJ Reports, 392 (431).

1334 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, ICJ Reports 1992, 240; on the Phosphates in Nauru case, see *I. Scobbie*, 42 ICLQ 3 (1993), 705 (710–718).

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through the Administering Authority.[1335] The ICJ rejected Australia's argument and decided that the legal rights and obligations of New Zealand and the United Kingdom were not the subject-matter of the case. The Court distinguished the *Phosphates in Nauru* case from the *Monetary Gold* case.[1336] In the *Monetary Gold* case, the Court could only decide upon Italy's claims if it first decided upon the international responsibility of Albania. In contrast, in the *Phosphates in Nauru* case, the Court could decide upon the international responsibility of Australia without also deciding about the international responsibility of New Zealand and the UK. The Court could assess Australia's conduct separately and without considering the conduct of the other two states. Of course, since all three states acted jointly through the Administering Authority, the Court's decision on the lawfulness of Australia's conduct could have implications for the lawfulness of the conduct of New Zealand and the United Kingdom. However, such necessary implications were not a sufficient reason for the Court to decline to exercise its jurisdiction.[1337] This makes sense, given that such implications are by no means conclusive, as there could be other reasons why the conduct of the third states had to be assessed differently (e.g., the existence of a bilateral treaty permitting the conduct). In sum, the rights and obligations of third states only form the subject-matter of a decision if the Court necessarily has to rule on them to decide the matter before it. Or, as the ICJ put it, if the link between the decision about the rights and obligations of third states and the decision at hand is "not purely temporal but also logical".[1338]

The 1995 *East Timor* case[1339] marks another important stage of the development of the Monetary Gold doctrine by the ICJ. Australia and Indonesia had concluded a treaty on the joint exploration and exploitation of the continental shelf of East Timor. In response to this, Portugal brought proceedings against Australia before the ICJ. Portugal argued that the conclusion of the treaty violated the right of self-determination of the people of East Timor as well as Portugal's rights as administering power under Chapter XI UNC. In contrast, Australia argued that a decision of the ICJ would

1335 ICJ Pleadings, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections of Australia, 135–138.

1336 *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, ICJ Reports 1992, 240 (261, para. 55).

1337 Ibid.

1338 Ibid.

1339 *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90; *C. Chinkin*, 45 ICLQ 3 (1996), 712.

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require the Court to decide upon the lawfulness of the invasion of East Timor by Indonesia and the legal validity of the treaty between Australia and Indonesia. As Indonesia was not a party to the case, the Court could not decide upon the matter.[1340]

The Court agreed with Australia. The Court held that the request of Portugal

> "would amount to a determination that Indonesia's entry into and continued presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."[1341]

The Court found itself unable to examine Australia's conduct separately from the conduct of Indonesia.

In summary, the Monetary Gold doctrine as applied by the ICJ prevents the Court, in the course of its contentious procedure, from making any judicial pronouncement directly concerning the rights and obligations of third states which are not parties to the proceedings. However, the doctrine does not prevent the Court from ruling on the rights and obligations of the parties to the case, even if the ruling may have implications for the rights and obligations of third states.[1342]

2. Doctrinal justification of the Monetary Gold doctrine

Thienel argues that there are three potential doctrinal justifications for the *Monetary Gold doctrine*.[1343]

According to the first justification for the Monetary Gold doctrine, the Court lacks jurisdiction to decide the case because deciding the case would amount to an exercise of jurisdiction over a third state without that state's

1340 *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90 (99–106).
1341 Ibid. (105), references omitted.
1342 So also *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 47–48.
1343 Ibid., 52 et seq., 144 et seq.

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consent.[1344] In the *Monetary Gold case*, the Court implied that deciding the case would constitute an exercise of jurisdiction over the third state when it stated that "[t]o adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law […] that the Court can only exercise jurisdiction over a State with its consent."[1345]

The first justification assumes that the Court exercises jurisdiction over a state when making judicial pronouncements on the legal rights and obligations of a third state and that this exercise of jurisdiction requires the consent of that state.[1346] This, of course, raises the question what constitutes an exercise of jurisdiction of an IC over a state.[1347] The decisions of the ICJ become binding only on the parties to the case (Article 59 ICJ Statute) and it is only between these parties that the decisions become *res judicata* (Articles 59–60 ICJ Statute).[1348] The binding force and the effect of *res judicata* result from the procedural relationship which is created between the parties on the one hand and between the parties and the Court on the other hand through the consent of the parties and the *seisin* of the Court.[1349] Such a relationship does not exist *vis-à-vis* the third state. For the third state the decision cannot be binding or become *res judicata*.[1350]

According to the second justification for the Monetary Gold doctrine, the Court lacks jurisdiction because there is no real dispute between the parties to the proceedings because the real dispute exists between the applicant and the non-participating third state.[1351] This justification is also echoed in the ICJ's case law. In the *Monetary Gold* case, the Court implied that the real dispute was not between Italy on the one hand and France, the United States and the United Kingdom on the other, but between Italy and Albania:

1344 Ibid., 52 et seq.
1345 *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States) (Preliminary Question)*, Judgment, ICJ Reports 1954, 19 (32).
1346 See for example, *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 66.
1347 Extensively on this question, see *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 105 et seq.
1348 Ibid., 128. See on this *supra*: § 6 Section C.III.
1349 Ibid., 130 et seq.
1350 Ibid., 132.
1351 Ibid., 148.

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"To go into the merits of such questions would be to decide a dispute between Italy and Albania."[1352]

However, this second justification stretches the function of the requirement of a dispute, which is primarily to ensure that the Court is not seised of purely abstract questions of law which have no relevance to the legal relations between the parties.[1353]

According to the third justification for the Monetary Gold doctrine, the Court has jurisdiction but it declines to exercise it in order to protect the integrity of the ICJ Statute's jurisdictional regime.[1354] This also finds expression in the Court's case law. In the *Nicaragua case*, the ICJ raised the question if the situation required the Court to "*decline* [...] *to exercise* the jurisdiction conferred upon it".[1355]

The Court could only decide to decline to exercise its jurisdiction, if the conditions for its jurisdiction are fulfilled in the first place. The ICJ thus expressed the view that it did not lack jurisdiction but that it may decline to exercise it.

Thienel argues that the *Monetary Gold doctrine* protects the integrity of the jurisdictional scheme of the Court's contentious procedure by complementing the protective function of the consent requirement.[1356] The contentious procedure's consent requirement would lose its protective function and become ineffective, if the legal rights and obligations of a non-consenting state could be similarly affected by the Court through the initiation of contentious proceedings between other states.[1357] As stated before, the *inter partes* effect of ICJ decisions means that decisions of the Court are binding only for the parties to a case before the Court and only in respect of the particular case.[1358] The consent requirement to ICJ contentious proceedings protects the third state from being bound by ICJ decisions against its will.

1352 *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States) (Preliminary Question)*, Judgment, ICJ Reports 1954, 19 (32).

1353 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 148.

1354 Ibid., 196 et seq.

1355 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility)*, Judgment, ICJ Reports, 392 (431), emphasis added.

1356 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 208–209.

1357 Ibid., 235

1358 See Article 59 ICJ Statute.

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The Monetary Gold doctrine complements this protection in situations where the third state, although not directly bound by the ICJ decision, is similarly affected in its legal position.[1359] In other words, the Monetary Gold doctrine provides an additional layer of protection for the third state in a situation in which reliance on the *inter partes* effect of ICJ decisions proves insufficient to protect its legal position.[1360] Such a situation may arise indirectly for a third state because of the legal effect the Court's decision has for the parties to the dispute. As the decision becomes binding for the parties to the dispute, they may be confronted with two conflicting legal obligations: on the one hand they have the obligation to respect the rights of the third state. On the other hand they have the obligation to obey the decision of the Court which may oblige them to act in a manner which is detrimental to these rights of the third state.[1361] The two legal obligations are of the same rank, but the disputing states may feel more obliged to follow the authoritative decision of the Court than to respect the rights of the third state.[1362]

An example may help to illustrate this dilemma: State A and State B have entered into trade relations with one another according to which both states have agreed to remove any trade barriers for goods. State C believes that the agreement between State A and State B violates the rights of State C as it also applies to goods produced on the territory of State C which is currently illegally occupied by State B. State C therefore initiates proceedings against State A. The Court decides that State A must cease all conduct which recognizes the sovereignty of State B over the territory of State C including importing products from State B that have been produced on illegally occupied territory of State C. State A is thus under conflicting obligations following from its treaty with State B on the one hand and the decision in the case between States A and C.

Other actors may also adapt their behavior *vis-à-vis* the non-consenting third state in accordance with the Court's decision.[1363] If the Court decided

1359 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 207–208.

1360 Ibid., 208–209.

1361 In the case of the ICJ, see Article 94 para. 1 UNC: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

1362 On the authority of ICs, see *infra* in this Chapter Section C.II.

1363 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 235.

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that the third state violated its international obligations, other states may adopt countermeasures and rely on the Court's judgment as justification. The moral authority of the Court's decision may convince these states to act in such a manner. What is more, the Court may be more likely to find that these countermeasures are lawful if it had already found that the third state's actions were illegal. While the Court is not bound to by previous decisions,[1364] it is likely to follow its previous determinations regarding the content[1365] and the application of the law[1366]. As *H. Lauterpacht* observed:

> "The Court follows its own decisions for the same reasons for which all courts—whether bound by the doctrine of precedent or not—do so, namely, because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice; and (a minor and not invariably accurate consideration) because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong."[1367]

The Court may thus be inclined to decide other cases involving the third state in a similar manner. The *Monetary Gold doctrine* seeks to prevent the third state from being prejudged in such a manner.

1364 *R. Kolb*, The International Court of Justice, 2013, 765.

1365 *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Application to Intervene, Judgment, Dissenting Opinion Jennings, ICJ Reports 1984, 148 (157 et seq., paras. 27 et seq.); cf. *M. Payandeh*, Internationales Gemeinschaftsrecht, 2010, 464; *A. v. Bogdandy/I. Venzke*, 23 European Journal of International Law 1 (2012), 7 (18–19); *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 198; *A. Pellet*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Art. 38, 308 et seq.

1366 *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Joint Declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal, Elaraby, ICJ Reports 2004, 330 (332–333); *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 198; *A. Pellet*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Art. 38, para. 314.

1367 *H. Lauterpacht*, The development of international law by the International Court, 2. ed. 1958, 14.

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3. Applying the rationale of the Monetary Gold doctrine to advisory proceedings

The Eastern Carelia doctrine and the Monetary Gold doctrine share certain features which may indicate that both doctrines follow the same logic:

For a start, both doctrines have been developed as a response to the same problem: How should the Court deal with the non-consent and non-participation by a state in the proceedings if that state's rights and legal interests may be affected by the outcome of the proceedings? Both doctrines flow from the Court's presumption that the Court may not directly render a judicial decision on the rights and interest of a state without that state's consent. In the context of the Monetary Gold doctrine, the Court referred to the "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."[1368] In the Eastern Carelia context, the same notion is referred to by the Court as the "principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent."[1369]

Does the justification of the Monetary Gold doctrine thus also justify the Eastern Carelia doctrine?[1370] In other words, does the Eastern Carelia doctrine like the Monetary Gold doctrine aim to protect the jurisdictional structure of the Court's contentious procedure from being circumvented?

At first sight, the situation with which the Court is faced in both contexts appears similar. The Court is asked to make a judicial pronouncement on the rights and obligations of a state without the consent or participation of that state. In both scenarios, the judicial pronouncements – while legally persuasive and morally authoritative – are not binding on that (third) state. The judicial pronouncements cannot alter the rights and obligations of the non-participating state, in one case because of the *inter partes* effect of ICJ decisions (Article 59 ICJ Statute), in the other because ICJ advisory opin-

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1368 *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States) (Preliminary Question)*, Judgment, ICJ Reports 1954, 19 (32); *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, 90 (105, para. 34).

1369 *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (25, para. 33).

1370 On this point, see also *Lando* who distinguishes the two doctrines based on the fact that consent is a jurisdictional requirement only for contentious proceedings, *M. Lando*, 61 CJTL 1 (2023), 67 (107–108); *Kolb* argues that the Eastern Carelia doctrine (or "non-circumvention rule") is an application of the Monetary Gold doctrine to advisory proceedings, see *R. Kolb*, The International Court of Justice, 2013, 1073.

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ions are generally not binding. In both scenarios, therefore, the legal rights and obligations of the non-participating state formally remain unaltered by the outcome of the proceedings.

Nevertheless, the ICJ is still concerned that rendering a decision or issuing an advisory opinion in such a case may circumvent the non-consent of the state in question. Since the state's legal rights and obligations are not directly affected by the outcome of the proceedings, the reason for the existence of the respective doctrines seems not to be to protect the non-participating state from the *legal* effects of the proceedings, but from their *factual* effects.

The question is therefore whether advisory opinions are capable of factually affecting the state in question in a manner similar to the decisions in the context of the Monetary Gold doctrine, so as to warrant a similar response from the Court.

When comparing the effects of ICJ decisions on third states and ICJ advisory opinions on interested states, there appears to be one striking difference: the binding force of ICJ judgments.

The ICJ Statute and the UNC explicitly limit the binding force of ICJ pronouncements to "decisions" of the Court. Advisory opinions do not qualify as decisions in the sense of Article 59 ICJ Statute, Article 94 para. 1 UNC and are thus not binding.[1371] Only the operative provisions (or *dispositif*) of a judgment are binding.[1372] The reasons which underly a decision are generally non-binding, unless they are indispensable to understand

1371 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (71); *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports 1956, 77 (84); *G. G. Fitzmaurice*, 29 British Yearbook of International Law (BYIL) 1 (1952), 1 (45); *E. Hambro*, 3 ICLQ 1 (1954), 2 (5–6); *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 195; *M. Shahabuddeen*, Precedent in the World Court, 1996, 165 et seq.; *S. Rosenne*, The law and practice of the International Court, 1920-2005, 4th ed. 2006, 304; *P. d'Argent*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 65, para. 48.

1372 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, 43 (94, para. 123); *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 41.

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and implement the operative provisions.[1373] Advisory opinions lack such operative provisions. The Rules of the Court differentiate on this point between judgments and advisory opinions. While judgments shall contain "the operative provisions of the judgment" (Article 95), advisory opinions contain "the reply to the question put to the Court" (Article 107). As such, advisory opinions are not binding for states in the sense described above.[1374]

Nevertheless, advisory opinions may create certain legal obligations for the requesting UN organ.[1375] According to *Abi-Saab*, the requesting organ has the duty to recognize the advisory opinion of the Court as the legal view of the UN on the particular legal question and it may not replace the Court's legal assessment with its own.[1376] Others argue that the requesting organ has a duty to take the opinion into account.[1377] However, this does not mean that the requesting organ has a legal obligation to also *implement* this legal view.[1378] Instead, the requesting organ remains free to adopt a different (political) solution than the (legal) solution proposed by the Court.[1379] Advisory opinions also lack the effect of *res judicata* with

1373 *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 41.

1374 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (71); *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports 1956, 77 (84); *G. G. Fitzmaurice*, 29 British Yearbook of International Law (BYIL) 1 (1952), 1 (45); *E. Hambro*, 3 ICLQ 1 (1954), 2 (5–6); *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 195; *M. Shahabuddeen*, Precedent in the World Court, 1996, 165 et seq.; *S. Rosenne*, The law and practice of the International Court, 1920-2005, 4th ed. 2006, 304; *P. d'Argent*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 65, para. 48.

1375 *G. Abi-Saab*, Les exceptions préliminaires dans la procédure de la Cour internationale, 1966, 82–84.

1376 Ibid., 82–84; so also *R. Kolb*, The International Court of Justice, 2013, 1097; cf. *D. Négulesco*, 57 Recueil des cours d'Académie de Droit International de La Haye (1936), 5 (64).

1377 *K. Oellers-Frahm/E. Lagrange*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 96, para. 43.

1378 *G. Abi-Saab*, Les exceptions préliminaires dans la procédure de la Cour internationale, 1966, 82–84; cf. *D. Négulesco*, 57 Recueil des cours d'Académie de Droit International de La Haye (1936), 5 (64).

1379 *G. Abi-Saab*, Les exceptions préliminaires dans la procédure de la Cour internationale, 1966, 82–84; *K. Oellers-Frahm/E. Lagrange*, in: B. Simma/D.-E. Khan/G.

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regard to subsequent judicial proceedings. The ICJ could give an advisory opinion or render a judgment on the same matter on which it has already given an advisory opinion.[1380] The ICJ is further not bound by its own advisory opinions. However, this is also true for judgments as the ICJ does not follow any *stare decisis* principle.[1381]

The non-binding nature of advisory opinions reflects the different function of advisory opinions as opposed to judgments. Advisory opinions – in contrast to judgments – do not settle international disputes, but guide the requesting UN organ in its future activities with respect to a certain issue by clarifying the underlying legal questions. As Judge *Nolte* held in his Separate Opinion in the recent *Policies and Practices of Israel in the Occupied Palestinian Territory* case:

> "In contentious proceedings, the Court "decide[s] ... disputes" in a binding and final manner. These proceedings are retrospective: their contribution to the peaceful settlement of disputes consists in ending a dispute by making a binding determination that is endowed with legal certainty and finality, the *res judicata* effect. In contrast, advisory proceedings are consultative and prospective: the Court gives an advisory opinion on a legal question to provide guidance for the requesting organ's future conduct. The conclusions of the Court in advisory opinions are not the end but the beginning of a process that seeks to establish and maintain peace through law."[1382]

There may exceptionally be instances where a state or an international organization has a legal obligation to comply with an advisory opinion. However, such 'compulsive'[1383] or 'binding'[1384] advisory opinions are the re-

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Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 96, para. 42; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, Separate Opinion Nolte, Publication pending in ICJ Reports 2024, 1 (1-2, para. 4).

1380 *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 227 et seq.; *P. d'Argent*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 65, para. 50.

1381 *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 228; *R. Kolb*, The International Court of Justice, 2013, 763.

1382 *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion, Separate Opinion Nolte, Publication pending in ICJ Reports 2024, 1 (1-2, para. 4).

1383 *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 228.

1384 *R. Ago*, 85 AJIL 3 (1991), 439.

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sult of separate agreements concluded between states and/or international organizations in which they agree to comply with the advisory opinion.[1385] Referring to such opinions as 'binding advisory opinions' is therefore somewhat misleading as it is not the advisory opinion that is compulsive or binding but the separate agreement. The agreement refers to the advisory opinion and adopts its content as binding. The binding force, therefore, does not originate from the advisory opinion but from the agreement.[1386] The example of 'binding advisory opinions' thus supports rather than contradicts the rule that advisory opinions have no binding force.

While ICJ decisions are similarly non-binding for third parties,[1387] they differ from advisory opinions insofar as they create not only a moral but a legal obligation for the states parties to the case to act in a certain way.[1388] Article 94 para. 1 UNC obliges UNC Member States to comply with all ICJ decisions in cases to which they are parties.[1389] "Decisions" in the sense of Article 94 para. 1 UNC include not only final judgments in contentious cases but also non-procedural binding orders such as orders indicating provisional measures.[1390] Such ICJ decisions can create different

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1385 See for example the Convention on the Privileges and Immunities of the United Nations, 1 UNTS 15, Section 30: "All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties." See also ILOAT Statute, Article XII, para. 2.

1386 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 3, Ch. 30, § 415; *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 51; *R. Ago*, 85 AJIL 3 (1991), 439 (439–451).

1387 See Art. 59 ICJ Statute: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

1388 See, however, *Thirlway* who argues that the "nature of an international judicial act would suggest that the law as declared by the Court is binding on the parties to the same extent after the judgment as it was before", see *H. W. Thirlway*, 60 British Yearbook of International Law (BYIL) 1 (1989), 1 (103).

1389 Art. 94 UNC reads: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

1390 *K. Oellers-Frahm*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 3. ed., 2012: Art. 94, paras. 4–5; *R. Kolb*, The Interna-

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types of obligations. Typically, the ICJ will make a declaratory judgment declaring that one or multiple parties have breached international law.[1391] Such declaratory judgments create an obligation on the parties to recognize the unlawfulness of the conduct. The ICJ will usually accompany such a decision with a decision that the State Party in violation of international law has a duty to immediately cease a certain unlawful act and refrain from such acts in the future.[1392] As the Court held:

> "This obligation to cease wrongful conduct derives both from the general obligation of each State to conduct itself in accordance with international law and from the specific obligation upon States parties to disputes before the Court to comply with its judgments, pursuant to Article 59 of its Statute."[1393]

Such decisions give rise to an obligation to refrain from a certain conduct. Occasionally, the Court will also order the violating state to give assurances and guarantees of non-repetition.[1394] However, the Court will only do so in exceptional circumstances as it must be assumed that the state will act in good faith.[1395] The ICJ will also usually combine such declaratory decisions on the unlawfulness of a certain conduct with a judgment on reparations and either indicate a general obligation to make reparation[1396] or indicate a specific type of reparation that is owed, i.e. restitution, the

tional Court of Justice, 2013, 835–836; for the opposite view, arguing that Art. 94 UNC only applies to judgments of the Court, see *A. Pillepich*, in: J.-P. Cot/A. Pellet (eds.), La Charte des Nations Unies, 3. ed., 2005: Art. 94, paras. 15–16. In *LaGrand*, the ICJ raised the question but decided not to answer it, limiting itself to stating that orders indicating provisional measures have "binding effect" on the parties to the case, see *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, 466 (505-506, paras. 108-109).

1391 *M. N. Shaw*, International law, 7. ed. 2014, 798.

1392 See for example *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, Judgment, ICJ Reports 1986, 14 (149); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports 2009, 213 (267, para. 148).

1393 *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports 2009, 213 (267, para. 148).

1394 Ibid. (267, para. 150); *M. N. Shaw*, International law, 7. ed. 2014, 800.

1395 *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, 253 (272, para. 60); *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports 2009, 213 (267, para. 150).

1396 See for example *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, Judgment, ICJ Reports 1986, 14 (149).

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payment of damages or satisfaction.[1397] Such decisions create an obligation of conduct for the parties to the dispute to make reparation. The ICJ may also prescribe a certain conduct as it did in the *LaGrand* case, in which the Court found that the USA committed itself to allow the review and reconsideration of convictions and sentencing whenever foreign nationals are arrested in future cases.[1398]

To illustrate the difference between ICJ decisions and advisory opinions, let us return to the *Chagos* case. The ICJ found that the continuous administration of the Chagos Archipelago by the United Kingdom constituted an internationally wrongful act and that the United Kingdom was therefore under an obligation to return the archipelago to Mauritius.[1399] Furthermore, the Court derived from the right to self-determination an *erga omnes* obligation on all UN Member States to cooperate with the UN to facilitate the return of the Chagos Archipelago to Mauritius.[1400] The advisory opinion thus directly concerned the rights and obligations of the United Kingdom, Mauritius, and of all UN Member States. However, the opinion merely recognized the legal rights and obligations of the parties at the time the Court rendered the advisory opinion. The opinion itself did not alter any existing rights or obligations or create any additional legal obligation that did not exist before the opinion was issued. The issuance of the advisory opinion thus did not create any independent legal incentives for any of the involved states to act in a certain manner. Instead it only created an additional *moral* incentive by presenting a persuasive account of the law by a highly authoritative IC.

We will now consider a hypothetical scenario in which the case would have been heard by the ICJ under its contentious procedure without the participation of the United Kingdom. Let us suppose that Mauritius and

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1397 *The Factory at Chorzow (Germany* v. *Poland*), Merits, PCIJ Series A No. 17, 1928, 47; *Corfu Channel (United Kingdom v. Albania)*, Judgment on Compensation, ICJ Reports 1949, 244; *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1998, 7 (80 et seq., paras. 148 et seq.); *M. N. Shaw*, International law, 7. ed. 2014, 798–799; *C. Brown*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 59 ICJ Statute, para. 41.

1398 *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, 466 (516, para. 128); see also *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Reports 2004, 12 (73, para. 153).

1399 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (138-139, paras. 175-179).

1400 Ibid. (139-140, paras. 180-182).

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the Maldives requested the Court to settle their dispute over the territorial sovereignty of the Chagos Archipelago and the United Kingdom refused to consent to the proceedings and to participate in them.[1401] In the event that the ICJ had rendered a decision in such a scenario (which the Court would invariably have refused to do in line with the Monetary Gold doctrine), it would have to decide over the territorial sovereignty over the Chagos Archipelago with binding force for Mauritius and the Maldives. Both states would not only be bound by the law as it was recognized by the Court, but the decision itself would create a legal obligation incumbent upon both states not to recognize the territorial sovereignty of the United Kingdom. In a hypothetical scenario in which one of the parties had concluded a treaty with the United Kingdom which recognized British sovereignty over the archipelago, that state would even be under contradictory international law obligations as a consequence of the ICJ judgment.

In brief, one major difference between ICJ judgments in the Monetary Gold scenario and advisory opinions in the Eastern Carelia scenario is that ICJ decisions create independent legal obligations for the States Parties to the proceedings, while advisory opinions merely recognize the law as it stood at the time of the rendering of the opinion without creating additional legal obligations.

The Monetary Gold doctrine aims to ensure that the *inter partes* effect (or relativity) of ICJ decisions does not only exist in theory but also in practice. This alone makes it difficult to transfer the rationale of the Monetary Gold doctrine to the Eastern Carelia doctrine. Advisory opinions have no binding force which needs to be contained to the disputing parties. As such there is no need to provide "collateral protection"[1402] of the *inter partes* effect. However, one notion may be transferred to the discussion of the Eastern Carelia doctrine: the idea that ICJ pronouncements may have effects beyond binding force and *res judicata* for the state in question. It is therefore necessary to examine such other legal effects of advisory opinions for interested states as a potential reason for the Eastern Carelia doctrine.

1401 This is the backdrop to the recent proceeding before ITLOS between Mauritius and the Maldives, see *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17.

1402 *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 208–209.

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II. Legal effects analogous to binding force: The authority of ICJ advisory opinions

As laid out above, ICJ advisory opinions differ from decisions in contentious cases in their lack of binding force and *res judicata* effect.[1403] However, they may have certain legal effects that are analogous to the legal effects of ICJ decisions which justify the Court's caution in rendering advisory opinions on inter-state disputes. The idea that advisory opinions possess certain qualities that set them apart from mere legal advice is not new.[1404] Advisory opinions are described by legal commentators and ICs as more than "mere utterances having no real importance in respect of their [i.e., states'] rights and interests",[1405] they are "an authoritative statement of the law",[1406] they have "legal value and a moral authority",[1407] they "carry with them the prestige and the authority of the Court",[1408] they exert "precedential influence",[1409] or simply have "legal effects".[1410] Others claim that the Court's advisory opinions carry the same authority as ICJ decisions in contentious proceedings.[1411]

1403 Instead of many, see *S. Rosenne*, The law and practice of the International Court, 1920-2005, 4th ed. 2006, 304.

1404 *G. Abi-Saab*, Les exceptions préliminaires dans la procédure de la Cour internationale, 1966, 75–76.

1405 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, Dissenting Opinion Winiarski, ICJ Reports 1950, 65 (91–92).

1406 *South-West Africa (Liberia v. South Africa)*, Second Phase, Judgment, Dissenting Opinion Tanaka, ICJ Reports 1966, 250 (260); *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17 (77, para. 202); *M. Shahabuddeen*, Precedent in the World Court, 1996, 168.

1407 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, Dissenting Opinion Winiarski, ICJ Reports 1950, 65 (91–92).

1408 *P. d'Argent*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 65, para. 49.

1409 *M. Shahabuddeen*, Precedent in the World Court, 1996, 167.

1410 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17 (78, para. 205).

1411 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, Separate opinion de Castro, ICJ Reports 1971, 170 (173, para. 4); *M. Shahabuddeen*, Precedent in the World Court, 1996, 171.

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The ITLOS Special Chamber in the *Maritime Delimitations case*[1412] between Mauritius and the Maldives emphasized the authority of ICJ advisory opinions when it found:

> "An advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. However, judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the "principal judicial organ" of the United Nations with competence in matters of international law."[1413]

The frequent references to the authority of advisory opinions beg the question what "authority" means in the context of ICs in general and ICJ advisory opinions in particular and whether the authority of ICJ advisory opinions may justify the Eastern Carelia doctrine.

1. Authority of international courts and tribunals

There are different approaches on how to define the authority of ICs.[1414] In a broad sense, authority can be defined as the power to "induce change in behavior".[1415] In an authoritative relationship, the change in one's behavior is not the result of certain substantive reasons but of the authoritative relationship itself.[1416] The authority provides a content-independent reason for the change in behavior.[1417] Authority can be distinguished from coercion by the fact that an authoritative relationship leaves the other side a residue of freedom of choice.[1418] In other word, authority persuades, whereas coercion

1412 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17.

1413 Ibid. (77, para. 203).

1414 For an overview of the debate on the authority of ICs, see K. J. Alter, L. R. Helfer, M. R. Madsen (eds.), International court authority, 2018.

1415 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (6).

1416 *B. Çalı*, Authority, in: J. d' Aspremont/S. Singh (eds.), Concepts for international law, 1. ed., 2019, 39 (41).

1417 Ibid., 41.

1418 Ibid., 41.

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forces. In a legal context, authority can be defined as the "legal capacity to determine others and to influence their freedom, i.e., to shape their legal or factual situation".[1419]

The field of legal scholarship has devoted a significant amount of attention to the subject of authority,[1420] particularly in relation to ICs.[1421] *Alter, Helfer* and *Madsen* identified four dominant approaches to studying the authority of international institutions: legal formalist approaches, normative approaches, sociological legitimacy theories, and compliance and performative approaches.[1422] They also propose a fifth perspective, which focuses on the practice of key audiences including (potential) litigants, government, and judges.[1423] The present study will apply this fifth approach, which focuses on the practice of key audiences (practice-based approach). However, let us first briefly examine the different approaches.

a) Legal formalist approaches

From a formalist perspective, authority of ICs is always delegated and delimited.[1424] Authority is delegated in the sense that authority originates

1419 *A. v. Bogdandy/I. Venzke*, 23 European Journal of International Law 1 (2012), 7 (18).

1420 For a succinct overview of the concept of authority and how it relates to in international law, see *B. Çalı*, Authority, in: J. d' Aspremont/S. Singh (eds.), Concepts for international law, 1. ed., 2019, 39; on the concept of authority more generally, see *J. Raz*, The authority of law, 1979; *S. Shapiro*, Authority, in: J. L. Coleman/S. Shapiro (eds.), The Oxford Handbook of Jurisprudence and Philosophy of Law, 2004, 382.

1421 For a general overview, see *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3; *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296.

1422 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (6–14); focusing on formalist and normative approaches, see *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296.

1423 See *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3; *K. J. Alter/L. R. Helfer/M. R. Madsen*, How Context Shapes the Authority of International Courts, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 24.

1424 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (6); on the delegation of adjudicative powers, see *C. Bradley/J. Kelley*, 71 Law and Contemporary Problems 1 (2008), 1 (11 et seq.).

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from states and is then delegated to the IC by means of some formal source of law, often in the form of the IC's constituent instrument.[1425] In the case of the ICJ, these formal sources are the UNC and the ICJ Statute which give authority to the Court to decide contentious cases in a binding[1426] and final[1427] manner and to render (non-binding) advisory opinions at the request of an authorized organ.[1428] Authority is delimited in the sense that the extent to which an IC can exert authority is predetermined by its delegated competences.[1429] Important discussions within legal formalist debates concern the extent of delegated powers and whether these powers can be extended by means of subsequent practice.[1430]

The type of authority that is bestowed by a formal source of law is called formal or *de jure* authority.[1431] While this type of authority is a necessary starting point for any kind of authority an IC can exercise,[1432] it seems clear that formal authority alone cannot explain the effects which judicial decisions have on their addressees. The insufficiency of a purely formalist-legalist perspective becomes apparent if one considers that even the most competent IC would be irrelevant if it was not given any cases to decide or its decisions were ignored.[1433] The fundamental challenge every IC thus faces is how to transform its delegated formal authority into *de*

1425 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (6); *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296 (300).

1426 Art. 59 ICJ Statute, Art. 94 UNC.

1427 Art. 60 ICJ Statute

1428 Art. 65 ICJ Statute, Art. 96 UNC.

1429 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (6).

1430 See *G. Nolte*, Treaties and subsequent practice, 2013; *G. Nolte*, Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, 7. April 2015, UN Docs A/CN.4/683.

1431 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (6); *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296 (300).

1432 *K. J. Alter/L. R. Helfer/M. R. Madsen*, How Context Shapes the Authority of International Courts, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 24 (33).

1433 Ibid., 26.

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facto authority.[1434] Other approaches to IC authority help answering this question.

b) Normative approaches

For scholars who apply a normative approach, the authority of an IC is tantamount to its legitimacy.[1435] According to this approach, to be able to induce behavioral changes, ICs must fulfil certain abstract legal criteria of legitimacy.[1436] *Franck* argued that the legitimacy of an IC directly influences the degree to which states comply with their legal obligations.[1437] According to *Franck*, the compliance-pull of a legal norm depends to a large extent on the norm's determinacy.[1438] ICs in turn play a crucial role in the process of increasing norm-determinacy. Whether an IC is successful in this, *Franck* argues, depends largely on its legitimacy:

> "Whether the clarifying process is successful in transforming rule indeterminacy into determinacy depends on the legitimacy that the members of the international system ascribe to the specific process. This implicates such factors of legitimacy as *who* is doing the interpreting, their *pedigree* or authority to interpret and the *coherence* of the principles the interpreters apply."[1439]

ICs possess normative authority not because of certain legal sources but because of their aspiration to meet the characteristics of an ideal judicial institution.[1440] Many scholars have developed theories of what the charac-

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1434 Cf. Ibid., 26.

1435 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (7); *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296 (300).

1436 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (7).

1437 *T. M. Franck*, The power of legitimacy among nations, 1990.

1438 Apart from a rule's determinacy, *Franck* identified three other factors which contribute to rule-compliance: symbolic validation, coherence, and adherence, see *T. M. Franck*, 82 Am. j. int. law 4 (1988), 705 (712); *T. M. Franck*, The power of legitimacy among nations, 1990, 49.

1439 *T. M. Franck*, The power of legitimacy among nations, 1990, 61.

1440 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court author-

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teristics of an ideal legal institution could look like. Famous examples include *Fuller*'s eight principles of legality which form an "internal morality of the law"[1441] and *Raz*'s service-conception of authority, according to which law derives its legitimacy from the fact that it provides a service to its addressees.[1442] Other normative approaches focus on the processes of making and applying the law and use normative criteria such as transparency, proportionality, accessibility, accountability, and representativeness to determine the legitimacy of legal rules and institutions.[1443] Finally, some scholars derive the authority of an institution from the authority of its creator, i.e., from the actor that has delegated certain powers to the institution.[1444]

When considering the normative authority of a judicial body like the ICJ, one can distinguish between the authority of the institution itself (or its *strictu sensu* authority) and the authority of its judicial pronouncements (also called its persuasive authority).[1445] *Strictu sensu* authority is the authority an institution claims because of certain intrinsic qualities.[1446] In other words, *strictu sensu* authority describes a content-independent authority that the institution itself possesses.[1447] Persuasive authority describes the degree to which a judicial decision is able to persuade its recipients (its direct addressees as well as the broader international community) of

ity, First edition, 2018, 3 (7); Cf. *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296 (300).

1441 *Fuller* claimed that compliance with the law is only possible if law-makers comply with certain principles of legality. Accordingly, laws must be general, publicized, non-retroactive, clear, consistent, possible to obey, stable, and congruent, see *L. L. Fuller*, The morality of law, Revised edition 1969, 33 et seq. Building on Fuller's account, see for example *J. Brunnée/S. J. Toope*, Legitimacy and legality in international law, 2010.

1442 *Raz* argued that law provides the service of replacing complex primary reasons for acting in a certain manner (i.e., moral reasons) with more easily comprehensible secondary reasons for action (i.e., legal obligations), thereby solving complex collective action problems, see *J. Raz*, The authority of law, 1979.

1443 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (7). See for example *A. Nollkaemper*, 23 Eur J Int Law 3 (2012), 769; *A. v. Bogdandy/I. Venzke*, 23 European Journal of International Law 1 (2012), 7.

1444 See for example *A. Cassese*, 25 Leiden Journal of International Law 2 (2012), 491.

1445 *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296 (301).

1446 Ibid., 301.

1447 Ibid., 301.

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the "correctness" of its pronouncements.[1448] In contrast to the *strictu sensu* authority, persuasive authority is content-dependent.[1449] In other words, the authority derives not from the judicial body rendering the decision but from the content of the decision.

There are different factors which bestow persuasive authority upon a judicial decision. The first factor of persuasive authority is the decision's relationship to previous decisions (also called *per relationem* authority).[1450] A decision is perceived as more authoritative if it is consistent with previous decisions of the same court or other ICs, as this consistency increases the predictability of the application of the law.[1451] As several ICJ judges stated in the *Legality of Use of Force* case:

> "[The ICJ] must ensure consistency with its own past case law in order to provide predictability. Consistency is the essence of judicial reasoning. This is especially true in different phases of the same case or with regard to closely connected cases."[1452]

ICs are keen on highlighting the *per relationem* authority of their decisions by referencing their own case law or the case law of other ICs.[1453]

A second source of a judicial decision's persuasive authority is its form and content.[1454] This is also called a judicial decision's "autonomous persuasive authority" as the authority emanates from the decision itself.[1455] A decision can claim a high degree of authority of content if it contains a sound interpretation and application of the law.[1456] The authority of form concerns the decision's rhetoric.[1457] Elements of this include the decision's

1448 Ibid., 302.
1449 Ibid., 302.
1450 Ibid., 303.
1451 Ibid., 303.
1452 *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary objections, Joint declaration of Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al Khasawneh, Buergenthal and Elaraby, ICJ Reports 2004, 330 (330, para. 3).
1453 *H. Lauterpacht*, The development of international law by the International Court, 2. ed. 1958, 14 Member of the ILC Bimal Patel recently referred to an "uncodified rule" of maintaining consistency and stated that ICs followed a kind of horizontal stare decisis in practice, see ILC, Provisional summary record of the 3633rd meeting held at the Palais des Nations, Geneva, 26 May 2023, A/CN.4/SR.3633, 9.
1454 *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296 (304).
1455 Ibid., 304.
1456 Ibid., 304.
1457 Ibid., 304.

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logical structure, the consistency of the argumentation and the use of clear and unambiguous language.[1458]

In 2023, the ILC published its draft conclusions on subsidiary means for the determination of rules of international law. The ILC listed six criteria for assessing the weight of subsidiary means. These criteria reflect both legal formalist and normative approaches.[1459]

c) Sociological approaches

Sociological approaches to the study of institutional authority build on the work of *Max Weber*.[1460] Like normative theories, most sociological theories define authority as legitimated power.[1461] However, unlike normative approaches, sociological approaches do not measure an institution's legitimacy against some objective normative criteria but instead focus on *perceived* legitimacy.[1462] An example of this is the concept of "semantic authority", as developed by *Venzke*.[1463] Semantic authority refers to the ability of an actor

1458 Ibid., 304.

1459 ILC, Seventy-fourth session, Subsidiary means for the determination of rules of international law, Geneva, 2 June 2023, A/CN.4/L.985., draft conclusion 3:
"When assessing the weight of subsidiary means for the determination of rules of international law, regard should be had to, inter alia:
(a) their degree of representativeness;
(b) the quality of the reasoning;
(c) the expertise of those involved;
(d) the level of agreement among those involved;
(e) the reception by States and other entities;
(f) where applicable, the mandate conferred on the body."

1460 See *M. R. Madsen*, Sociological Approaches to International Courts, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013, 388.

1461 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (9–10). Applying a sociological approach to international law, see *D. Beetham*, The legitimation of power, 1991; *G. A. Caldeira/J. L. Gibson*, 89 The American Political Science Review 2 (1995), 356; *B. Çalı/A. Koch/N. Bruch*, 35 Human Rights Quarterly 4 (2013), 955.

1462 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (9); On the "social legitimacy" of the ECtHR, see *B. Çalı/A. Koch/N. Bruch*, 35 Human Rights Quarterly 4 (2013), 955.

1463 *I. Venzke*, How interpretation makes international law, 2012; *I. Venzke*, 14 Theoretical Inquiries in Law 2 (2013), 381; *I. Venzke*, 4 Transnational Legal Theory 3 (2013),

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such as an IC to create reference points about the law, which other actors cannot ignore when engaging in legal discourse irrespective of whether they agree or disagree with the assessment of the law.[1464] The notion of semantic authority premises on the idea that the formal sources of international law do not adequately represent the nature of international law. Instead, international law is a "communicative practice".[1465] In contrast to normative approaches, semantic authority is not premised on persuasion.[1466] While persuasiveness may increase an actors authority, the constitutive feature of semantic authority is that it looks at an actor's capacity to bring others to engage with its legal reasoning irrespective of agreement on the merits of the argument.[1467] The concept of semantic authority also makes no statement about the legitimacy of the exercise of authority.[1468]

d) Compliance studies and performance-based approaches

Compliance studies regard the degree to which litigants comply with an IC's decisions as the principal benchmark for the authority of an IC.[1469] Performance-based approaches move the perspective further and examine

354; *I. Venzke*, Semantic authority, legal change and the dynamics of international law, in: P. Capps/H. P. Olsen (eds.), Legal authority beyond the state, 2018, 102; *I. Venzke*, Semantic Authority, in: J. d' Aspremont/S. Singh (eds.), Concepts for international law, 1. ed., 2019, 815.

1464 *I. Venzke*, Semantic Authority, in: J. d' Aspremont/S. Singh (eds.), Concepts for international law, 1. ed., 2019, 815 (815).

1465 The concept of semantic authority traces its roots to the German free law movement (*Freirechtsschule*) and US American legal realism, in particular the New Haven School, see Ibid., 817–820.

1466 Ibid., 820.

1467 Ibid., 821; cf. *S. Shapiro*, Authority, in: J. L. Coleman/S. Shapiro (eds.), The Oxford Handbook of Jurisprudence and Philosophy of Law, 2004, 382 (383).

1468 *I. Venzke*, Semantic Authority, in: J. d' Aspremont/S. Singh (eds.), Concepts for international law, 1. ed., 2019, 815 (822).

1469 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (11–12). Examples of such compliance studies include *H. Keller/A. Stone Sweet*, A Europe of rights, 2008; *M. Wind*, 48 J of Common Market Studies 4 (2010), 1039; *A. Nollkaemper*, National courts and the international rule of law, 2012.

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the cumulative impact of IC decisions beyond individual proceedings.[1470] An example of the latter is *Shany's* approach to evaluate the effectiveness of an IC by comparing the IC's cumulative output with its objectives.[1471] Using an IC's objectives as a reference point and the degree to which it fulfils these objectives as a benchmark for authority has the advantage of providing a clear metric. However, it ignores the possible impact of an IC's activities beyond its pre-defined objectives.[1472]

e) Practice-based approaches

The practice-based approach developed by *Alter, Helfer* and *Madsen* intends to accommodate for this shortcoming of the performance-based approach by extending the scope of the perspective beyond an IC's pre-determined goals and towards other effects on the actions of its addressees.[1473] The core idea of the practice-based approach is to measure the authority of IC's by reference to the practice of its key audiences.[1474] *Alter et al.* argue that *de facto* authority exists when judgments of an IC are reflected in the practices of its audiences:

> "The capacity of an IC to exercise authority is, therefore, its ability to influence practices in law, politics, and society. More specifically, IC authority is a court's ability to project its ideas and values about the law and to have these projections reflected by, or even internalized in, the actions of individuals, groups, and organizations within society."[1475]

In this framework, it is irrelevant why a particular actor does or does not comply with an IC's judgment.[1476] What matters is whether the key audiences recognize their obligation to comply with the decision and take

1470 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (12).
1471 *Y. Shany*, 106 American Journal of International Law 2 (2012), 225.
1472 Cf. *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (12).
1473 Ibid., 12.
1474 Ibid., 13.
1475 Ibid., 13.
1476 Ibid., 11.

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meaningful action toward giving effect to the decision.[1477] Importantly, according to this approach, authority is not binary.[1478] *Alter et al.* paint a differentiated picture of authority which accounts for the fact that reactions to IC decisions may vary significantly among audiences with some actors rejecting a decision while others adhere to it.[1479] The practice-based approach also accounts for the fact that *de facto* authority is susceptible to change and erosion and is shared between institutions operating at international and national levels.

Importantly and unlike the normative and the sociological approaches, the practice-based approach separates the question of authority from the question of legitimacy.[1480] The authority of an IC, according to the practice-based approach, depends on how its decisions are accepted, not on the institution's legitimacy. Separating authority from legitimacy has the advantage of evading the problematic amalgamation of two often correlating but not identical concepts. As *Peters* and *Schaffer* highlight, the idea that authority derives from legitimacy would mean that every particularly authoritative institution is also particularly legitimate, an idea which runs counter the empirically observable fact of illegitimate institutions with great authority.[1481]

2. Formal and normative authority of ICJ advisory opinions

From a formalist perspective, the degree to which the ICJ exerts authority by issuing advisory opinions is determined by the Court's constituent instrument. The power to give advisory opinions is bestowed upon the ICJ by virtue of Article 96 UNC and Article 65 ICJ Statute. The ICJ Statute distinguishes between "decisions" and "judgments" on the one hand, which are

1477 *K. J. Alter/L. R. Helfer/M. R. Madsen*, How Context Shapes the Authority of International Courts, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 24 (29).

1478 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (5).

1479 Ibid., 5, 11. See the five-level metric of factual authority developed by *Alter et al.* referenced in the case study below.

1480 Ibid., 4, 9; *K. J. Alter/L. R. Helfer/M. R. Madsen*, How Context Shapes the Authority of International Courts, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 24 (28–29).

1481 See *B. Peters/J. K. Schaffer*, 4 Transnational Legal Theory 3 (2013), 315 (334).

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binding under the Articles 59 and 60 ICJ Statute, and "advisory opinions" on the other which lack such binding force.[1482] Lacking binding force, the formal authority of ICJ advisory opinions is significantly lower than that of ICJ decisions.

Article 38 para. 1 lit. d ICJ Statute stipulates that the Court shall apply "subject to the provisions of Article 59, judicial decisions (…) as subsidiary means for the determination of rules of law."

The reference to "decisions" seems to exclude ICJ advisory opinions.[1483] This reading of the provision's scope is supported by the drafting history of the PCIJ Statute.[1484] However, the Court has used both decisions and advisory opinions in the same manner as subsidiary means for the determination of the law.[1485] Thus, as *H. Lauterpacht* put it, an ICJ advisory opinion "is as authoritative a statement of the law as a judgment rendered in contentious proceedings".[1486]

Special Rapporteur on subsidiary means for the determination of rules of international law *Jalloh* therefore argued that the term "decisions" in Article 38 para. 1 lit. d ICJ Statute also extends to advisory opinions,[1487] a view that was shared by "virtually all members" of the ILC when he proposed it during the ILC's 74th session.[1488]

Judge *Moore* was one of the first to comment on the relationship between the authority of judicial decisions and their binding force. In his 1922 memorandum on the PCIJ, Judge *Moore* stated:

> "Human experience, especially as exemplified in legislation, justifies the belief that the moral authority of judicial decisions is derived chiefly from the fact that they have the authority of law and legally bind the parties to the dispute. If deprived of this effect their so-called moral authority would promptly vanish."[1489]

1482 On the non-binding nature of advisory opinions, see *supra*: § 6 Section D.I.3.

1483 *H. Lauterpacht*, 10 British Yearbook of International Law (1929), 65 (65).

1484 *C. C. Jalloh*, First Report on Subsidiary Means for the Determination of Rules of International Law, Second reissue 16 May 2023, A/CN.4/760, para. 277.

1485 Ibid., para. 277.

1486 *H. Lauterpacht*, 10 British Yearbook of International Law (1929), 65 (185).

1487 *C. C. Jalloh*, First Report on Subsidiary Means for the Determination of Rules of International Law, Second reissue 16 May 2023, A/CN.4/760, para. 280.

1488 ILC, Provisional summary record of the 3633rd meeting held at the Palais des Nations, Geneva, 26 May 2023, A/CN.4/SR.3633, 6.

1489 *J. B. Moore*, The question of advisory opinions, 1922, PCIJ Series D. No. 2, 392.

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Yet, contrary to *Moore's* prediction in 1922 and despite their lack of binding force, the (normative) authority of advisory opinions did not "promptly vanish" but instead rose steadily over the decades. Scholars and practitioners have identified three primary reasons for the authority of ICJ advisory opinions: The intrinsic merit or persuasiveness of the advisory opinions,[1490] the (*strictu sensu*) authority of the institution rendering the advisory opinions[1491] and the judicial process of rendering the opinions[1492].

Hambro dismissed the reliance on the Court's *strictu sensu* authority and argued that the authority of advisory opinions depended exclusively on their intrinsic merit or persuasive authority:

> "Advisory Opinions, even more than the judgments of the Court, will be judged on their intrinsic merits. A judgment of the Court, even if it is not perfect and even if the reasoning can be criticised, can serve a useful purpose because it will put an end to a dispute between two or more States. An Advisory Opinion, on the other hand, does not serve this purpose. It stands or falls with the legal arguments that can be deduced from the reasoning of the majority and it is very much to be feared that a Court seriously split on any legal question submitted to it for Advisory Opinion will not contribute anything useful to the solution of that question."[1493]

Hambro voiced this as a critique of allowing separate and dissenting opinions in advisory proceedings and he is not the first one to do so. Judge *Moore* in his 1922 Memorandum voiced a similar concern arguing that an advisory opinion which is rendered by a small majority against a strong minority opinion "might not prove to be either convincing or conspicuously weighty."[1494]

Moore and *Hambro* point to an important aspect. ICJ decisions have binding force and as such enjoy a high degree of formal authority irrespective of whether the decision has been rendered unanimously or only by a

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1490 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, Dissenting Opinion Winiarski, ICJ Reports 1950, 65 (91–92); *E. Hambro*, 3 ICLQ 1 (1954), 2 (21); *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 231; *M. Shahabuddeen*, Precedent in the World Court, 1996, 167.

1491 *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 231.

1492 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, Dissenting Opinion Zoričić, ICJ Reports 1950, 98 (101–102).

1493 *E. Hambro*, 3 ICLQ 1 (1954), 2 (21).

1494 *J. B. Moore*, The question of advisory opinions, 1922, PCIJ Series D. No. 2, 392.

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small majority. In contrast, advisory opinions have no binding force and as such their authority may be significantly lower if they are issued by a small majority instead of unanimously. This critique is a legal formalist critique, as it primarily makes a distinction on the basis of the formal authority bestowed upon decisions by virtue of them being binding. If one were to focus exclusively on the question of persuasiveness, the fact that a decision is delivered by a small majority against a powerful minority would lead to a reduction in the authority of the decision in question.[1495] In this respect, there is no difference between decisions and advisory opinions. The institution of separate and dissenting opinions in advisory proceedings has not led to a reduction in normative authority (neither *strictu sensu* authority regarding the institution nor persuasive authority). If scholars, practitioners or the Court itself cite ICJ advisory opinions on a point of law, they refer to them in the same manner as they refer to ICJ decisions.[1496] As Judge *Zoričić* stated:

> "[T]he Court's advisory opinions enjoy the same authority as its judgments, and are cited by jurists who attribute the same importance to them as to judgments. The Court itself refers to its previous advisory opinions in the same way as to its judgments."[1497]

1495 This is reflected in the Draft conclusion 3 lit. d of the ILC Draft conclusions on Subsidiary means for the determination of rules of international law passed during the 74th session, in which the ILC lists as one of the criteria for assessing the weight of a subsidiary means for determining the rules of international law "the level of agreement among those involved", see A/CN.4/L.985 Subsidiary means for the determination of rules of international law Titles and texts of draft conclusions 1 to 3 provisionally adopted by the Drafting Committee, Geneva, 2 June 2023.

1496 In the May 2023 session on Subsidiary means for the determination of rules of international law, all members of the ILC shared the view that advisory opinions could have the same authority as judicial decisions. This position was expressed in light of the fact that the ICJ and other ICs, such as the ITLOS and the IACtHR, refer to their previous judgments and advisory opinions without distinguishing between the two, see ILC, Provisional summary record of the 3633rd meeting held at the Palais des Nations, Geneva, 26 May 2023, A/CN.4/SR.3633. On the practice of the ICJ in this regard, see *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 257–259; *M. Shahabuddeen*, Precedent in the World Court, 1996, 168.

1497 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, Dissenting Opinion Zoričić, ICJ Reports 1950, 98 (101).

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However, the authority of an advisory opinion is not limited to the merit of its legal reasoning.[1498] Otherwise, there would be no difference between an advisory opinion of the ICJ and the opinion of a group of particularly capable legal scholars. The claim to authority of ICJ advisory opinions goes further. When the ICJ issues an advisory opinion, it does not merely give legal advice.[1499] It makes a judicial pronouncement following a pre-defined legal procedure and thus performs a judicial function.[1500] The drafters of the League's Covenant already intended to underscore the distinction between "advice" and an "advisory opinion" by choosing the wording "give an advisory opinion" instead of "to advise" as was proposed by the Committee of Jurists.[1501] In 1971, Judge *de Castro* referred to this distinction when he stated that the ICJ's "constitutional status and independence" meant that its "authority may never be compared to that of a legal consultant or advisor".[1502]

Advisory opinions are rendered by the ICJ in full plenum. As such, they represent the legal opinion of the Court[1503] and carry the same authority and prestige as the institution of the Court, increasing the opinions' *strictu sensu* authority.[1504] It was a deliberate decision during the drafting process of the PCIJ Statute to give the power to issue advisory opinions to the full

1498 See however E. Hambro, who bases the authority of ICJ advisory opinions primarily on their 'intrinsic merits', that is the legal reasoning, *E. Hambro*, 3 ICLQ 1 (1954), 2 (21).

1499 See however Judge Jennings, who stated "The advice is simply advice and is not a binding decision of the Court", *R. Y. Jennings*, Advisory Opinions of the International Court of Justice, in: B. Boutros-Ghali (ed.), Amicorum Discipulorumque Liber, 1998, 531 (532).

1500 *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports 1956, 77 (84); *M. O. Hudson*, 42 AJIL 3 (1948), 630 (630); *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 230.

1501 *D. Négulesco*, 57 Recueil des cours d'Académie de Droit International de La Haye (1936), 5 (66).

1502 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, Separate opinion de Castro, ICJ Reports 1971, 170 (173, para. 4).

1503 *Hudson* contrasts this with the practice of US State Supreme Courts in which the advisory opinions represent the opinions of individual judges, *M. O. Hudson*, 37 Harvard Law Review 8 (1924), 970 (1000).

1504 In contrast, separate and dissenting opinions are the opinions of the individual judges and as such only attributable to the named judge and not the Court, see *C. C. Jalloh*, First Report on Subsidiary Means for the Determination of Rules of International Law, Second reissue 16 May 2023, A/CN.4/760, para. 282.

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Court and not to an advisory chamber. The Advisory Committee of Jurists, in drafting the PCIJ Statute, proposed the creation of such an advisory chamber composed of three to five members of the Court.[1505] The idea was meant to give the PCIJ greater flexibility when the same matter came before the plenary in contentious proceedings. It was believed that the Court could more easily overturn a position taken in an advisory opinion if the opinion was issued by a smaller chamber rather than by the full Court. However, this idea was rejected by the Committee of the Assembly of the League of Nations.[1506]

There are various provisions in the UNC and the ICJ Statute which are formulated to underscore the ICJ's *strictu sensu* authority. The ICJ is the "principal judicial organ of the United Nations" (Article 92 UNC), and it "shall be composed of a body of independent judges, elected (…) from among persons of high moral character, who (…) are jurisconsults of recognized competence in international law" (Article 2 ICJ Statute). Collectively, the Court shall be a "representation of the main forms of civilization and of the principal legal systems of the world" (Article 9 ICJ Statute).

During a meeting on subsidiary means for the determination of rules of international law, several ILC members emphasized the Court's status as the principal judicial organ of the United Nations and as the only IC with general jurisdiction over inter-state disputes, arguing that this status gives its decisions greater weight than those of other ICs.[1507] Others pointed to the Court's long history of outstanding jurisprudence and its standard-setting decision-making process as further elements conferring intrinsic or *strictu sensu* authority on the ICJ.[1508]

Another important factor bestowing a high degree of authority on the Court's advisory opinions is the fact that the Court's advisory procedure closely resembles the Court's contentious procedure. Judge *Zoričić* argued

1505 *J. B. Moore*, The question of advisory opinions, 1922, PCIJ Series D. No. 2, 391, citing the Report of the Advisory Committee of Jurists.

1506 On the drafting history of the PCIJ Statute, see *supra*: § 1 Section B.II.

1507 See ILC, Provisional summary record of the 3633rd meeting held at the Palais des Nations, Geneva, 26 May 2023, A/CN.4/SR.3633, 4–5; others including Special Rapporteur Jalloh emphasized the decentralized nature of the international judicial system and that there was no hierarchy among the different ICs, see in the same Provisional summary record, 6.

1508 *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296 (302).

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that the judicial procedure applied in advisory proceedings on inter-state disputes made them into "unenforceable judgments".[1509] *Zoričić* found that:

> "in such a case, the procedure normally follows the same course as in an actual contentious case. The States parties to the dispute submit written and oral statements, the case is argued in open Court, the full Court deliberates, the national judges take part in the deliberations of the Court and in the voting and, finally, the opinion is read out at a public sitting and printed in the Court's publications exactly in the same way as a judgment."[1510]

Keith argued that there was an interaction between the authority of the advisory opinion and the judicial procedure to be followed:

> "The more authoritative the opinions, the more likely the Court is to insist on a judicial procedure and conversely the more "judicial" the procedure the more authoritative the opinions are likely to be."[1511]

Similarly, *Hambro* argued that because advisory proceedings follow essentially the same procedural safeguards as contentious proceedings, "the legal reasons behind the Opinions carry the same weight and are invested with the same high authority as in the case of judgments."[1512] *Hambro* gives the example of the Court's practice of allowing *ad hoc* judges to participate in advisory proceedings, which he sees as an indication that advisory opinions "are, in effect, much more than advisory".[1513]

3. De-facto authority of ICJ advisory opinions

In terms of the de-facto authority of advisory opinions, it seems useful to first consider the different questions which have been brought before the ICJ in advisory proceedings thus far. The submitted questions have broadly

1509 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, Dissenting Opinion Zoričić, ICJ Reports 1950, 98 (101).

1510 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, Dissenting Opinion Zoričić, ICJ Reports 1950, 98 (101).

1511 *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 151.

1512 *E. Hambro*, 3 ICLQ 1 (1954), 2 (5).

1513 Ibid., 6.

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concerned four subject-areas:[1514] The first category concerned requests concerning institutional matters arising from the activities of the requesting organ.[1515] The second category concerned abstract questions of international law on which differing views exist among states and international organizations but which do not relate to a specific controversy.[1516] A third category concerned questions of law concerning a specific legal controversy between two or more states (inter-state disputes).[1517] A fourth type of requests related to the now discontinued appeals procedure against decisions of UN administrative tribunals in employment disputes between UN agencies and staff members.[1518] ICJ advisory opinions have had significant effects in clarifying institutional matters of the UN and other organizations and in answering

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1514 *D. Akande*, 7 J Int. Disp. Settlement 2 (2016), 320 (339–340); *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296 (307–308).

1515 Examples include: *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports 1948, 57; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, 4; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 73; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the HRC*, Advisory Opinion, ICJ Reports 1999, 62.

1516 Examples include *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226.

1517 Examples include *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136; *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95.

1518 See *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1954, 47; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, Advisory Opinion, ICJ Reports 1956, 77; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, 166; *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1982, 325; *Application for Review of Judgment No. 333 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports, 18; *Judgment No. 2867 of the Administrative Tribunal of the ILO*, Advisory Opinion, ICJ Reports 2012, 10.

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abstract questions of law.[1519] However, have they also been successful in bringing about change in behavior in the context of specific inter-state disputes? *Alter et al.'s* practice-based approach provides a useful framework for studying such practical effects.[1520]

a) A practice-based approach to studying the authority of ICJ advisory opinions

The practice-based approach asks whether "one or more audience recognizes by their words, actions, or both, that IC rulings are legally binding and engage in actions that push toward giving full effect to those rulings."[1521]

What is required is an element of "*recognition*" accompanied by "*meaningful action*" to implement the relevant obligation.[1522] Since ICJ advisory opinions are not binding, the criteria of the practice-based approach need to be adapted. Accordingly, the focus is on whether the relevant audiences, by their words, actions, or both, recognize as legally binding the legal obligation not *created by*, but *referenced in* the advisory opinion, and take meaningful action to comply with that obligation. In line with the practice-

1519 See on this *K. Oellers-Frahm*, 12 GLJ 5 (2011), 1033 (1040 et seq.); *Lanzoni* refers to the "obvious normative authority" of ICJ advisory opinions and notes that in the context of institutional questions they "produce substantially binding effects vis-à-vis the requesting organ and other UN bodies", see *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296 (308–309).

1520 Other commentators, such as *Lando,* also support a practice-based approach, arguing that the legal effects of advisory opinions "cannot be determined a priori" and as such they should be "assessed depending on whether States and international organisations have acted on, and consistent with, the judicial determinations in those opinions", see *M. Lando*, Binding Advisory Opinions, in: R. Buchan/D. Franchini/N. Tsagourias (eds.), The Changing Character of International Dispute Settlement: Challenges and Prospects, 2023, 106 (120).

1521 *K. J. Alter/L. R. Helfer/M. R. Madsen*, How Context Shapes the Authority of International Courts, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 24 (28).

1522 Ibid., 29; others like *Huneeus* focus only on the actions of a state, not on its recognition of the ruling as binding, see *A. Huneeus*, Compliance with Judgments and Decisions, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013, 437 (442).

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based approach, this section is agnostic as to the reasons for compliance or non-compliance with the relevant obligations.[1523]

In applying a practice-based approach to ICJ advisory opinions, the section applies the five-level metric developed by *Alter et al.* to describe the different types of factual authority an IC can acquire:[1524]

On the most basic level, an IC's judicial pronouncements could have no factual authority.[1525] This describes a situation in which an IC is either inactive despite apparent infringements of international law, which it is competent to adjudicate upon, or its decisions are widely ignored.[1526]

The second level of de-facto authority *Alter et al.* call "narrow authority".[1527] Narrow authority exists when only the parties to the dispute accept the decision as legally binding and take meaningful steps towards implementation while others do not take notice of it.[1528] ICJ advisory opinions have no parties in the formal sense.[1529] As the ICJ held:

> "The Court's Opinion is given not to the States, but to the organ which is entitled to request it".[1530]

Nevertheless, there are several immediate audiences of ICJ advisory opinions, first and foremost the requesting organ. The requesting organ has a duty to consider, potentially even a duty to comply with the advisory opinion.[1531] Other immediate audiences of advisory opinions are the states that

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1523 Cf. *K. J. Alter/L. R. Helfer/M. R. Madsen*, How Context Shapes the Authority of International Courts, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 24 (28).

1524 See in detail, Ibid., 31–33.

1525 Ibid., 31.

1526 Ibid., 31.

1527 Ibid., 31.

1528 Ibid., 31.

1529 *M. Benzing*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Evidentiary Issues, 1412; On the audiences of ICJ advisory opinions, see *J. Salmon*, Who are the addressees of the Opinions?, in: L. Boisson de Chazournes/P. Sands (eds.), International law, the World Court of justice and nuclear weapons, 1999.

1530 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, Dissenting Opinion Winiarski, ICJ Reports 1950, 65 (71).

1531 *Lanzoni* argues that ICJ advisory opinions produce "substantially binding effects vis-à-vis the requesting organ and other UN bodies", see *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296 (309); on this see also *G. Abi-Saab*, Les exceptions préliminaires dans la procédure de la Cour internationale, 1966, 82–84; so also *R. Kolb*, The International Court of Justice, 2013, 1097; cf. *D. Négulesco*, 57 Recueil des

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are particularly affected by the underlying dispute[1532], i.e., the states whose legal rights and obligations form the subject-matter of the proceedings. In the *Wall* case this is Israel, in the *Chagos* case these are the United Kingdom and Mauritius. Although these states are not directly bound by the advisory opinion itself, the respective opinion addresses their legal obligations and calls upon them to act in a certain way. In this respect, the disputing states, which have a particular interest in the outcome of the advisory proceedings, take the position of the parties to the proceedings in the narrow authority sense.

The third level of factual authority *Alter et al.* call "intermediate authority."[1533] In contentious proceedings, intermediate authority refers to a situation in which the judgment is recognized and acted upon by actors for whom the judgment is not directly binding but who nevertheless adapt their actions accordingly.[1534] These actors include potential future litigants, governments and domestic courts,[1535] as well as the Member States of the requesting organization, other organs and specialized agencies which may be in a similar situation to the requesting organ, as well as other states, particularly those that have participated in the proceedings.[1536] In the context of advisory proceedings, this group consists of those states and organizations whose conduct is not the subject-matter of the proceedings but which nevertheless have an interest in the outcome of the proceeding.

The fourth level of legal authority is called "extensive authority" and it describes a situation in which judgments are recognized and acted upon by a wider audience within the legal profession, including legal practitioners, scholars and NGO lawyers.[1537]

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cours d'Académie de Droit International de La Haye (1936), 5 (64). On "binding" advisory opinions, see *supra*: § 6 Section D.I.3.

1532 Cf. *J. Salmon*, Who are the addressees of the Opinions?, in: L. Boisson de Chazournes/P. Sands (eds.), International law, the World Court of justice and nuclear weapons, 1999 (31–32).

1533 *K. J. Alter/L. R. Helfer/M. R. Madsen*, How Context Shapes the Authority of International Courts, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 24 (31–32).

1534 Ibid., 31–32.

1535 Ibid., 31–32.

1536 Cf. *J. Salmon*, Who are the addressees of the Opinions?, in: L. Boisson de Chazournes/P. Sands (eds.), International law, the World Court of justice and nuclear weapons, 1999 (29–32).

1537 *K. J. Alter/L. R. Helfer/M. R. Madsen*, How Context Shapes the Authority of International Courts, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 24 (32); cf. *J. Salmon*, Who are the addressees

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Lastly, an IC reaches ”popular authority”, the fifth level of authority, when its judgments, or in the case of advisory opinions the obligations referenced to therein, are considered binding by the general public.[1538]

It is important to note that these types of de-facto authority relate to different audiences and are independent of each other.[1539] This means that the different types of de-facto authority are not structured in some kind of hierarchy, where an IC that achieves a "higher" level of authority (e.g., intermediate authority) automatically has "more" authority than one whose authority is at a "lower" level (e.g., narrow authority).[1540] An IC may influence the behavior of potential future litigants and thus exert intermediate authority, while it may not be able to conduce change in the behavior of the parties to a case before it and thus lacks narrow authority.[1541] In particular, the advisory opinions of the ICJ regularly influence the international legal discourse at large and the behavior of many states not directly involved, without creating sufficient compliance pull on the states whose legal obligations are the subject-matter of the proceedings.

Having set out the parameters of the practice-based approach, let us now revisit two of the most recent advisory opinions relating to inter-state disputes: the *Wall* and the *Chagos* advisory opinions. Before doing so, one point should be emphasized: *Alter et al.* have developed the practice-based approach to assess the authority of ICs, not the authority of individual decisions.[1542] Nevertheless, the practice-based approach may still provide a useful framework for assessing the authority of individual ICJ advisory opinions.

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of the Opinions?, in: L. Boisson de Chazournes/P. Sands (eds.), International law, the World Court of justice and nuclear weapons, 1999 (34–35).

1538 *K. J. Alter/L. R. Helfer/M. R. Madsen*, How Context Shapes the Authority of International Courts, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 24 (32–33); cf. *J. Salmon*, Who are the addressees of the Opinions?, in: L. Boisson de Chazournes/P. Sands (eds.), International law, the World Court of justice and nuclear weapons, 1999 (35).

1539 *K. J. Alter/L. R. Helfer/M. R. Madsen*, International Court Authority in a Complex World, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 3 (4).

1540 Cf. Ibid., 4.

1541 Ibid., 4.

1542 Cf. *K. J. Alter/L. R. Helfer/M. R. Madsen*, How Context Shapes the Authority of International Courts, in: K. J. Alter/L. R. Helfer/M. R. Madsen (eds.), International court authority, First edition, 2018, 24 (28 et seq.).

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b) De-facto authority of the Wall advisory opinion

In 2004, the ICJ rendered its *Wall* advisory opinion[1543] addressing the construction of a wall (or fence) by Israel extending into large swaths of the Palestinian territory within the West Bank, including East Jerusalem, thus leading to a fragmentation of Palestinian communities and destruction of Palestinian property. The ICJ held that Israel committed an internationally wrongful act by constructing the wall on Palestinian territory.[1544] In particular, Israel violated its obligation to respect the Palestinian people's right to self-determination, Israel's obligations under international humanitarian law[1545] as well as Israel's obligations under international human rights law.[1546] The Court found that Israel's conduct could not be justified as an act of self-defense under Article 51 UNC or UNSC resolutions 1368 (2001) and 1373 (2001) since Israel's actions are not directed against another state.[1547] The ICJ further found that the situation did not meet the strict requirements of the customary law exception of necessity.[1548]

As a consequence of Israel's breaches of international law, the Court found that Israel was under an obligation to stop its construction of the wall, dismantle any parts that were located on Palestinian territory, repeal any legislative acts that have been adopted in relation to the construction of the wall and make reparations for any damage caused by the construction of the wall to all natural or legal persons, including – where possible –

1543 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136.

1544 Ibid. (197, para. 149); on the legal consequences of the *Wall* opinion, see *R. J. Araujo*, 22 BUILJ 2 (2004), 349 (382 et seq.); on the legal consequences of the *Wall* opinion for the UN and its Member States, see *I. Scobbie*, 16 EJIL 5 (2005), 941; for a general overview of the Israeli-Palestinian conflict, see *V. Kattan*, The Palestine question in international law, 2008; *Dinstein*, The International Law of Belligerent Occupation, 2009.

1545 The Court held that the construction of the Wall led to the destruction or requisition of properties in violation of Art. 46 and 52 of the Hague Regulations and Art. 53 of the fourth Geneva Convention.

1546 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (197, para. 149).

1547 Ibid. (194, para. 139); criticizing the Court's interpretation of Art. 51 UNC, see *S. D. Murphy*, 99 AJIL 1 (2005), 62; in defence of the Court's interpretation of Art. 51 UNC, see *I. Scobbie*, 99 AJIL 1 (2005), 76.

1548 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (194-195, para. 140).

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by returning the land used for the construction of the wall.[1549] The ICJ further found that since Israel's construction of the wall violated *erga omnes* obligations (including the Palestinians' right to self-determination), all states had the obligation "not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory" and "not to render aid or assistance in maintaining the situation created by such construction".[1550]

The Court also asked the UNGA and the UNSC to "consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion".[1551]

The ICJ finally considered that "it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region."[1552]

While shying away from recognizing specific obligations incumbent upon the UNGA, the Court emphasized that the opinion is addressed to the UNGA and that there was a need for the UNGA to intensify efforts to facilitate negotiations on a two-state-solution.

When assessing the effects of the *Wall* advisory opinion, one must bear in mind that the opinion is but one link in a long chain of efforts to resolve the Israeli-Palestinian conflict such as negotiations, UN resolutions and court proceedings. The conflict has already been the subject of numerous UN resolutions and Israel's illegal settlement activities in the occupied ter-

1549 Ibid. (197-198, paras. 150-152).

1550 Ibid. (200, para. 159); on the question whether violations of erga omnes obligations can create obligations for other states, see *I. Scobbie*, 16 EJIL 5 (2005), 941 (949–952).

1551 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (200, para. 160).

1552 Ibid. (201, para. 162).

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ritory have been criticized by the UNSC[1553] and the UNGA[1554] on numerous occasions prior to the *Wall* opinion. Recent efforts to resolve the conflict by means of negotiation include the "Road Map for Peace" initiative which was launched in 2002 and overseen by the so-called "Quartet"[1555]. The *Wall* opinion has to be seen against this backdrop and its impact is therefore inevitably limited. What is more, the recurring escalations of violence between Israel and Palestinians in 2008, 2012, 2014, 2021, and since October 2023 as well as the continued settlement activities in the West Bank conducted by Israeli settlers and encouraged and legalized by the Israeli government already seem to indicate that the *Wall* opinion had a limited effect. However, it may still be worth examining whether the *Wall* opinion and the obligations of Israel and other states recognized therein find resonance in meaningful action taken thereafter.

aa) Narrow de-facto authority: Reactions by the UNGA and Israel

Let us therefore start by examining whether the two primary addressees of the opinion – Israel and the UNGA – took specific action in reaction to the findings of the Court. To do so we shall look at Israel's obligation to cease and dismantle the construction of the wall and make reparation for the damage caused by its construction.

(1) Reactions by Israel

The most apparent way in which the *Wall* advisory opinion failed to bring about practical change concerns the physical topography of the region. Instead of ceasing further and dismantling existing parts of the wall on Palestinian territory, Israel continued to build its "security fence" which in

1553 See for example UNSC resolutions 242 (1967) of 22 November 1967, 338 (1973) of 22 October 1973, 446 (1979) of 22 March 1979, 1322 (2000) of 7 October 2000, 1397 (2002) of 12 March 2002, 1402 (2002) of 30 March 2002, 1403 (2002) of 4 April 2002, 1405 (2002) of 19 April 2002, 1435 (2002) of 24 September 2002, 1515 (2003) of 19 November 2003, and 1544 (2004) of 19 May 2004.

1554 See for example UNGA resolutions ES-10/9 of 24 December 2001, ES-10/10 of 14 May 2002, ES-10/11 of 10 September 2003, ES-10/12 of 25 September 2003, ES-10/13 of 27 October 2003, and ES-10/14 of 12 December 2003.

1555 The "Quartet on the Middle East" is made up of the EU, the UN, Russia and the United States.

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2020 already extended to 525 km in length with another 200 km being planned.[1556] It is worth noting that the Israeli Supreme Court rendered several decisions in which it obliged the Israeli government to alter the route of the Wall.[1557] However, Israel's Supreme Court did not base its decisions on the ICJ's findings that the Wall in its entirety violated international law. The Supreme Court held in the *Alfei Menashe* case:

> "[T]he ICJ's conclusion, based upon a factual basis different than the one before us, is not res judicata, and does not obligate the Supreme Court of Israel to rule that each and every segment of the fence violates international law."[1558]

While the Israeli Supreme Court recognized the ICJ advisory opinion, it expressly rejected any binding effect for the Supreme Court. Instead, the Supreme Court merely found that specific segments of the Wall did not strike an appropriate balance between Israel's reasonable security interests and the rights of the Palestinian inhabitants of the area.[1559]

(2) Reactions by the UNGA and other UN organs

Shortly after the ICJ rendered its *Wall* opinion, the UNGA passed resolution ES-10/15 in which it endorsed the *Wall* advisory opinion and demanded from Israel and all other UN Member States to comply with their legal obligations as recognized in the advisory opinion.[1560] The *Wall* advisory opinion was subsequently referred to *inter alia* in a resolution by the UNSC in which it condemned Israel's illegal settlement activities in the West Bank,[1561] in the application of Palestine for admission to full membership

1556 *A. Watts/R. Jorritsma*, Israeli Wall Advisory Opinion (last updated 2019), in: A. Peters/R. Wolfrum (eds.), The Max Planck Encyclopedia of Public International Law, 2008 (47).

1557 Beit Sourik Village Council v. The Government of Israel et. al., HCJ 2056/04, Supreme Court of Israel, 20 June 2004; Mara'abe et al. v Prime Minister of Israel et al. (Alfei Menashe), HCJ 7957/04, Supreme Court of Israel, 15 September 2005, para. 116.

1558 *Mara'abe et al. v Prime Minister of Israel et al. (Alfei Menashe)*, HCJ 7957/04, Supreme Court of Israel, 15 September 2005, paras. 76, 116.

1559 Ibid, para. 116.

1560 UNGA resolution ES-10/15 of 20 July 2004, UN doc. A/RES/ES-10/15, para. 2. On the discussion in the General Assembly in the aftermath of the advisory opinion, see *R. J. Araujo*, 22 BUILJ 2 (2004), 349 (387 et seq.)

1561 UNSC resolution 2334 (2016), UN doc. S/RES/2334(2016).

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in the UN,[1562] the UNGA's decision to grant non-member observer status to Palestine in the UN,[1563] as well as numerous other UNGA resolutions like the annual resolution entitled "*Peaceful settlement of the question of Palestine*"[1564].

To facilitate the fulfillment of Israel's obligation to make reparations, the UNGA requested the UNSG to draft a proposal for a register of damage which collects and documents all damages caused to natural or legal persons by the construction of the Wall.[1565] In doing so, the UNGA expressly referred to paras. 152 and 153 of the Court's *Wall* opinion.[1566] The *United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory* (UNRoD) was established two years later as a subsidiary body of the UNGA under the administration of the UNSG.[1567] Its function is to "serve as a record, in documentary form, of the damage caused to all natural and legal persons concerned as a result of the construction of the wall by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem."[1568]

UNRoD's function is strictly preparatory in nature. UNRoD is only competent to conduct fact-finding missions and collect claims, not, however, to

1562 Application of Palestine for admission to membership in the United Nations, submitted on 23 September 2011, Annex II, Letter dated 23 September 2011 from the President of Palestine to the Secretary-General.

1563 UNGA resolution 67/19 of 29 November 2012, UN doc. A/RES/67/19.

1564 UNGA resolutions 59/31 (2004), 60/39 (2005), 61/25 (2006), 62/83 (2007), 63/29 (2008), 64/19 (2009), 65/16 (2010), 66/17 (2011), 67/23 (2012), 68/15 (2013), 69/23 (2014), 70/15 (2015), 71/23 (2016), 72/14 (2017), 73/19 (2018), 74/11 (2019), 75/22 (2020), 76/10 (2021), 77/25 (2022).

1565 UNGA resolution ES-10/15 of 20 July 2004, UN doc. A/RES/ES-10/15, para. 4.

1566 The resolution reads in relevant part: "*Requests* the Secretary-General to establish a register of damage caused to all natural or legal persons concerned in connection with paragraphs 152 and 153 of the advisory opinion", UNGA resolution ES-10/15 of 20 July 2004, UN doc. A/RES/ES-10/15 para. 4.

1567 UNGA resolution ES-10/17 of 15 December 2006, UN doc. A/RES/ES-10/17, para. 3(a). The first UNRoD Board was appointed on 10 May 2007 and UNRod started registering claims in 2008. By 2020, UNRoD collected 71,547 damage registration application forms in the West Bank, of which 36,023 were included in the register, see Progress report of the Board of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, A/ES-10/839, paras. 4–5. On the UNRoD, see *R. C. Williams*, 49 ILM 2 (2010), 620.

1568 UNGA resolution ES-10/17 of 15 December 2006, UN doc. A/RES/ES-10/17, para. 3(a).

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decide about these claims.[1569] Any potential mechanism to decide about the claims collected by UNRoD has yet to be established.[1570]

The installation of the UNRoD was welcomed by many states particularly by the Member States of the Organization of the Islamic Conference and the Non-Aligned Movement. Israel, on the other hand, strongly criticized the establishment of UNRoD, claiming it would damage the legitimacy of the UN and undermine the prospects of resolving the dispute by bilateral negotiations.[1571] Israel's Permanent Representative to the UNGA Gillermann stated in no uncertain terms:

> "This Register, despite the perception of its being yet another achievement for the Palestinian observer, (...) cannot help the Palestinian people. Let me make it very clear: no Palestinian impacted by the security fence will be helped or assisted by this mechanism."[1572]

Despite its apparent disapproval, Israel has cooperated with UNRoD by providing relevant material and granting visas to UNRoD employees who collect claims in the West Bank.[1573] However, Israel rejected the idea that damages can be claimed through any kind of international mechanism. Instead, Gillerman referred to the possibility for Palestinians to register their damages with an Israeli registry, which, according to Gillerman, had already paid out more than $1.5 million to Palestinian complainants by 2006.[1574]

On the one hand, UNRoD and the *Wall* advisory opinion have hardly had any impact on the matter of compensation. They have failed to bring about any reparations being paid to legal or natural persons affected by the construction of the Wall. On the other hand, regarding a potential negotiated solution in the future, the preparatory work done by the UNRoD may become invaluable in facilitating a fact-based solution. In a sense,

1569 *A. Watts/R. Jorritsma*, Israeli Wall Advisory Opinion (last updated 2019), in: A. Peters/R. Wolfrum (eds.), The Max Planck Encyclopedia of Public International Law, 2008 (49).

1570 Ibid., para. 49.

1571 UNGA, Tenth Emergency Special Session, 30th meeting, 15 December 2006, Verbatim record.

1572 Ibid.

1573 Progress report of the Board of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, A/ES-10/839, para. 17.

1574 UNGA, Tenth Emergency Special Session, 30th meeting, 15 December 2006, Verbatim record.

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UNRoD's limited scope thus gives greater room for such a negotiated, political solution to the conflict. Against this background, it is worrying that the financial crisis of the UN also affects the work of UNRoD. In 2020, its Board expressed the concern that UNRoD's claim collection program may need to be suspended if no further funding can be secured.[1575]

The idea of a register of damage was subsequently taken up by another international organizations. In 2023, the Council of Europe established the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine.[1576]

bb) Intermediate authority: Reactions by other states and organizations

Let us now turn to the reactions of other states and organizations, particularly in light of the obligations the Court recognized as being incumbent upon all UN Member States as a consequence of Israel's internationally wrongful act.[1577]

(1) Obligations of third states not to recognize and support the Wall regime

Regarding third states, the ICJ held in its *Wall* opinion that

> "all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian

1575 Progress report of the Board of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, A/ES-10/839, para. 16.

1576 According to Art. 2(1) of the Register's Statute, the "Register shall receive and process information on claims of damage and evidence; categorise, classify and organise such claims, assess and determine the eligibility of claims for inclusion in the Register and record the eligible claims for the purposes of their future examination and adjudication. The Register shall not have any adjudication functions with respect to such claims, including determination of responsibility and allocation of any payments or compensation.", Appendix to resolution CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine, adopted by the Committee of Ministers on 12 May 2023 at the 1466th meeting of the Ministers' Deputies.

1577 For more a detailed discussion of the obligations of third states regarding Israeli settlements in the West Bank, see *J. Crawford*, Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories, 2012.

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Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention."[1578]

The Court referred to three obligations all states have as a consequence of Israel's breach of international law: the obligation of non-recognition, the obligation of non-support, and the obligation to ensure compliance by Israel with international humanitarian law. The ICJ derived these obligations from the *erga omnes* nature of the obligations breached by Israel, namely the right of the Palestinian people to self-determination and certain obligations under international humanitarian law.[1579] *Erga omnes* obligations have been described by the Court in its *Barcelona Tractions* judgment as a "concern of all States".[1580] Because of their importance "all States can be held to have a legal interest in their protection".[1581]

Since *erga omnes* obligations are obligations owed to the international community as a whole, any state can invoke the international responsibility of the state that violates *erga omnes* obligations, regardless of any harm directly suffered. This right of non-injured states is also enshrined in Article 48 para. 1 lit. b of the ILC Articles on State Responsibility:

"Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (...) (b) the obligation breached is owed to the international community as a whole."

1578 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (200, para. 159); on the question whether violations of erga omnes obligations can create obligations for other states, see *I. Scobbie*, 16 EJIL 5 (2005), 941 (949–952).

1579 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (199, para. 155).

1580 *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, ICJ Reports 1970, 3 (32, para. 33).

1581 Ibid.

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However, the ICJ deduced something further from the *erga omnes* nature of the obligations breached by Israel. Third states not only have the *right* (or standing) to invoke the international responsibility of Israel, they also have the *obligation* not to recognize or support the illegal situation created by Israel and to ensure Israel's compliance with international humanitarian law.[1582] To support this view, the Court cited the 1970 Friendly Relations Declaration in which the UNGA stated:

> "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle (…)."[1583]

Regarding the *erga omnes* nature of the humanitarian obligations in question, the ICJ referred to the *Nuclear Weapons (UNGA)* opinion in which it held that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" (…), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[1584]

The dictum from the *Nuclear Weapons (UNGA)* advisory opinion concerns the *ius cogens* nature of certain humanitarian law obligations. The ICJ thus equates the *ius cogens* nature of an obligation with its *erga omnes* nature.

The Court's finding that states have an obligation to ensure Israel's compliance with international humanitarian law is controversial. *Crawford* criticized the Court's dictum, stating:

1582 See however, *Orakhelashvili*: "It is not the erga omnes nature of an obligation that confers an imperative character on that rule or itself determines any of the consequences of its breaches.", *A. Orakhelashvili*, 11 Journal of Conflict and Security Law 1 (2006), 119 (131).

1583 UNGA resolution 2625 (XXV) of 24 October 1970, UN doc. A/RES/2625(XXV) (Friendly Relations Declaration).

1584 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226 (257, para. 79).

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> "While Article 49(6) of the Fourth Geneva Convention is arguably an obligation *erga omnes*, owed to the community of States as a whole, and as such any State is *entitled* to invoke the responsibility of Israel for its breach, there is no *obligation* on States to do so stemming either from its status as *erga omnes* or otherwise. Law does not compel those concerned to seek a remedy, even if they are entitled to do so. Article 16 of the ILC Articles on State Responsibility makes it clear that a State only breaches international law when it directly aids or assists the commission of an internationally wrongful act. By inference there is no responsibility for simple neglect."[1585]

In contrast, the obligation of non-recognition[1586] and the obligation of non-support[1587] are widely recognized. The obligation of non-recognition finds its legal basis in the principle of *ex injuria ius non oritur*.[1588] As *Crawford* put it:

> "As territory cannot be acquired by the unlawful use of force nor where that purported territorial acquisition violates the right to self-determination, States are obliged to not give legal credence – recognition of authority over the territory – to the unlawful acquisition."[1589]

Both obligations also find expression in the ILC Articles on State Responsibility. The obligation of non-recognition is codified in Article 41 para. 2 of the ILC Articles which stipulates:

> "No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."

1585 *J. Crawford*, Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories, 2012, paras. 41–42.

1586 See UNGA resolution 2625 (XXV) of 24 October 1970, UN doc. A/RES/2625(XXV) (Friendly Relations Declaration); Human Rights Committee, ICCPR General Comment No. 12: The right to self-determination of peoples (Art. 1), 13 March 1984, paras 5–6. See also *M. Dawidowicz*, The Obligation of Non-Recognition of an Unlawful Situation, in: J. Crawford/A. Pellet/S. Olleson/K. Parlett (eds.), The law of international responsibility, 2010, 677.

1587 See *N. H. Jørgensen*, The Obligation of Non-Assistance of the Responsible State, in: J. Crawford/A. Pellet/S. Olleson/K. Parlett (eds.), The law of international responsibility, 2010, 687.

1588 *J. Crawford*, Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories, 2012, para. 46.

1589 Ibid., para. 46.

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The ICJ has clarified the content of the obligation of non-recognition in its *Namibia* advisory opinion. Accordingly, states must refrain from engaging in treaty relations, invoking existing bilateral treaties, sending diplomatic missions, or establishing economic relations with an unrecognized regime regarding illegally acquired territory, as these actions may strengthen the regime's authority over the territory.[1590] However, third states are not completely barred from interacting with an occupied territory. As the ICJ held in the *Namibia* case:

> "In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."[1591]

Thus, certain economic or other dealings which are beneficial to the local population and which do not entrench the illegal authority over the territory are permitted.[1592]

The non-support obligation is likewise codified in Article 16 of the ILC Articles on State Responsibility:

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) The act would be internationally wrongful if committed by that State."

1590 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, Dissenting Opinion Gros, ICJ Reports 1971, 16 (55, para. 120-122); *J. Crawford*, Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories, 2012, para. 48.

1591 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, Dissenting Opinion Gros, ICJ Reports 1971, 16 (56, para. 125).

1592 *J. Crawford*, Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories, 2012, paras. 49–51.

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As the wording indicates, the obligation of non-support has strict requirements. Third states only violate their obligation of non-support if they have actual knowledge of the circumstances and the assistance contributes significantly to the wrongful act.[1593]

Regarding violations of peremptory norms of international law, Article 41 para. 2 of the ILC Articles stipulates a specific obligation not to recognize as lawful a situation created by a serious breach against such a norm, nor render aid or assistance in maintaining that situation.

The ICJ's statements in its *Wall* advisory opinion on the obligations of third states have influenced subsequent action by the UNGA. Taking the annual "Peaceful settlement of the question of Palestine" resolutions as an example: While the UNGA had already stated in previous resolutions that Israel's occupation of the West Bank and its settlement activities therein were illegal,[1594] after the Court rendered its *Wall* opinion, the UNGA also called "upon all States Members of the United Nations to comply with their legal obligations as mentioned in the advisory opinion".[1595] The UNGA later formulated more specific obligations of third states *vis-à-vis* the Israel-Palestine conflict.[1596]

(2) Reactions by EU institutions

The non-recognition and non-support obligations recognized by the ICJ are particularly pertinent to the field of economic and commercial cooperation. By entering into or continuing certain commercial relations, third states may breach the obligations of non-recognition and non-support and

1593 Ibid., para. 77 See also ILC, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Art. 16(4–5).

1594 See for example UNGA resolution 58/21 of 3 December 2003, UN doc. A/RES/58/21.

1595 UNGA resolution 59/31 of 1 December 2004, UN doc. A/RES/59/31, para. 7.

1596 "*Calls* upon all States, consistent with their obligations under the Charter of the United Nations and relevant Security Council resolutions, inter alia: (a) Not to recognize any changes to the pre-1967 borders, including with regard to Jerusalem, other than those agreed by the parties through negotiations; (b) To distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967; (c) Not to render aid or assistance to illegal settlement activities, including not to provide Israel with any assistance to be used specifically in connection with settlements in the occupied territories, in line with Security Council resolution 465 (1980) of 1 March 1980;", see UNGA resolution 73/19 of 30 Nov 2018, UN doc. A/RES/73/19, para. 14.

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thereby commit an internationally wrongful act themselves.[1597] Such a situation may arise when a state enters into treaty relations with Israel in which it explicitly or implicitly recognizes Israel's sovereignty over the occupied territories. This matter arose in two cases before the Court of Justice of the European Union (CJEU): The *Brita* case[1598] and the *Organisation juive européenne* case[1599].

(a) The Brita case

The *Brita* case concerned the application of preferential treatment to goods under the trade agreements between the EU and Israel (EC-Israel Association Agreement[1600]) and the EU and Palestine (EC-PLO Association Agreement[1601]). The German company Brita imported drink-makers for sparkling water from a supplier operating in the West Bank. Brita contacted German customs authorities and applied for preferential treatment for the imported goods under the EC-Israel Association Agreement. Brita claimed the products originated in Israel and are thus eligible for preferential treatment under the EC-Israel Association Agreement. Israeli customs authorities informed German customs authorities that the goods in question originated in an area under Israeli Customs responsibility and, as such, Brita argued that the goods qualified for preferential treatment under the EC-Israel Association Agreement. However, the German customs authorities denied Brita's application on the ground that it could not conclusively establish whether the products fell within the scope of the EC-Israel Association Agreement. Brita challenged this decision before a German fiscal court which referred the question to the CJEU by means of the preliminary ruling procedure. The CJEU confirmed that the customs authorities of an import-

1597 *A. Watts/R. Jorritsma*, Israeli Wall Advisory Opinion (last updated 2019), in: A. Peters/R. Wolfrum (eds.), The Max Planck Encyclopedia of Public International Law, 2008 (51).

1598 Case C-386/08, judgment of 25 February 2010, ECLI:EU:C:2010:91 – *Brita*.

1599 Case C-363/18, judgment of 12 November 2019, ECLI:EU:C:2019:954 – *Organisation juive européenne*.

1600 Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part (Euro-Mediterranean Agreement), OJ L 147, 21.6.2000, 3.

1601 Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, OJ L 187 16.7.1997, 3.

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ing Member State may refuse to grant preferential treatment provided for under the EC-Israel-Association Agreement if the goods originate in the West Bank.[1602] The CJEU found that the EC-Israel Association Agreement cannot grant Israeli customs authority jurisdiction over products originating in the West Bank:

> "Each of those two association agreements has its own territorial scope. Under Article 83 thereof, the EC-Israel Association Agreement applies to the 'territory of the State of Israel'. Under Article 73 thereof, the EC-PLO Association Agreement applies to the 'territories of the West Bank and the Gaza Strip'. (...) Accordingly, to interpret Article 83 of the EC-Israel Association Agreement as meaning that the Israeli customs authorities enjoy competence in respect of products originating in the West Bank would be tantamount to imposing on the Palestinian customs authorities an obligation to refrain from exercising the competence conferred upon them by virtue of the abovementioned provisions of the EC-PLO Protocol. Such an interpretation, the effect of which would be to create an obligation for a third party without its consent, would thus be contrary to the principle of general international law, '*pacta tertiis nec nocent nec prosunt*', as consolidated in Article 34 of the Vienna Convention."[1603]

While the CJEU thus decided in line with the obligation of third states not to recognize and support Israel's illegal occupation of Palestinian territoriy recognized by the ICJ, the CJEU did not base its decision on this obligation or on the ICJ's advisory opinion. Instead, the CJEU based its decision on the principle of *pacta tertiis nec nocent nec prosunt*.[1604] One reason for this may be that the focus of the Court's *Wall* opinion was not on the illegal Israeli settlements within Palestinian territories,[1605] but on the construction

1602 Case C-386/08, judgment of 25 February 2010, ECLI:EU:C:2010:91 – *Brita*, para. 58.

1603 Ibid., paras. 47, 52.

1604 This was highlighted by *A. Watts/R. Jorritsma*, Israeli Wall Advisory Opinion (last updated 2019), in: A. Peters/R. Wolfrum (eds.), The Max Planck Encyclopedia of Public International Law, 2008 (51).

1605 See however para. 120 of the opinion in which the Court held: "As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory. In this respect, the information provided to the Court shows

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of the Wall and the legal regime surrounding that construction.[1606] Regardless of the reasons, the CJEU decided not to rely on the *Wall* opinion in the *Brita* case.

(b) The Organisation juive européenne case

In the *Organisation juive européenne* case, the CJEU held that under EU law, products originating in a territory occupied by Israel must bear not only the indication of that territory but also – where applicable – the indication that the product originates from an Israeli settlement within the occupied territory.[1607] The CJEU based its decision on Article 9 para. 1 lit. i and Article 26 para. 2 lit. a of the Regulation (EU) No 1169/2011 on the provision of food information to consumers.[1608] According to the two provisions, food products must contain an indication of the country or place of origin where an omission of this may mislead the costumer about the true country or place of origin. Based on this, the CJEU found the indication of Israel as the country of origin for products originating in the occupied territories misleading. The CJEU found:

> "displaying, on foodstuffs (...) the indication that the State of Israel is their 'country of origin', when those foodstuffs actually originate in one of the [occupied] territories (...), would be liable to deceive consumers. In addition, in order to prevent consumers being misled as to the fact that the State of Israel is present in those territories as an occupying

that, since 1977, Israel has conducted a policy and developed practices involving the establishment of Settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited…The Court concludes that the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law.", see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (183, para. 120).

1606 Pointing this out, *J. Crawford*, Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories, 2012, para. 16.

1607 Case C-363/18, judgment of 12 November 2019, ECLI:EU:C:2019:954 – *Organisation juive européenne*, para. 58.

1608 Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, OJ L 304, 22/11/2011, p. 18.

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> power and not as a sovereign entity (…), it appears necessary to inform them that those foodstuffs do not originate in that State."[1609]

An informed consumer decision further required that relevant food products must bear an indication that they originate from an Israeli settlement. The Court found that the omission of the words "Israeli settlement" on the product would mislead consumers into believing that the foodstuffs came from a Palestinian (West Bank) or Syrian (Golan Heights) producer, rather than an Israeli producer.[1610]

Once again, the CJEU did not base its decision on the non-recognition and non-support obligation recognized by the ICJ in the *Wall* opinion, but on EU law. However, the CJEU referred to the ICJ's *Wall* advisory opinion on several occasions in its decision to support the point that the Palestinian people have the right to self-determination (para. 35), to demonstrate the illegality of the Israeli settlements in the West Bank (para. 48) and to emphasize the fundamental importance of the rules of international humanitarian law (para. 56). The CJEU found that the illegality of the settlements as well as the relevance of the violated rules of international law are important factors impacting consumer choices.[1611] The ICJ's *Wall* opinion thus constituted an important foundation for the CJEU's decision in the *Organisation juive européenne* case.

cc) Conclusions on the Wall advisory opinion

The unequivocal rejection by Israel indicates that the ICJ's *Wall* advisory opinion did not reach the level of narrow authority. Israel neither acknowledged any of its legal obligations recognized in the *Wall* opinion, nor took meaningful action towards complying with them. In fact, in recent years Israel has extended the wall as well as its settlement activities in the West Bank. The two CJEU cases referenced above also demonstrate a considerable hesitancy by other courts to rely on the ICJ's advisory opinion as an authoritative statement of the law. The CJEU decided to evade questions of international law which the ICJ answered in its advisory opinion and decided its cases entirely based on EU law.

1609 Case C-363/18, judgment of 12 November 2019, ECLI:EU:C:2019:954 – *Organisation juive européenne*, paras. 35–36.

1610 Ibid., paras. 49–51.

1611 Ibid., para. 55.

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c) De-facto authority of the Chagos advisory opinion

In the *Chagos* advisory opinion[1612], the ICJ found that the United Kingdom's continued administration of the Chagos Archipelago rendered the decolonization process of Mauritius incomplete and constituted an internationally wrongful act. The Court further found that the United Kingdom was under an obligation to end its administration of the Chagos Archipelago as soon as possible, and that all UN Member States were under an obligation to co-operate with the UN to complete the decolonization of Mauritius.

aa) Narrow authority: Reactions by the UK, Mauritius and the UN

Shortly after the ICJ rendered its *Chagos* advisory opinion, the United Kingdom issued a statement in which it rejected the Court's findings and reaffirmed its claim to sovereignty over the Chagos Archipelago:

> "[W]e have no doubt about our sovereignty over the Chagos Archipelago, which has been under continuous British sovereignty since 1814. Mauritius has never held sovereignty over the Archipelago and we do not recognise its claim. We have, however, made a long-standing commitment since 1965 to cede sovereignty of the territory to Mauritius when it is no longer required for defence purposes. We stand by that commitment."[1613]

In contrast, the UNGA endorsed the Court's opinion on 22 May 2019 by passing resolution 73/295 in which it demanded from the United Kingdom to "withdraw its colonial administration from the Chagos Archipelago unconditionally within (…) six months".[1614]

The UNGA emphasized that the Chagos Archipelago formed an integral part of Mauritius[1615] and that the United Kingdom's ongoing administration

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1612 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95.

1613 United Kingdom Minister of State for Europe and the Americas, Statement made on 30 April 2019, https://questions-statements.parliament.uk/written-statements/detail/2019-04-30/HCWS1528.

1614 UNGA resolution 73/295 of 22 May 2019, UN doc. A/RES/73/295, paras. 1, 3.

1615 Ibid., para. 6.

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constituted an internationally wrongful act.[1616] The UNGA also urged the United Kingdom to cooperate with Mauritius in facilitating the resettlement of Mauritian nationals to the Chagos Archipelago.[1617] The resolution was passed almost unanimously with only six states voting against it. These six states included the United Kingdom, the Maldives,[1618] and the United States, the latter of which operates a military base on Diego Garcia, the largest island in the Chagos Archipelago.[1619]

The United Kingdom ignored the six-month deadline set by the UNGA and took no steps to hand over the Chagos Archipelago to Mauritius. Instead, it repeated its previous statements on the matter.[1620] However, three years later, in October of 2022, UK Foreign Secretary *Cleverly* announced that the UK had agreed to negotiate with Mauritius over the handover of the Chagos Archipelago.[1621] This shift followed early discussions between then UK Prime Minister *Truss* and Mauritian representatives in New York.[1622] On 13 June 2023, *Cleverly* was asked by Parliament about the progress of these negotiations and whether "negotiations are going on in the spirit of the International Court of Justice advisory opinion and the decision of the UN General Assembly in 2019 on the reunification of the

1616 Ibid., para. 2.

1617 Ibid., para. 4

1618 The Maldives opposed the resolution because it feared that it could negatively affect its interests in the region in particular regarding its submissions to the Commission on the Limits of the Continental Shelf, see the statement of the representative of the Maldives during the 83rd plenary meeting, A/73/PV.83, Official records.

1619 See the statement of the representative of the United States during the 83rd plenary meeting, A/73/PV.83, Official records.

1620 Alan Duncan, British Indian Ocean Territory, Statement made on 30 April 2019, HCWS1528, https://questions-statements.parliament.uk/written-statements/detail/2019-04-30/hcws1528; Christopher Pincher, British Indian Ocean Territory, Written Statement made on 5 November 2019, HCWS 90, https://questions-statements.parliament.uk/written-statements/detail/2019-11-05/hcws90. See also the statement of the representative of Mauritius during the 77th meeting of the UNGA Fourth Committee, 15 October 2019, GA/SPD/696.

1621 The Guardian, UK agrees to negotiate with Mauritius over handover of Chagos Islands, 11.04.2022, https://www.theguardian.com/world/2022/nov/03/uk-agrees-to-negotiate-with-mauritius-over-handover-of-chagos-islands.

1622 Negotiations between the United Kingdom and Mauritius have commenced amidst criticism that Chagos Islanders have been excluded from the negotiations, see The Guardian, Negotiations on Chagos Islands' sovereignty face legal challenge, 09.01.2023, https://www.theguardian.com/world/2023/jan/09/negotiations-chagos-islands-sovereignty-legal-challenge-talks-uk-mauritius.

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Chagos islands with Mauritius."[1623] *Cleverly* responded that four rounds of negotiations had taken place but no concrete settlement was in sight. However, he lowered expectations of a swift settlement by emphasizing that the United Kingdom's "primary objective is to ensure the continued effective operation of our defence facility on Diego Garcia".[1624] In early October 2024, it became public that a political agreement has been reached between the UK and Mauritius concerning the Chagos Archipelago.[1625] Accordingly, the UK agreed to return the territorial sovereignty over the Chagos Archipelago to Mauritius. However, the UK is to retain sovereignty over the archipelago's largest island, Diego Garcia, for a period of 99 years "to ensure the continued operation of the base well into the next century".[1626] On 22 May 2025, the United Kingdom published the finalized agreement signed by the Prime Ministers of the UK and Mauritius.[1627] According to the treaty, the United Kingdom recognizes Mauritius's sovereignty over the Chagos Archipelago in its entirety, including Diego Garcia (Article 1) and Mauritius authorizes the United Kingdom to "exercise the rights and authorities of Mauritius with respect to Diego Garcia" (Article 2 para. 1). During the duration of the agreement, Mauritius receives an annual payment from the United Kingdom (Article 11 para. 1), which amounts to £3.4bn over the 99-year span of the treaty. Notably, the preamble of the agreement references the ICJ's Chagos advisory opinion:

> "Having regard to the decisions of international courts and tribunals, including the International Court of Justice, relating to the Chagos Archipelago;"

1623 United Kingdom House of Commons, Chagos Islands: Resettlement and Sovereignty Volume 734: debated on Tuesday 13 June 2023, https://hansard.parliament.uk/commons/2023-06-13/debates/554A9F25-BD9B-4B9B-860D-89E550C6D601/ChagosIslandsResettlementAndSovereignty.

1624 Ibid.

1625 The Guardian, Britain to return Chagos Islands to Mauritius ending years of dispute, 03.10.2024, https://www.theguardian.com/world/2024/oct/03/britain-to-return-chagos-islands-to-mauritius-ending-years-of-dispute.

1626 Joint statement between the governments of the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland concerning the Chagos Archipelago, including Diego Garcia, 3 October 2024, https://www.gov.uk/government/news/joint-statement-between-uk-and-mauritius-3-october-2024.

1627 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Mauritius concerning the Chagos Archipelago including Diego Garcia, London and Port Louis, 22 May 2025, https://assets.publishing.service.gov.uk/media/682f25afc054883884bff42a/CS_Mauritius_1.2025_Agreement_Chagos_Diego_Garcia.pdf.

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The *Chagos* advisory opinion thus helped initiate negotiations which culminated in an agreement on the handing over of control over the Chagos Archipelago.

The Chagos advisory opinion was likely not the only reason for the United Kingdom to act. Another contributing factor might have been the 2021 judgment of the ITLOS Special Chamber in the *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)* case.[1628] In its judgment on preliminary objections, the Special Chamber dealt a major blow to the United Kingdom's claim of sovereignty over the Chagos Archipelago. The Special Chamber decided that the *Chagos* advisory opinion and the subsequent UNGA resolutions resolved the territorial dispute between the United Kingdom and Mauritius over the Chagos Archipelago and as such the United Kingdom was not an indispensable party to the proceedings between Mauritius and the Maldives.[1629] The use of the *Chagos* opinion as a quasi-precedent by Special Chamber provides an interesting example of how ICJ advisory opinions can affect pending disputes. The Special Chamber's judgment has been dubbed a "landmark judgment",[1630] with some commentators even going so far as to predict that the decision marks "the beginning of a new era where international courts and tribunals recognise ICJ advisory opinions as having the (normative) authority to resolve a dispute".[1631]

Let us therefore turn to the 2021 ruling of the ITLOS Special Chamber on preliminary objections in the case between Mauritius and the Maldives.

bb) Intermediate authority: The Maritime Delimitation case between Mauritius and the Maldives case

In 2001, Mauritius invited the Maldives to enter into negotiations about the delimitation of their respective continental shelfs around the Chagos

1628 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17; for an analysis of the Special Chamber's decision, see *F. S. Eichberger*, 22 Melbourne Journal of International Law 2 (2021), 1.

1629 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Written Preliminary Objections of the Republic of Maldives, ITLOS Reports 2021 (114).

1630 *F. S. Eichberger*, 22 Melbourne Journal of International Law 2 (2021), 1 (11).

1631 *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296 (299).

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Archipelago.[1632] The Maldives rejected this offer claiming that Mauritius did not exercise jurisdiction over the archipelago:

> "As jurisdiction over the Chagos Archipelago is not exercised by the Government of Mauritius, the Government of Maldives feels that it would be inappropriate to initiate any discussions between the Government of Maldives and the Government of Mauritius regarding the delimitation of the boundary between the Maldives and the Chagos Archipelago."[1633]

Ten years later, the Maldives made submissions to the Commission on the Limits of the Continental Shelf (CLCS) on its extended continental shelf. Mauritius regarded these submissions as affecting its claims in the region. Following these submissions, a first meeting between the Maldives and Mauritius took place in October of 2010 for negotiations on the delimitation of their respective exclusive economic zones (EEZ). However, the Maldives declined to negotiate any further on a maritime boundary as it was concerned that it could be drawn into a dispute between Mauritius and the United Kingdom over the territorial sovereignty over the Chagos Archipelago. In September of 2019, after negotiations between Mauritius and the Maldives reached an impasse and following consultations with the President of the ITLOS, the two states submitted their dispute to a special chamber of the ITLOS.[1634] The Special Chamber was asked to delimit the maritime boundary between Mauritius and the Maldives in the Indian Ocean, in the EEZ, and the continental shelf, and to decide whether the Maldives had taken actions contrary to its obligation not to jeopardize the reaching of a final agreement on the question of delimitation.[1635]

1632 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17 (37, para. 62).

1633 Ibid. (37-38, para. 62).

1634 Ibid. (23, para. 2); on the use of ad hoc chambers under the ITLOS Statute, see *R. Wolfrum*, Ad Hoc Chambers, in: J. M. van Dyke/S. P. Broder/S. Yi/C. Paek (eds.), Governing ocean resources, 2013, 275; for a commentary on the case, see *F. S. Eichberger*, 22 Melbourne Journal of International Law 2 (2021), 1; *T. Burri/J. Trinidad*, 60 Int. leg. mater. 6 (2021), 969; *C. D. Gaver*, 115 Am. j. int. law 3 (2021), 519.

1635 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17 (51-52, para. 112).

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(1) ITLOS Special Chamber judgment

Mauritius' claim rested on the premise that the Chagos Archipelago rightfully belonged to Mauritius, making Mauritius the opposite coastal state of the Maldives in accordance with Articles 74 and 83 UNCLOS. The validity of this premise was contested between the Maldives and Mauritius: While the Maldives claimed that the territorial sovereignty over the Chagos Archipelago remained in dispute between Mauritius and the United Kingdom, Mauritius argued that the *Chagos* advisory opinion had resolved this dispute in Mauritius' favor by finding that the Chagos Archipelago was an integral part of Mauritius.[1636]

The question of territorial sovereignty over the Chagos Archipelago was at the heart of – and in fact the reason for – the proceedings before the Special Chamber. As Judge ad hoc *Oxman* noted:

> "It is accordingly apparent (...) that this case is not before the Special Chamber because of a difference between the Parties regarding how overlapping entitlements should be delimited. It is here because one of the Parties has declined to proceed with delimitation negotiations. The reasons for doing so help to define the nature and scope of the dispute between the Parties."[1637]

The Maldives raised five preliminary objections to the jurisdiction of the Special Chamber and the admissibility of Mauritius' claims, the first two of which concerned the question of territorial sovereignty over the Chagos Archipelago.[1638] In its first preliminary objection, the Maldives argued that "the United Kingdom is an indispensable third party to the present proceedings, and, as the United Kingdom is not a party to these proceedings, the Special Chamber does not have jurisdiction over the alleged dispute".[1639]

In its second preliminary objection, the Maldives argued that "the Special Chamber has no jurisdiction to determine the disputed issue of

1636 Ibid. (36, para. 114).

1637 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Separate and Dissenting Opinion Oxman, ITLOS Reports 2021 (para. 24).

1638 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17 (43, para. 79).

1639 Ibid. (43, para. 79).

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sovereignty over the Chagos Archipelago, which it would necessarily have to do if it were to determine Mauritius' claims".[1640]

This objection is premised on the principle that maritime rights are derived from the coastal state's sovereignty over the land ("the land dominates the sea"[1641]). Accordingly, sovereignty over the respective islands needs to be determined prior to and independently from maritime delimitation.

The Special Chamber decided to respond to the Maldives' first two preliminary objections jointly, finding that both objections center on the question if the territorial dispute between Mauritius and the United Kingdom had been resolved:

> "[T]he Parties' disagreement boils down to the question as to whether a sovereignty dispute between Mauritius and the United Kingdom over the Chagos Archipelago still exists or has been resolved. Accordingly, if a sovereignty dispute over the Chagos Archipelago exists, the United Kingdom may be regarded as an indispensable party and the Monetary Gold principle would prevent the Special Chamber from exercising its jurisdiction. On the other hand, if such sovereignty dispute has been resolved in favour of Mauritius, the United Kingdom may not be regarded as an indispensable party and the Monetary Gold principle would not apply."[1642]

The Special Chamber first rejected the Maldives' claim that the existence of a dispute between Mauritius and the United Kingdom was determined by the award rendered in the *Chagos Marine Protected Area Arbitration*.[1643] Finding the award had no *res judicata* effect for the matter at hand, the Special Chamber proceeded to examine the content and legal effects of the ICJ's *Chagos* advisory opinion.[1644]

1640 Ibid.

1641 *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, ICJ Reports 2007, 659 (699, para. 126).

1642 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17 (48, paras. 98-99).

1643 Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, UNRIAA, Vol. XXXI (2015), 359.

1644 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17 (53-59, paras. 120-139).

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The Maldives argued that the *Chagos* opinion did not and could not resolve the territorial sovereignty dispute between Mauritius and the United Kingdom because the UNGA did not ask the Court to settle any bilateral dispute over territorial sovereignty but to give its opinion on the process of decolonization of Mauritius.[1645] The ICJ expressly stated so when it held:

> "In Question (a), the General Assembly asks the Court to examine certain events which occurred between 1965 and 1968, and which fall within the framework of the process of decolonization of Mauritius as a non-self-governing territory. It did not submit to the Court a bilateral dispute over sovereignty which might exist between the United Kingdom and Mauritius."[1646]

In fact, the Maldives pointed out, the ICJ justified the exercise of its advisory jurisdiction in the *Chagos* case on the grounds that it had not been asked to resolve the sovereignty dispute.[1647] According to the Maldives, the resolution of the sovereignty dispute was not only not intended by the ICJ, it is also not "an implied or necessary consequence" of the *Chagos* advisory opinion.[1648] This can be seen, the Maldives argued, by the fact that there was an ongoing dispute between Mauritius and the United Kingdom over the consequences of the advisory opinion for the sovereignty dispute between them.[1649] The Maldives further argued that there was no rule under international law that "an administering State which bears an obligation to complete the process of decolonisation in respect of a given territory is immediately stripped of sovereignty over that territory".[1650]

Accordingly, while the United Kingdom may be obliged to return the Chagos Archipelago to Mauritius, it still has territorial sovereignty over the archipelago. Finally, the Maldives referred to the non-binding nature of ICJ advisory opinions arguing that "even if the Court had purported to advise on the sovereignty dispute, its opinion did not have binding force on the UNGA or any State (including the United Kingdom and the Maldives)".[1651]

1645 Ibid. (60-61, para. 145).

1646 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (129, para. 136).

1647 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17 (61, para. 146).

1648 Ibid. (70 et seq., paras. 176 et seq.).

1649 Ibid. (71, para. 178).

1650 Ibid. (71, para. 179).

1651 Ibid. (59, para. 195).

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In contrast, Mauritius argued that the *Chagos* advisory opinion had resolved the territorial dispute between it and the United Kingdom over the Chagos Archipelago in favor of Mauritius. The *Chagos* advisory opinion thus confirmed that the archipelago "is, and always has been, a part of the territory of Mauritius".[1652]

Mauritius agreed with the Maldives that the UNGA asked the ICJ to give an opinion on the decolonization of Mauritius, however, according to Mauritius, "the underlying sovereignty dispute could not be separated from the question of decolonization, and that by answering the UNGA's questions on decolonization (…) the sovereignty issue would inevitably be resolved."[1653]

According to Mauritius, several passages in the *Chagos* opinion demonstrate that the ICJ was aware that it would have to decide the territorial sovereignty dispute between the United Kingdom and Mauritius. In particular, the ICJ referred to the United Kingdom's "obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self- determination."[1654]

Likewise the ICJ had found that "obligations arising under international law and reflected in the resolutions adopted by the General Assembly during the process of decolonization of Mauritius require the United Kingdom, as the administering Power, to respect the territorial integrity of that country, including the Chagos Archipelago."[1655]

The references to "its territory" and the "territorial integrity of that country, including the Chagos Archipelago", Mauritius argued, indicate that the ICJ considered the Chagos Archipelago to already be part of the territory of Mauritius, despite the fact that the decolonization process was

1652 ITLOS Pleadings, Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives), Preliminary Objections, Written Statement of the Maldives, para. 3.13.

1653 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17 (64, para. 156).

1654 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Dissenting Opinion Donoghue, ICJ Reports 2019, 95 (139, para. 179).

1655 Ibid. (137, para. 173).

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not complete.[1656] Regarding the legal effects of the *Chagos* advisory opinion, Mauritius maintained that "while an advisory opinion is not binding as such, this does not mean that it is devoid of legal effects. (…) when the ICJ gives an advisory opinion, it provides an authoritative statement of the law in relation to the issues to which the advisory proceedings give rise. (…) although compliance may not be obligatory in respect of an opinion itself, States are bound and obliged to comply with the law, as declared and defined by the ICJ, whether in contentious cases or advisory opinions."[1657]

Mauritius thus did not ask the Special Chamber to decide the territorial dispute between it and the United Kingdom but to simply recognize that the dispute had already been resolved by the ICJ in the *Chagos* advisory opinion and the ensuing UNGA resolution. As Judge ad hoc *Oxon* put it:

> "Mauritius thereby invites the Special Chamber to avoid the question of the existence of jurisdiction to determine disputed rights to land territory by attributing conclusive prescriptive and, in practical effect, *res judicata* consequences to the advisory opinion and the ensuing General Assembly resolution 73/295 of 22 May 2019. In doing so, Mauritius attempts to avoid the distinction between the authoritative nature of an advisory opinion of the ICJ and its legally binding effect, and the distinction between the competence of the General Assembly to deal with a matter and the legally binding effect of its conclusions."[1658]

The Special Chamber agreed with the Maldives that the *Chagos* advisory opinion was not directed at settling the territorial dispute between the United Kingdom and Mauritius, however, it may have important implications for it. Accordingly, the Special Chamber found:

> "It would be contrary to the principle of consent to accept the proposition that international courts or tribunals, through contentious or advisory proceedings, can resolve a bilateral dispute without the consent of a

1656 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17 (65, paras. 160–161).

1657 Ibid. (76, paras. 197-198).

1658 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Separate and Dissenting Opinion Oxman, ITLOS Reports 2021 (para. 27).

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> party to the dispute. However, this does not mean that the advisory opinion could not entail implications for the disputed issue of sovereignty."[1659]

The Special Chamber found that the Court's findings in the *Chagos* advisory opinion had

> "unmistakable implications for the United Kingdom's claim to sovereignty over the Chagos Archipelago. (…) such claim is contrary to the determinations made by the ICJ that the detachment of the Chagos Archipelago was unlawful and that the United Kingdom's continued administration of the Chagos Archipelago constitutes an unlawful act of a continuing character."[1660]

The Special Chamber further found that the ICJ's findings "may also entail considerable implications for the sovereignty claim of Mauritius".[1661]

The Special Chamber highlighted two passages in the Chagos advisory opinion in which the ICJ refers to Mauritius "territorial integrity (…), including the Chagos Archipelago" as well as "the decolonization of its territory".[1662] The Special Chamber interpreted these statements as suggesting that Mauritius has sovereignty over the Chagos Archipelago.[1663] The Special Chamber further agreed with Mauritius that "the decolonization and sovereignty of Mauritius, including the Chagos Archipelago, are in-separably related".[1664]

Having found that the *Chagos* opinion contained relevant findings on the territorial sovereignty over the archipelago, the Special Chamber went on to assess the legal effects of the opinion for the dispute between the United Kingdom and Mauritius. This is arguably the most interesting, yet also the most controversial part of the judgment. The Special Chamber drew a distinction between the binding character and the authoritative nature of ICJ advisory opinions. While ICJ advisory opinions "cannot be considered legally binding", they entail "an authoritative statement of international law on the questions with which it deals".[1665] The Special Chamber found:

1659 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Judgment, ITLOS Reports 2021, 17 (67, para. 168).
1660 Ibid. (69-70, para. 173).
1661 Ibid. (70, para. 174).
1662 Ibid.
1663 Ibid.
1664 Ibid. (74, para. 189).
1665 Ibid. (77, para. 202).

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> "An advisory opinion is not binding because even the requesting entity is not obligated to comply with it in the same way as parties to contentious proceedings are obligated to comply with a judgment. However, judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the "principal judicial organ" of the United Nations with competence in matters of international law."[1666]

The Special Chamber found that the ICJ's findings in its *Chagos* advisory opinion had "legal effect"[1667] and that it therefore "takes them into consideration in assessing the legal status of the Chagos Archipelago".[1668] The Special Chamber found that the *Chagos* opinion authoritatively determined the question of sovereignty over the Chagos Archipelago stating that the main difference between the case at hand and the *Coastal State Rights* case, upon which the Maldives relied, was that

> "[i]n the latter case, the Annex VII Arbitral Tribunal did not have the benefit of prior authoritative determination of the main issues relating to sovereignty claims to Crimea by any judicial body. However, that does not seem to be the case in the present proceedings."[1669]

The Special Chamber consequently found that the

> "determinations made by the ICJ with respect to the issues of the decolonization of Mauritius in the Chagos advisory opinion have legal effect and clear implications for the legal status of the Chagos Archipelago. The United Kingdom's continued claim to sovereignty over the Chagos Archipelago is contrary to those determinations. While the process of decolonization has yet to be completed, Mauritius' sovereignty over the Chagos Archipelago can be inferred from the ICJ's determinations."[1670]

As a consequence of this, the Special Chamber decided that the United Kingdom had no legal interests relating to the maritime zones around the Chagos Archipelago[1671] and that Mauritius was the coastal state in respect of

1666 Ibid. (77, para. 203).
1667 Ibid. (78, para. 205).
1668 Ibid. (78, para. 206).
1669 Ibid. (87, para. 244).
1670 Ibid. (87-88, para. 246).
1671 Ibid. (88, para. 247).

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the Chagos Archipelago for the purpose of the delimitation of a maritime boundary.[1672]

(2) Analysis

The ITLOS Special Chamber relied on the *Chagos* advisory opinion to make two important findings: first, that the United Kingdom had no legal interests that could be affected by the Special Chamber proceedings in the sense of the *Monetary Gold* doctrine and, secondly, that Mauritius holds territorial sovereignty over the Chagos Archipelago making Mauritius the coastal state of the archipelago for the purposes of maritime delimitation. In doing so, the Special Chamber held that the territorial dispute between the United Kingdom and Mauritius had been authoritatively resolved by the *Chagos* advisory opinion. The Special Chamber recognized that the United Kingdom continued to claim sovereignty over the Chagos Archipelago. However, the Special Chamber found that such claims were irrelevant since the ICJ had determined that the Chagos Archipelago was part of the territory of Mauritius.[1673] By deciding that the *Chagos* advisory opinion settled the dispute between the United Kingdom and Mauritius, the ITLOS Special Chamber judgment undermined the premise of the *Chagos* advisory opinion which was that the ICJ would exercise its advisory jurisdiction precisely because its opinion was not directed at settling the underlying territorial dispute and would thus not circumvent the consent requirement to judicial dispute settlement. As pointed out by the Maldives, this premise was expressly stated by the ICJ.

The Special Chamber explained its use of the *Chagos* advisory opinion by referring to the "authority" and "legal effects" of ICJ advisory opinions, without however, expanding on these concepts any further. While the Special Chamber reaffirmed the conventional position that ICJ advisory opinions had no binding force, it claimed that "judicial determinations made in advisory opinions carry no less weight and authority than those in judgments", the reason for this being that they are "made with the same rigour and scrutiny by the "principal judicial organ" of the United Nations with competence in matters of international law".[1674] This distinction between binding force and authority is not new, nor is the idea that advisory

1672 Ibid. (89, para. 250).
1673 Ibid. (86-87, paras. 243-245).
1674 Ibid. (77, para. 203).

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opinions have the same authority as judgments of the ICJ.[1675] However, the way the Special Chamber relied on the advisory opinion's authority to reject the preliminary objections raised by the Maldives is highly controversial as it gives *de facto* precedential effect to the advisory opinion.[1676]

As illustrated above, ICs regularly rely on decisions of other ICs as guidance on the interpretation and application of the law.[1677] However, the Special Chamber relied on the advisory opinion not as authoritative guidance for its *own* determination of the applicable law or the facts of the case. Instead, the Special Chamber found that the advisory opinion *had already determined* the question before the Special Chamber in an authoritative manner. In doing so, the Special Chamber effectively attributed *res judicata* effect to the advisory opinion and the ensuing UNGA resolution 73/295. It is important to note that in doing so, the Special Chamber went beyond the usual reference to the advisory opinion as a secondary source of international law under Article 38 para. 1 lit. d ICJ Statute. The reliance on judicial decisions as secondary sources of international law does not relieve the deciding IC from making its own determination, albeit informed by the secondary source in question. However, the Special Chamber's subject-matter jurisdiction under Article 288 para. 1 UNCLOS did not allow the Special Chamber to make a decision about the territorial sovereignty over the Chagos Archipelago since such a determination would not constitute a "dispute concerning the interpretation or application" of UNCLOS as commonly understood in the case law.[1678]

The Special Chamber tried to "avoid the question of the existence of jurisdiction to determine disputed rights to land territory by attributing conclusive prescriptive and, in practical effect, *res judicata* consequences to the advisory opinion and the ensuing General Assembly resolution 73/295

1675 *P. d'Argent*, in: A. Zimmermann/C. J. Tams/K. Oellers-Frahm/C. Tomuschat/D. W. K. Anderson (eds.), The Statute of the International Court of Justice, 3. ed., 2019: Article 65, para. 49.

1676 See on this Special Rapporteur Jalloh who points out that "[t]his view stands in tension with their technically non-binding nature, the subsidiary character of Article 38 (1) (d) of the ICJ Statute and the formal lack of precedent in international law.", *C. C. Jalloh*, First Report on Subsidiary Means for the Determination of Rules of International Law, Second reissue 16 May 2023, A/CN.4/760, para. 279.

1677 With further references, see *N. Lanzoni*, 2 Ital. Rev. Int. Comp. Law 2 (2022), 296.

1678 See Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation), Award on Preliminary Objections, PCA Case No. 2017–06, 54–55 para. 176.

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of 22 May 2019."[1679] In doing so, the Special Chamber negated the difference between the authoritative nature of ICJ advisory opinions and their legally binding effect as well as the difference between the power of the UNGA to pass a resolution on a matter and its legal effects.[1680] In sum, while the Special Chamber claimed to recognize that ICJ advisory opinions had no binding force, by relying on the opinion's "legal effects" to dispose of the United Kingdom as a necessary third party in the sense of the Monetary Gold doctrine, the Special Chamber effectively treated the *Chagos* advisory opinion as if it had binding force.[1681]

One could even argue that the quasi-precedential effect, which the Special Chamber ascribed to ICJ advisory opinions, is even more far-reaching than the binding force of ICJ decisions.[1682] While Article 59 of the ICJ Statute limits the binding force of ICJ judgments in contentious proceedings to the parties to a particular case, advisory opinions are given on questions of law and may extend beyond the scope of the bilateral dispute.[1683] Additionally, while the binding force and *res judicata* effect of judgments in contentious cases is limited to the operative provisions of the judgment, advisory opinions have no operative provisions allowing a much more flexible recourse to the findings of the Court.

cc) Conclusions on the Chagos advisory opinion

Taking stock of the practice of key audiences of the *Chagos* advisory opinion leaves a mixed picture. In terms of the Court's *narrow authority*, it is apparent that of the two states whose legal rights and obligations form the subject-matter of the Chagos advisory proceedings, Mauritius and the United Kingdom, only Mauritius recognized the authority of the opinion. It did so through public statements as well as in the proceedings before the ITLOS Special Chamber against the Maldives in which it relied on the ICJ's findings in the *Chagos* opinion. In contrast, the United Kingdom initially

1679 *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Preliminary Objections, Separate and Dissenting Opinion Oxman, ITLOS Reports 2021 (para. 27).

1680 Cf. Ibid.

1681 So also *M. Lando*, Binding Advisory Opinions, in: R. Buchan/D. Franchini/N. Tsagourias (eds.), The Changing Character of International Dispute Settlement: Challenges and Prospects, 2023, 106 (127).

1682 See *F. S. Eichberger*, 22 Melbourne Journal of International Law 2 (2021), 1 (18).

1683 Ibid.

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neither recognized the Court's advisory opinion as authoritative nor took meaningful action towards complying with it. Instead, the United Kingdom rejected the *Chagos* opinion and reasserted its claim of sovereignty over the Chagos Archipelago. Subsequently, the United Kingdom adopted a more conciliatory stance, initiating preliminary negotiations with Mauritius in 2023 regarding the transfer of the Chagos Archipelago. While negotiations initially stalled, with the UK even considering withdrawing from the talks altogether,[1684] the UK finally agreed to return sovereignty over the archipelago back to Mauritius in 2024.[1685] However, not without a big caveat: the UK will continue to exercise territorial sovereignty over the archipelago's largest island for another 99 years. One can thus not conclude that the United Kingdom acknowledged its obligation to immediately end its administration of the Chagos Archipelago in line with the *Chagos* opinion. The recognition element as one of the two key components of measuring *de facto* authority is thus lacking.

Moving to the ICJ's *intermediate authority*, i.e., the Court's power to affect the position of similarly situated actors, the position of the Maldives is particularly illustrative. The Maldives invoked the Monetary Gold doctrine and the *Chagos* opinion's lack of binding force to challenge the admissibility of the proceedings Mauritius had launched before the ITLOS Special Chamber. The Maldives argued that the *Chagos* opinion could not settle the dispute between Mauritius and the United Kingdom thus denying the opinion's capacity to exert narrow authority.

Broadening the scope further to the Court's *extensive authority*, the position of the ITLOS Special Chamber in the proceedings between Mauritius and the Maldives significantly strengthened the Court's *de facto* authority. The *Chagos* opinion is being treated as a quasi-contentious judgment in the dispute between the United Kingdom and Mauritius containing an authoritative statement on the law and facts of the case. Similarly, civil society groups like Human Rights Watch have endorsed the ICJ's *Chagos* advisory opinion and called upon the United Kingdom to make reparations

1684 The Telegraph, UK to drop plan to hand Chagos Islands back to Mauritius, 15.12.2023, https://www.telegraph.co.uk/world-news/2023/12/01/uk-drop-plan-to-hand-chagos-islands-back-mauritius/.

1685 Joint statement between the governments of the Republic of Mauritius and the United Kingdom of Great Britain and Northern Ireland concerning the Chagos Archipelago, including Diego Garcia, 3 October 2024, https://www.gov.uk/government/news/joint-statement-between-uk-and-mauritius-3-october-2024.

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and "comply with the findings and recommendations of UN bodies and human rights mechanisms".[1686]

E. Conclusions on the justifications for the Eastern Carelia doctrine

The core justification for the ICJ's Eastern Carelia doctrine lies in the protection of the integrity of the Court's judicial function. The ICJ may refuse certain requests for an advisory opinion if the issuing of the advisory opinion would be incompatible with the Court's judicial function. However, herein already lies the first ambiguity of the doctrine. There is not one clearly identifiable judicial function of the ICJ. Instead, the term judicial function refers to a plethora of aims and activities the Court pursues, such as the stabilization of normative expectations, the control of the compatibility of the conduct of international actors with international law, the concretization and development of legal norms, the support of the other UN organs in their activities (especially by means of the advisory procedure), and the settlement of international disputes. Each of these functions raises different problems with respect to the Court's advisory procedure.

The function most often invoked as being at odds with requests for advisory opinions on inter-state disputes is the Court's dispute settlement function. The idea is that the issuing of advisory opinions on legal questions which form the subject-matter of an inter-state dispute constitutes a form of dispute settlement which circumvents the respective state's consent to dispute settlement and thereby undermines the contentious procedure's jurisdictional regime established by the ICJ Statute. However, the principle of consent pursues a specific function which is to prevent the exercise of judicial jurisdiction over a state without that state's consent. An IC exercises jurisdiction over a state only if it decides over that state's legal rights and obligations with binding force. Since advisory opinions lack binding force, the issuing of advisory opinions on a legal question which lies at the heart of an inter-state dispute does not constitute an exercise of judicial jurisdiction over the respective states.

Even if one broadens the perspective and asks whether the Eastern Carelia doctrine is justified as a form of complementary or auxiliary protection

1686 *C. Baldwin*, "That's When the Nightmare Started", Human Rights Watch, 2023, https://www.hrw.org/report/2023/02/15/thats-when-nightmare-started/uk-and-us-forced-displacement-chagossians-and.

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of the jurisdictional system of the ICJ Statute, no other conclusion can be drawn. This was illustrated by a comparison to the Monetary Gold doctrine. In contrast to contentious cases, which form the backdrop of the Monetary Gold doctrine, advisory opinions on inter-state disputes do not create any additional legal obligations which may be at odds with the existing rights and obligations of non-participating states. An advisory opinion can only provide an additional authoritative *moral* reason to act in a certain way, but it cannot provide an additional *legal* reason to act.

ICJ advisory opinions exert significant authority. Particularly the normative authority of ICJ advisory opinions may be the principal reason for states to invoke the Eastern Carelia doctrine as a defense against advisory opinions on legal matters close to them. However, this normative authority – even if it may have practical effects for the state in question – does not mean that the ICJ exercises jurisdiction over the affected states when issuing an advisory opinion. Instead, we are left with a much more vague interest of states not to be confronted with an authoritative but non-binding legal pronouncement. Considering that the ICJ as an organ of the UN has a legal duty to assist the other UN organs in their activities, it seems unjustifiable to refuse a request merely based on such vague notions. Thus, it is asserted that there is no justification for the Eastern Carelia doctrine. Judge *Donoghue* warned in her dissenting opinion to the *Chagos* advisory opinion "that the advisory opinion procedure is available as a fall-back mechanism to be used to overcome the absence of consent to jurisdiction in contentious cases".[1687] However, it seems that as long as an authorized UN organ has expressed its need for an advisory opinion on a matter, the Court has little room to deny such a request.

1687 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Dissenting Opinion Donoghue, ICJ Reports 2019, 95 (266, para. 23).

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