## § 5 Legal framework of the Eastern Carelia doctrine

The core tenet of the Eastern Carelia doctrine is that the ICJ's advisory procedure may not be used with the aim to settle inter-state legal disputes. This chapter assesses the merit of this argument by reference to the legal framework of the ICJ's advisory jurisdiction. As will be demonstrated, the Court's legal framework in no way prevents the Court from issuing advisory opinions on inter-state disputes.

### *A. Relevant provisions*

The advisory jurisdiction of the Court is governed by Article 96 UNC, Articles 65–68 ICJ Statute, Articles 102–109 of the Rules of the Court (the Rules)[663], and Practice Direction XII[664].

The UNC and the ICJ Statute form a single instrument (Article 92 sentence 2 UNC)[665] and constitute the ICJ's constituent instrument.[666] Article 96 UNC and Article 65 para. 1 ICJ Statute contain the conditions of the Court's jurisdiction *ratione personae* and *ratione materiae*, while the other provisions relate to procedural questions.[667]

Article 96 UNC stipulates:

> "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request

663 See Art. 30 para. 1 ICJ Statute.

664 Since 2001, the Court has issued Practice Directions as guidance for the States appearing before the Court. These Practice Directions do not amend the Rules of the Court, but supplement them.

665 *S. Rosenne*, The law and practice of the International Court, 1920-2005, 4th ed. 2006, 106.

666 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 3, Ch. 16, § 255.

667 *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. 1.

> advisory opinions of the Court on legal questions arising within the scope of their activities."

Article 65 para. 1 ICJ Statute stipulates:

> "The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

### *B. Methods of treaty interpretation*

Before examining the relevant legal provisions, it is worth taking a step back and reflecting on the rules that apply when interpreting constituent instruments of international organizations. While the basic rules of treaty interpretation apply to all international treaties, there are certain principles that are particularly important when it comes to the interpretation of constituent instruments of international organizations: the principle of specialty and principle of implied powers.

#### I. Basic rules of treaty interpretation

Constituent instruments of international organizations are multilateral treaties and as such – in principle – subject to the rules of treaty interpretation codified in Articles 31–33 VCLT.[668] However, the VCLT only applies to treaties that have been concluded after the VCLT's entry into force (Article 4 VCLT). This excludes the application of Articles 31 and 32 VCLT to the interpretation of the UNC and the ICJ Statute, which were concluded prior to the entry into force of the VCLT. However, the ICJ held that Articles 31 and 32 VCLT codify customary international law and applied the rules enshrined therein to treaties concluded prior to the entry into force of

668 Art. 5 VCLT stipulates that the VCLT applies to the constituent instruments of international organizations "without prejudice to any relevant rules of the organization". E contrario, the rules of the organization may deviate from this general rule, *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, 8, paras. 21 et seq. See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66 (74, para. 19).

the VCLT.[669] The methods of interpretation listed in Article 31 VCLT are of equal status, there is no hierarchy among them.[670]

In addition to the "primary"[671] methods of treaty interpretation contained in Article 31 VCLT, Article 32 VCLT codifies "supplementary means of interpretation". These supplementary means of interpretation, which include the treaties' preparatory work and the circumstances of their conclusion, may only be applied if the application of the primary methods leaves ambiguity or obscurity (Article 32 lit. a VCLT) or the result is manifestly absurd or unreasonable (Article 32 lit. b VCLT).

## II. Principle of specialty and principle of implied powers

Constituent instruments of international organizations are treaties of a special kind. States conclude such treaties to create new subjects of international law that possess international legal personality.[672] The signatory states want these new subjects of international law to achieve certain common objectives and in order to do so they confer on them certain powers.[673] Importantly, international organizations and their organs possess only those powers which have been conferred on them by the States Parties to the organization's constituting instrument. This principle is commonly referred

669 *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, ICJ Reports 1991, 53 (69-70, para. 48); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66 (75, para. 19); *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, ICJ Reports 1999, 1045 (1059, para. 18); *LaGrand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, 466 (501, para. 99); *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, ICJ Reports 2004, 279 (318, para. 100). Arguing that it was only the conclusion of the VCLT itself that rendered the principles of treaty interpretation customary, see *J.-M. Sorel/V. Eveno Boré*, in: O. Corten/P. Klein (eds.), The Vienna Conventions on the law of treaties, 2011: Art. 31, para. 15.

670 *M. E. Villiger*, in: M. E. Villiger (ed.), Commentary on the 1969 Vienna Convention on the Law of Treaties, 2009: Art. 31, para. 29; *J.-M. Sorel/V. Eveno Boré*, in: O. Corten/P. Klein (eds.), The Vienna Conventions on the law of treaties, 2011: Art. 31, para. 8.

671 *M. E. Villiger*, in: M. E. Villiger (ed.), Commentary on the 1969 Vienna Convention on the Law of Treaties, 2009: Art. 31, para. 9 et seq.

672 *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, 4, para. 8.

673 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66 (75, para. 19).

to as the *principle of specialty* or the *principle of conferred powers*.[674] As the organization is a product of the states' collective will, it has only those powers that the states conferred on it.

The powers of an organization are not limited to those powers which are explicitly stated in the organization's constituent instrument. By means of treaty interpretation, one can also deduce an organization's competences from its objectives. In other words, all those powers are considered to have been implicitly conferred by the signatory states to the organization which are deemed essential for the fulfilment of the organization's objectives.[675] This deduction from the objectives of the organization to its powers is called the *principle of implied powers*.[676]

Precursors to the principle of implied powers can be traced back to the case law of the United States Supreme Court. In a case from 1819, the Court examined the relationship between US federal states and the US federal government. The US Supreme Court held:

> "Many particular means are, of course, involved in the general means necessary to carry into effect the powers expressly granted […]. It was impossible for the framers of the constitution to specify, prospectively, all these means, both because it would have involved an immense variety of details, and because it would have been impossible for them to foresee the infinite variety of circumstances, in such an unexampled state of political society as ours, for ever changing and for ever improving."[677]

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674 Ibid. (78, para. 25); *M. Virally*, La notion de fonction dans la théorie de l'organisation internationale, in: M. Virally (ed.), Le droit international en devenir, 1990 (para. 71); *N. M. Blokker*, International Organizations or Institutions, Implied Powers (last updated 2021), in: A. Peters/R. Wolfrum (eds.), The Max Planck Encyclopedia of Public International Law, 2008 (1–2); *H. G. Schermers/N. Blokker*, International institutional law, 6. edition 2018, paras. 209-210.

675 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174 (182); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66 (78, para. 25); on the principle of implied powers with further references, see *H. G. Schermers/N. Blokker*, International institutional law, 6. edition 2018, paras. 232 et seq.

676 Some commentators distinguish between powers being implied from explicit powers and powers being implied from the purpose or functions of an organization, see on this *H. G. Schermers/N. Blokker*, International institutional law, 6. edition 2018, para. 233.

677 *McCulloch v. Maryland, 17 U.S. 316 (1819)*, U.S. Supreme Court decision (384 et seq), cited in *N. M. Blokker*, International Organizations or Institutions, Implied Powers (last updated 2021), in: A. Peters/R. Wolfrum (eds.), The Max Planck Encyclopedia of Public International Law, 2008 (7).

The two central ideas which underlie the principle of implied powers are exemplified in the US Supreme Court's decision: First, as a matter of drafting technique, the drafters of a treaty cannot conclusively list all the powers which an organization needs to achieve its objectives as this would amount to an incomprehensively long list. Secondly, it is equally impossible for the drafters to predict all the powers that may become necessary in the future under changed circumstances. The latter notion is also known as the idea that constituent instruments of international organizations are "living instruments".[678]

It is important to emphasize that the principle of conferred powers and the principle of implied powers do not contradict each other. Rather, the principle of implied powers serves to effectuate the will of the States Parties by giving the organization the powers which are necessary to fulfil the objectives set by the States Parties.[679] Instead of contradicting the principle of conferred powers, the principle of implied powers thus builds on and supplements it. This clarity in principle becomes blurred when applied in practice. It may be difficult to distinguish between powers implicitly conferred by the States Parties onto the organization to achieve the organization's objectives on the one hand and an unauthorized assumption of powers by the organization (in the sense of a "*Kompetenz-Kompetenz*") on the other hand.[680] The latter would be contrary to the principle of conferred powers. To navigate this field, it is important to bear in mind that the implied powers doctrine cannot establish an interpretation of a treaty provision that is incompatible with the text of the treaty.[681] The implied powers doctrine thus finds its limits in the ordinary meaning of the text of the treaty.[682]

678 *M. N. Shaw*, International law, 7. ed. 2014, 946. On the concept of treaties as living instruments, see *T. Thienel*, The 'Living Instrument' Approach in the ECHR and Elsewhere: Some Remarks on the Evolutive Interpretation of International Treaties, in: J. Delbrück/U. E. Heinz/K. Odendahl/N. Matz-Lück/A. von Arnauld (eds.), Aus Kiel in die Welt: Kiel's Contribution to International Law, 1. ed., 2014, 165 (165).

679 Cf. *H. G. Schermers/N. Blokker*, International institutional law, 6. edition 2018, para. 233.

680 *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna convention on the law of treaties, 2012: Art. 31, para. 76.

681 Cf. *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2. ed., 2018: Art. 31, para. 57.

682 Cf. Ibid., para. 57.

### C. General scope of the ICJ's advisory jurisdiction

Article 65 ICJ Statute and Article 96 UNC address the Court's advisory jurisdiction from different perspectives: Article 96 UNC focuses on the power of the authorized UN organ to *request* an advisory opinion from the ICJ, whereas Article 65 ICJ Statute focuses on the Court's power to *give* an advisory opinion.[683] Together, the two provisions lay down two conditions for the Court's advisory jurisdiction[684]: First, there must be a request from an authorized organ on a matter within that organ's scope of activities (*jurisdiction ratione personae*). Secondly, the request must relate to a legal question (*jurisdiction ratione materiae*). The Court's jurisdiction or power to give an advisory opinion can be distinguished from the Court's discretion *not* to give an advisory opinion. The Court's discretion will be addressed separately.[685]

#### I. Jurisdiction ratione personae – request from an "authorized organ"

Article 96 UNC distinguishes between two categories of authorized organs. Paragraph 1 grants the UNGA and the UNSC the power to request advisory opinions from the Court. Paragraph 2 extends this power to "other organs of the United Nations and specialized agencies", however under two further conditions: prior authorization by the UNGA and the request for an advisory opinion must relate to a legal question "arising within the scope of [the authorized organ's] activities". While the first paragraph resembles Article 14 sentence 3 of the Covenant of the League of Nations, which empowered the League's Council and Assembly to request advisory

683 See the discussions during the sixteenth meeting of Committee IV/1 during the San Francisco Conference of 1945, during which the delegate of Australia suggested that provisions on advisory opinions should be in both the Charter and in the ICJ Statute and that the Charter should indicate the power of certain bodies to seek advisory opinions, while the Statute should define the power of the Court to render advisory opinions, United Nations, Sixteenth Meeting of Committee IV/1, 31 May 1945, Doc. 714, IV/1/57, p. 241.

684 *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, paras. 6–40; *M. M. Aljaghoub*, The Advisory Function of the International Court of Justice 1946 - 2005, 2006, 38–63; *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 121 et seq.

685 See *infra* in this Chapter Section E.

opinions from the PCIJ, the second paragraph extends the power to request advisory opinions to a broader category of entities.[686]

### 1. Authorization

The UNSC and the UNGA are authorized *per se* to request advisory opinions from the ICJ. For the UNSC, the necessary quorum to request an advisory opinion from the Court is stipulated in Article 27 paras. 2 and 3 UNC.[687] If the request constitutes a "procedural matter" within the meaning of Article 27 para. 2 UNC, a simple majority of nine votes is sufficient. If it qualifies as "other matters" within the meaning of Article 27 para. 3 UNC, the affirmative vote of all permanent members is required. The UNSC has so far only requested one advisory opinion[688] and the request was decided without the affirmative vote of two permanent members thus indicating that a request constitutes a procedural matter.[689]

With regards to the UNGA, it was the initial position of the UNGA that a request for an advisory opinion constituted an "important question" within the meaning of Article 18 para. 2 UNC and thus requires a two-thirds-majority.[690] However, when the UNGA requested an advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*[691], it did so by simple

686 For further comments on the genesis of Art. 96 UNC during the 1945 San Francisco Conference see for example *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1, Ch. 2, § 9; *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 (62).

687 On this, see *R. Kolb*, The International Court of Justice, 2013, 1044.

688 *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.

689 UNSC resolution 284 (1970) of 29 July 1970, UN doc. S/RES/284(1970) which requested the *Namibia* advisory opinion was passed by 12 votes in favor to none against with three abstentions (Poland, the UK and the USSR). Arguing that a request for an advisory opinion constitutes a "procedural matter" in the sense of Article 27 para. 2 UNC, see *R. Kolb*, The International Court of Justice, 2013, 1044.

690 UNGA resolution 44(I) of 8 December 1946, UN doc. A/RES/44(I).

691 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226.

majority vote.[692] Nevertheless, the ICJ gave the requested advisory opinion without addressing the issue of the quorum, thus implicitly finding that a request for an advisory opinion is not an "important question" within the meaning of Article 18 para. 2 UNC.[693] This practice was confirmed in the *Wall* case, the *Kosovo* case and the *Chagos* case.[694] It thus seems accepted practice that the UNGA may request advisory opinions by simple majority.[695]

Other UN organs and specialized agencies require an authorization by the UNGA to request advisory opinions from the ICJ. It seems convincing to treat the authorization of other organs by the UNGA as a matter which falls within the purview of Article 18 para. 3 UNC and thus requiring a simple majority. The UNGA may grant conditional authorization,[696] although it has never made use of this right.[697] The UNGA has granted authorization to two principal organs of the UN: the ECOSOC[698] and the Trusteeship Council[699]. Thus, among the principal organs of the UN only the ICJ and the UNSG are not authorized to request advisory opinions, the former because it is unable to seize itself, the latter because it was generally feared that such a power could shift the balance of powers within the UN too much in favor of the UNSG.[700] The UNGA has further authorized

692 UNGA resolution 49/75(K) of 15 December 1994, UN doc. A/RES/49/75(K), which requested the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, was passed by 78 votes in favor and 43 votes against with 38 abstentions.

693 *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. 13.

694 Ibid., para. 13.

695 *R. Kolb*, The International Court of Justice, 2013, 1043; *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. 13; *Keith* argues that the necessary quorum depends on the subject-matter of the request, see *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 45 et seq.

696 *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 39; *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1 Ch. 5 § 60.

697 *R. Kolb*, The Elgar companion to the International Court of Justice, 2014, 263. If the UNGA grants its authorization subject to further conditions, the fulfilment of these conditions may be examined by the ICJ, *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1 Ch. 5 § 60.

698 UNGA resolution 89(I) of 11 December 1946, UN doc. A/RES/89(I).

699 UNGA resolution 171(II) of 14 November 1947, UN doc. A/RES/171(II).

700 *R. Kolb*, The Elgar companion to the International Court of Justice, 2014, 265.

one subsidiary organ of the UNGA[701], 15 specialized agencies[702] and one independent related organization[703].

### 2. Question arising within the requesting organ's scope of activities

Article 96 para. 2 UNC further stipulates that the legal question on which an advisory opinion is requested must arise within the requesting organ's scope of activities. An organ's "scope of activities" or "field of jurisdiction"[704] is determined by the organization's constituent instrument.[705] In order to determine an organ's scope of activities one must therefore interpret the organization's constituent instrument, particularly the provisions relating to the powers of the organization and its organs.

701 The UNGA authorized the Interim Committee of the General Assembly in resolutions 196(III) of 3 December 1948, UN doc. A/RES/196(III) and 295(IV) of 21 November 1949, UN doc. A/RES/295(IV).

702 The authorized specialized agencies of the UN are: the International Labour Organization (ILO), the Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Civil Aviation Organization (ICAO), the World Health Organization (WHO), the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC), the International Development Association (IDA), the International Monetary Fund (IMF), the International Telecommunication Union (ITU), the World Meteorological Organization (WMO), the International Maritime Organization (IMO), the World Intellectual Property Organization (WIPO), the International Fund for Agricultural Development (IFAD), and the United Nations Industrial Development Organization (UNIDO). For a list of all authorized organs, see Report of the International Court of Justice (2022–2023), 14, https://www.icj-cij.org/sites/default/files/2023-10/2022-2023-en_0.pdf.

703 The UNGA authorized the International Atomic Energy Agency (IAEA) in UNGA resolution 1146(XII) of 14 November 1957, UN doc. A/RES/1146(XII).

704 *R. Kolb*, The Elgar companion to the International Court of Justice, 2014, 263.

705 Ibid., 263; *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. 33.

a) ICJ interprets "scope of activities" narrowly

In the 1996 *Nuclear Weapons* case[706], the ICJ refused to give the advisory opinion requested by the WHO finding that the question did not arise within the WHO's scope of activities:

> "Having arrived at the view that the request for an advisory opinion submitted by the WHO does not relate to a question which arises "within the scope of [the] activities" of that Organization in accordance with Article 96, paragraph 2, of the Charter, the Court finds that an essential condition of founding its jurisdiction in the present case is absent and that it cannot, accordingly, give the opinion requested."[707]

In particular, the ICJ found that the question of the *legality* of the use of nuclear weapons was beyond the scope of the WHO's activities. The Court reasoned that the WHO is only competent to assess the *effects* of the use of nuclear weapons on the health of human beings.[708] However, this assessment of the effects of nuclear weapons, according to the Court, is independent from the *legal assessment* of the use of nuclear weapons.[709] The WHO may fulfil its functions regarding the protection of human health without knowing whether the specific use of nuclear weapons violates international law.[710] For this reason, the WHO was not competent to ask the Court for a legal opinion on the lawfulness of the use of nuclear weapons.

The reasoning of the Court is plausible but not beyond reproach. Article 2 lit. (v) of the WHO Constitution[711] states that the function of the WHO is "generally to take all necessary action to attain the objective of the Organization". The objectives of the WHO are described in Article 1 WHO

706 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66; on the Nuclear Weapons (WHO) opinion, see *D. Akande*, 9 EJIL 3 (1998), 437; on both Nuclear Weapons opinions, see L. Boisson de Chazournes, P. Sands (eds.), International law, the World Court of justice and nuclear weapons, 1999.

707 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66 (84, para. 31).

708 Ibid. (76 para. 21).

709 Ibid.; in favor *R. Kolb*, The Elgar companion to the International Court of Justice, 2014, 267.

710 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66 (77 para. 22).

711 Constitution of the World Health Organization, signed 22 July 1946, entry into force 7 April 1948, 14 UNTS 185.

Constitution as the "attainment by all peoples of the highest possible level of health".

It seems at least possible that an advisory opinion of the ICJ on the general illegality of the use of nuclear weapons could deter states from using nuclear weapons. The request could thus be seen as a preventative measure by the WHO. This line of reasoning is supported by Article 2 lit. (k) WHO Constitution, according to which the WHO is empowered "to propose conventions, agreements and regulations, and make recommendations with respect to international health matters".

It seems unclear how the WHO is supposed to meaningfully contribute to the development of conventions without knowing the legal *status quo*. The opinion indicates that the ICJ interprets the requirement that the question must arise within the requesting organ's scope of activities narrowly – at least where it concerns requests from specialized organizations such as the WHO.

### b) Applying the "scope of activities" limitation to the UNSC and the UNGA

The wording of Article 96 para. 2 UNC seems to indicate that only the specifically authorized organs must meet the additional requirement that the question they refer to the Court must arise within their scope of activity.[712] However, many commentators argue that the UNSC and the UNGA are also limited by their scope of activities when requesting advisory opinions from the ICJ.[713]

According to *Kolb*, the difference in wording between "any legal question" in para. 1 and "legal questions arising within the scope of the

712 *A. Zimmermann*, Uniting-for-Peace und Gutachtenanfragen der Generalversammlung: Anmerkungen aus Anlaß des Gutachtens des Internationalen Gerichtshofes zur Zulässigkeit des Sicherheitszaunes zwischen Israel und den palästinensischen Gebieten, in: K. Dicke/S. Hobe/K.-U. Meyn/A. Peters/E. Riedel/H.-J. Schütz/C. Tietje (eds.), Weltinnenrecht, 2005, 909 (918); *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 205.

713 *H. Kelsen*, The law of the United Nations, 2. ed. 1951, 546; *R. Kolb*, The International Court of Justice, 2013, 1046–1047; *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1 Ch. 5 § 60; cf. *J. A. Frowein/K. Oellers-Frahm*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. J. Tams/M. Kashgar/D. Diehl (eds.), The Statute of the International Court of Justice, 2. ed., 2012: Art. 65, para. 16.

activities" in para. 2 is merely intended to emphasize the special importance of the UNSC and the UNGA as well as their equal status with the ICJ.[714] *Shaw* argues that the difference is intended to emphasize that the UNGA and UNSC have broad competences, while the bodies mentioned in para. 2 have specialized competences.[715] Nonetheless, no organ, including the UNGA and the UNSC, could act outside their own competences, even when requesting advisory opinions from the Court.[716]

The ICJ initially rejected the argument that questions referred to the Court by the UNGA or the UNSC must also arise within the organs' scope of activities.[717] More recently, however, the ICJ left the question either unanswered,[718] or – without explicitly making it a jurisdictional requirement – examined if the question related to the UNGA's scope of activities.[719] Despite the difference in wording, it thus seems that the UNSC and the UNGA are also limited by their respective scope of activities when requesting advisory opinions.

In practice, however, the scope of activities of the two organs as formulated in the UNC is so broad that hardly any request could be considered *ultra vires*.[720] The UNSC's scope of activities extends to the "maintenance of international peace and security" (Article 24 UNC). In particular, the UNSC's broad understanding of the term "threats to peace" in Article 39 UNC[721] extends the scope of its activities significantly. The UNGA's scope

714 *R. Kolb*, The International Court of Justice, 2013, 1046–1047.

715 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1 Ch. 5 § 60.

716 Ibid., Vol. 1 Ch. 5 § 60.

717 *Application for Review of Judgment No. 273 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1982, 325 (333-334, para. 21).

718 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226 (233, para. 11).

719 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (145, paras. 15 et seq.); *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403 (413-414, paras. 21 et seq.).

720 *K. Oellers-Frahm*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 3. ed., 2012: Art. 96, para. 14; arguing that requests made by the UNSC and the UNGA are not limited to the organs' scope of activities, see in the most recent edition *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. 11.

721 See on this *K. Wellens*, 8 Journal of Conflict and Security Law 1 (2003), 15.

of activities potentially extends even further.[722] According to Article 10 UNC, the UNGA may discuss "any question or any matter" within the scope of the UNC. According to Article 11 para. 2 UNC, this explicitly extends to questions relating to the maintenance of international peace and security.[723]

c) Relationship between the UNGA and the UNSC

While any matter within the scope of the UNC also falls within the scope of activities of the UNGA, this does not mean that the UNGA can always request an advisory opinion on such a matter. Instead, the UNGA's competence to request advisory opinions from the ICJ is also limited by the relationship between the UNGA and the UNSC. Article 12 para. 1 UNC gives the UNSC priority when dealing with "disputes or situations". It stipulates:

> "While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

In the *Wall* case, Israel relied on this provision to argue that the UNGA acted *ultra vires* when it requested an advisory opinion on the legal consequences of the construction of the wall in the occupied Palestinian territory while the UNSC was also actively engaged in the Israel-Palestine-conflict.[724] The case was preceded by various resolutions of the two organs.[725] On 14 October 2003, the USA vetoed a resolution by the UNSC which would have declared the Israeli construction of the wall in the occupied

722 *M. Lippold*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 7, para. 10.

723 See on this *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (145, para. 17).

724 Ibid. (148, para. 24).

725 For a description of the chronology of UNSC and UNGA involvement in the case, see *A. Zimmermann*, Uniting-for-Peace und Gutachtenanfragen der Generalversammlung: Anmerkungen aus Anlaß des Gutachtens des Internationalen Gerichtshofes zur Zulässigkeit des Sicherheitszaunes zwischen Israel und den palästinensischen Gebieten, in: K. Dicke/S. Hobe/K.-U. Meyn/A. Peters/E. Riedel/H.-J. Schütz/C. Tietje (eds.), Weltinnenrecht, 2005, 909 (910–911).

territories illegal under international law.[726] Following this veto, the UNGA reconvened the Tenth Emergency Special Session and passed a resolution in which it declared the border facilities to violate international law.[727] Shortly afterwards, the UNSC passed a resolution in which it called on the parties to the dispute to fulfil their obligations under the "Roadmap"[728] and decided to "remain seized of the matter".[729] A few days later, the UNGA requested an advisory opinion from the Court on the legal consequences of the construction of wall by Israel.[730] Israel argued the UNGA acted *ultra vires* when it convened the Tenth Emergency Special Session, because the requirements of the Uniting for Peace Resolution were not fulfilled.[731] Israel further argued that the UNGA could not have requested the advisory opinion under its general competence because of the active involvement of the UNSC.[732] The Court thus had to address the question whether Article 12 UNC prohibits the UNGA from requesting an advisory opinion about a matter of which the UNSC was already seized.[733]

Article 12 para. 1 UNC prohibits the UNGA from making recommendations regarding a dispute or situation while the UNSC exercises its functions regarding that dispute or situation. This is a reflection of the UNSC's "primary responsibility for the maintenance of international peace and security" enshrined in Article 24 para. 1 UNC.

In the early years of the UN, the UNSC and the UNGA interpreted Article 12 para. 1 UNC as prohibiting the UNGA from making recommen-

726 UNSC draft resolution S/2003/973 of 9 October 2003.
727 UNGA resolution ES-10/13 of 27 October 2003, UN doc. A/RES/ES-10/13.
728 The so-called "Quartet", consisting of representatives of the United States of America, the European Union, Russia and the United Nations, prepared a proposal to resolve the Israeli-Palestinian conflict entitled "A performance-based road map to a permanent two-State solution to the Israeli-Palestinian conflict", see S/2003/529, Annex.
729 UNSC resolution 1515 (2003) of 19 November 2003, UN doc. S/RES/1515(2003).
730 UNGA resolution ES-10/14 of 3 December 2003, UN doc. A/RES/ES-10/14.
731 ICJ Pleadings, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Written Statements of Israel, paras. 4.28 et seq.
732 Ibid., paras. 4.46 et seq.
733 See on this also *A. Zimmermann*, Uniting-for-Peace und Gutachtenanfragen der Generalversammlung: Anmerkungen aus Anlaß des Gutachtens des Internationalen Gerichtshofes zur Zulässigkeit des Sicherheitszaunes zwischen Israel und den palästinensischen Gebieten, in: K. Dicke/S. Hobe/K.-U. Meyn/A. Peters/E. Riedel/H.-J. Schütz/C. Tietje (eds.), Weltinnenrecht, 2005, 909 (917 et seq).

dations on any issue that was on the agenda of the UNSC.[734] On several occasions, the UNSC removed items from its agenda to allow the UNGA to make recommendations.[735] Over time, the UNGA started interpreting the words "is exercising the functions" in Article 12 UNC as meaning "is exercising the functions at this moment".[736] The UNGA thus started to make recommendations on matters that were on the UNSC's agenda, but on which the Council has not recently acted.[737] This interpretation led to the two organs dealing in parallel with the same matters, often focusing on different sub-topics.[738]

Based on this developed practice, the Court found in the *Wall* case, that the request made by the UNGA was in line with Article 12 para. 1 UNC.[739] A recent example of this "complementary relationship"[740] between the UNSC and the UNGA are the actions taken by the UNGA in the context of Russia's war of aggression against Ukraine. After a UNSC resolution condemning Russia's invasion of Ukraine was vetoed by Russia, the UNSC called for an emergency special session of the UNGA.[741] The UNGA subsequently adopted resolutions "deplor[ing] in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the Charter"[742] and deciding that whenever a permanent member

734 In 1949, the UNGA thus did not comment on the question of Indonesia because the UNSC was already seized of the matter, see Official Records of the General Assembly, Fourth Session, Ad Hoc Political Committee, Summary Records of Meetings, 56th Meeting, 3 December 1949, 339 para. 118.

735 Official Records of the Security Council, First Year: Second Series, No. 21, 79th Meeting, 4 November 1946, 498 (regarding Spain); Second Year: No. 89, 202nd Meeting, 15 September 1947, 2404–2405 (regarding the Greek border); Fifth Year, No. 48, 506th Meeting, 29 September 1950, 5 (regarding Taiwan); Sixth Year, S/PV.531, 541st Meeting, 31 January 1951, 11–12, para. 57 (Republic of Korea).

736 UNGA, Twenty-third Session, Third Committee, 1637th meeting, A/C.3/SR.1637, para. 9.

737 See UNGA resolution 1600 (XV) of 15 April 1961, UN doc. A/RES/1600(XV) (on the Congo) and UNGA resolution 1913 (XVIII) of 3 December 1963, UN doc. A/RES/1913(XVIII) (on Portuguese colonies).

738 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (149-150, para. 27).

739 Ibid. (150, para. 28).

740 *M. Lippold*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 4. ed., 2024: Art. 7, para. 11.

741 UNSC resolution 2623 of 27 Feburary 2022, UN doc. S/RES/263(2022).

742 UNGA resolution ES-11/1 of 2 March 2022, UN doc. A/RES/ES-11/1, para. 2.

of the UNSC vetoes a resolution, the UNGA will "hold a debate on the situation as to which the veto was cast"[743].

The Court also found that a request for an advisory opinion was not in itself a "recommendation" by the UNGA with regard to a dispute or situation.[744] This view finds support in literature.[745] The ordinary meaning (cf. Article 31 para. 1 VCLT) of the word "recommendation" implies a non-binding legal act expressing a desire.[746] A request for an advisory opinion, however, goes beyond a mere non-binding desire as it compels the Court to issue the requested advisory opinion unless there are compelling reasons not to.[747]

## II. Jurisdiction ratione materiae – "any legal question"

According to Article 96 para. 1 UNC and Article 65 para. 1 ICJ Statute, the ICJ may address "any legal question" by means of its advisory opinions, including questions of interpretation of the provisions of the UNC.[748]

743 UNGA resolution 79/262 of 26 April 2022, UN doc. A/RES/76/262, para. 1.

744 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (148, para. 25); *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403 (414, para. 24).

745 *A. Zimmermann*, Uniting-for-Peace und Gutachtenanfragen der Generalversammlung: Anmerkungen aus Anlaß des Gutachtens des Internationalen Gerichtshofes zur Zulässigkeit des Sicherheitszaunes zwischen Israel und den palästinensischen Gebieten, in: K. Dicke/S. Hobe/K.-U. Meyn/A. Peters/E. Riedel/H.-J. Schütz/C. Tietje (eds.), Weltinnenrecht, 2005, 909 (917 et seq).

746 *E. Klein/S. Schmahl*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 3. ed., 2012: Art. 10, para. 48.

747 *A. Zimmermann*, Uniting-for-Peace und Gutachtenanfragen der Generalversammlung: Anmerkungen aus Anlaß des Gutachtens des Internationalen Gerichtshofes zur Zulässigkeit des Sicherheitszaunes zwischen Israel und den palästinensischen Gebieten, in: K. Dicke/S. Hobe/K.-U. Meyn/A. Peters/E. Riedel/H.-J. Schütz/C. Tietje (eds.), Weltinnenrecht, 2005, 909 (918–919).

748 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports 1948, 57 (61); *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, 4 (6) In 1947, the UNGA called upon all authorized organs of the UN to make use of the Court's advisory jurisdiction to receive guidance on the interpretation of the UNC, see UNGA resolution 171(II) of 14 November 1947, UN doc. A/RES/171(II).

### 1. Political questions

The only express restriction of the Court's subject-matter jurisdiction is contained in the word "legal". The Court distinguishes between legal questions on the one hand and political or moral questions on the other hand.[749] Purely political questions do not fall within the purview of the Court.[750] The first time the Court had to do distinguish between political and legal questions was in the two *Admissions* advisory opinions.[751] In the first case, the UNGA requested advice on whether a UN Member State could make its consent to the admission of new Member States subject to conditions that are not explicitly mentioned in Article 4 para. 1 UNC.[752] In the second opinion, the UNGA inquired whether it could admit a new Member State without a recommendation from the UNSC.[753] The questions concerned the admission to the UN and the voting procedure of a political body of the UN, which lent them a political dimension.[754] However, the ICJ found that they were questions of interpretation of Article 4 UNC and thus legal questions in the sense of Article 96 UNC and Article 65 ICJ Statute. The ICJ held:

749 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports 1948, 57 (58); *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, 4 (5); *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (18, para. 15); *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, ICJ Reports 1980, 73 (87, para. 33); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226 (234, para. 13); *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403 (415, para. 27); on the distinction between legal and political questions, see *D. W. Greig*, 15 ICLQ 2-3 (1966), 325.

750 *J. A. Frowein/K. Oellers-Frahm*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. J. Tams/M. Kashgar/D. Diehl (eds.), The Statute of the International Court of Justice, 2. ed., 2012: Art. 65, para. 22; *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. 21.

751 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports 1948, 57; *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, 4.

752 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports 1948, 57 (58).

753 *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, 4 (5).

754 *F. B. Sloan*, 38 CLR 5 (1950), 830 (843).

> "The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives which may have inspired this request […]."[755]

The Court has continuously emphasized that a political dimension of a question will not deprive the Court of its competence to answer the question, if the question has a legal element to it.[756] If the Court can clearly distinguish between a legal and a political part of a question, the Court will only answer the legal part. The controversial *International Status of South-West Africa* advisory opinion[757] provides an example of this. After the Court rejected a legal obligation of the Union of South Africa to place the administration of then South-West Africa (Namibia) under the system of the UN Trusteeship Council, it declined to elaborate on the political consequences:

> "It is not for the Court to pronounce on the political or moral duties which these considerations may involve."[758]

### 2. Questions of fact, historical questions, interpretation of the UN Charter

While the Court lacks the resources, in particular the personnel, to conduct its own fact-finding missions, it may nevertheless address factual questions which underlie the legal question it is asked to answer. As the Court held in its *Namibia* advisory opinion:

> "[T]he contingency that there may be factual issues underlying the question posed does not alter its character as a 'legal question' as envis-

755 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion, ICJ Reports 1948, 57 (61).

756 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226 (234, para. 13); *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403 (415, para. 27); *R. Kolb*, The Elgar companion to the International Court of Justice, 2014, 267.

757 *International Status of South-West Africa*, Advisory Opinion, ICJ Reports 1950, 128; on the opinion, see *C. Heyns/M. Killander*, South West Africa/Namibia (Advisory Opinions and Judgments) (last updated 2007), in: A. Peters/R. Wolfrum (eds.), The Max Planck Encyclopedia of Public International Law, 2008 (9 et seq.).

758 *International Status of South-West Africa*, Advisory Opinion, ICJ Reports 1950, 128 (140).

> aged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues."[759]

The ICJ held that "[i]t is for the Court to assess the sufficiency of the information available to it."[760] Furthermore, the Court is not limited to address existing rights and obligations, but it may also address relevant historical legal questions. This was confirmed by the Court in its *Western Sahara* opinion:

> "[T]here is nothing in the Charter or Statute to limit either the competence of the General Assembly to request an advisory opinion, or the competence of the Court to give one, to legal questions relating to existing rights or obligations. […] [T]he references to "any legal question" in the above-mentioned provisions of the Charter and Statute are not to be interpreted restrictively."[761]

### *D. The question of state consent*

States have claimed in various advisory proceedings that the ICJ may only give an advisory opinion on their legal disputes with their consent.[762] This idea which lies at the heart of the Eastern Carelia doctrine has been referred to as "[t]he most important challenge to the competence of the Court".[763]

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759 *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. 40).

760 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (20, para. 47).

761 *Western Sahara*, Advisory Opinion, ICJ Reports 1975, 12 (27, para. 40).

762 See in detail *supra*: § 3.

763 *F. B. Sloan*, 38 CLR 5 (1950), 830 (845); discussing state consent as a jurisdictional requirement of the Court's advisory procedure see *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 89 et seq; *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 154 et seq.; *M. Pomerance*, The advisory function of the International Court in the League and U.N. eras, 1973, 287 et seq.; *K. J. Keith*, 16 AYBIL 39 (1996), 39-58 (43 et seq.); *C. F. Amerasinghe*, Jurisdiction of International Tribunals, 2003, 528 et seq.; *M. M. Aljaghoub*, The Advisory Function of the International Court of Justice 1946 - 2005, 2006, 97 et seq.; *M. M. Aljaghoub*, 24 ALQ 2 (2010), 191.

However, an interpretation of the legal framework of the Court's advisory jurisdiction demonstrates that there is no basis for such an objection. The wording of Article 96 UNC and Article 65 ICJ Statute indicate no consent requirement. Considering the provision's context, it becomes apparent that the ICJ has the power to address inter-state disputes without the affected states' consent.

## I. Grammatical interpretation

Despite there being no hierarchical order between the different methods of treaty interpretation, the logical starting point for interpreting a treaty is the text of the treaty provision in light of its ordinary meaning.[764] Neither Article 96 UNC nor Article 65 ICJ Statute expressly stipulate a condition of state consent or expressly exclude bilateral disputes from the purview of the Court's advisory jurisdiction. According to the two provisions, the advisory opinion procedure is a procedure which takes place between two entities: the ICJ and the requesting UN organ. Article 96 para. 1 UNC and Article 65 para. 1 ICJ Statute stipulate that the Court may address within its advisory opinions "any legal question". The inclusion of the word "any" indicates a broad subject-matter jurisdiction. Bilateral legal disputes clearly entail legal questions. A first reading of the text of Articles 96 UNC and 65 ICJ Statute thus seems to indicate that the Court may address inter-state disputes within its advisory jurisdiction without the consent of the disputing states.[765]

The Court's subject-matter jurisdiction is further qualified by Article 96 para. 2 UNC. Accordingly, the legal question which forms the subject-mat-

764 "[T]he first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.", *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, 4 (8); Gardiner argues that the ICJ recognized here the interpretation in accordance with a term's ordinary meaning as "the starting point of an interpretation", *R. K. Gardiner*, Treaty interpretation, 2nd ed. 2015, 185.

765 Cf. *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, paras. 27–30.

ter of the request for an advisory opinion must arise within the requesting organ's scope of activities. If inter-state legal disputes necessarily fell outside the scope of activities of the requesting UN organs, Article 96 para. 2 UNC would support the Eastern Carelia doctrine.[766] The organ's scope of activities is determined by the organ's constituent instrument.[767] To determine whether the UNGA or the UNSC could request an advisory opinion on a legal question which forms the subject-matter of an inter-state dispute, one must therefore refer to other provisions within the UNC. We thus move to the second method of treaty interpretation, the provision's context.

## II. Context

The entire text of the treaty is to be taken into account as the provision's "context".[768] This includes the treaty's title, preamble, annexes and potential protocols, as well as the systematic position of the relevant provision within the treaty.[769]

766 On limiting an organ's power to request advisory opinions to its scope of activities, see *H. Kelsen*, The law of the United Nations, 2. ed. 1951, 546; *S. Rosenne*, The law and practice of the International Court, 1920-2005, 4th ed. 2006, 290; *R. Kolb*, The International Court of Justice, 2013, 1046–1047; *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, § 60; cf. *J. A. Frowein/K. Oellers-Frahm*, in: A. Zimmermann/C. Tomuschat/K. Oellers-Frahm/C. J. Tams/M. Kashgar/D. Diehl (eds.), The Statute of the International Court of Justice, 2. ed., 2012: Art. 65, para. 16; arguing for an unlimited material scope, see *A. Zimmermann*, Uniting-for-Peace und Gutachtenanfragen der Generalversammlung: Anmerkungen aus Anlaß des Gutachtens des Internationalen Gerichtshofes zur Zulässigkeit des Sicherheitszaunes zwischen Israel und den palästinensischen Gebieten, in: K. Dicke/S. Hobe/K.-U. Meyn/A. Peters/E. Riedel/H.-J. Schütz/C. Tietje (eds.), Weltinnenrecht, 2005, 909 (918); *T. Thienel*, Drittstaaten und die Jurisdiktion des Internationalen Gerichtshofs. Die Monetary Gold-Doktrin, 2016, 205.

767 *R. Kolb*, The Elgar companion to the International Court of Justice, 2014, 263; *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. 33.

768 *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2. ed., 2018: Art. 31, para. 44.

769 Ibid., para. 44.

### 1. Provisions governing the scope of activities of the UNGA and UNSC

Having regard to the UNC provisions, it becomes apparent that inter-state legal disputes regularly fall within the scope of activities of both the UNGA and the UNSC.

Article 10 UNC stipulates that the UNGA "may discuss *any questions* or *any matters* within the scope of the present Charter".[770] According to Article 14 UNC, the UNGA "may recommend measures for the peaceful adjustment of *any situation*, regardless of origin, which it deems likely to impair the *general welfare* or *friendly relations* among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations".[771] While this responsibility of the UNGA may be superseded by the UNSC if the latter decides to exercise its functions (Article 12 UNC), Article 14 UNC nevertheless clearly stipulates a *prima facie* responsibility of the UNGA to address "any situation" which may negatively affect the "general welfare or friendly relations among nations".[772] Inter-state legal disputes have the potential to negatively affect the general welfare or friendly relations among nations and thus fall within the scope of activities of the UNGA.

Even more so than the UNGA's activities are the UNSC's activities geared towards the settlement of specific inter-state disputes. The UNSC has the "primary responsibility for the maintenance of international peace and security" (Article 24 UNC), which it fulfils through exercising its competences under Chapters VI to VIII. Chapter VI is entitled "Pacific Settlement of Disputes" and gives the UNSC a pivotal role in the settlement of inter-state disputes. The UNSC "may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute" (Article 34 UNC) and "may, at any stage of a dispute (…) recommend appropriate procedures or methods of adjustment" (Article 36 para. 1 UNC). Chapter VII grants the UNSC the power to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to "make recommendations, or decide what measures shall be taken (…) to maintain or restore international peace and security" (Article 39 UNC).

770 Emphasis added.
771 Emphasis added.
772 Even if the UNSC decides to exercise its functions over a situation or dispute, the UNGA may nevertheless request an advisory opinion on the matter. On the relationship between the UNSC and the UNGA, see *supra*: § 5 Section C.I.2.c).

Thus, inter-state legal disputes regularly fall within the scope of activities of the UNGA and the UNSC.[773]

## 2. No consent requirement in Articles 66–68 ICJ Statute

Inter-state disputes may be brought before the ICJ by means of the Court's contentious procedure. In such a case, the disputing states' consent is required, see Article 36 ICJ Statute. However, the consent requirement enshrined in Article 36 ICJ Statute does not apply to the Court's advisory procedure, as a closer look at the Articles 66 to 68 ICJ Statute reveals.

The only example the ICJ Statute references states in the context of the advisory procedure is in Articles 66 and 67. According to Article 66 ICJ Statute, once a request for an advisory opinion has been made, the Court's Registrar notifies all states that are entitled to appear before the Court (para. 1), particularly those which are likely to furnish information on the submitted question (para. 2). According to Article 67 ICJ Statute, the Court's Registrar notifies all states that are "immediately concerned" prior to delivering its advisory opinion. None of these provisions contain any form of consent requirement, even though Article 67 ICJ Statute acknowledges that certain states may be "immediately concerned" by ICJ advisory proceedings. The provision thus presupposes that the Court may issue advisory opinions on matters that affect certain states more than others.

Whereas the ICJ's contentious jurisdiction is subject to the prior consent of the disputing states (Article 36 ICJ Statute), there is no similar provision regarding the Court's advisory jurisdiction. One may be tempted to read Article 68 ICJ Statute as a reference to the consent requirement found in Article 36 ICJ Statute. Article 68 ICJ Statute states:

> "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, both the wording and the structure of the provision speak against the notion that the provision incorporates the contentious procedure's consent requirement into the advisory opinion procedure. Firstly, Article 68 ICJ Statute does not state that the Court "shall apply" the provisions which

773 Cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (145, para. 17).

apply in contentious cases, but that it "shall further be guided by" these provisions. If Article 68 ICJ Statute were to establish a consent requirement to the Court's advisory jurisdiction, this would not be aptly described as "mere guidance". Jurisdictional requirements are a *conditio sine qua non* for the Court's competence, not flexible guidelines.[774] Secondly, the Court shall only be guided "to the extent to which it recognizes [the provisions] to be applicable". In other words, the Court has discretion when applying the provisions applicable to contentious proceedings. As such, Article 68 ICJ Statute was designed to allow the Court a flexible recourse to the provisions which govern contentious cases.[775] Such flexibility, however, stands in contrast to the function of jurisdictional clauses which outline and delimit the competences of the Court and which apply without discretion.[776]

Articles 66–68 ICJ Statute thus do not contain any consent requirement nor incorporate the consent requirement into the advisory opinion procedure. In contrast, they indicate a broad advisory competence of the Court extending to inter-state disputes.

### 3. Rules of the Court expressly refer to inter-state disputes

The finding that the UNC and the ICJ Statute stipulate a broad advisory jurisdiction extending to inter-state disputes is further supported by reference to the Rules of the Court.

While the Rules of the Court are not binding treaty norms, they provide important legal guidance. Article 30 para. 1 ICJ Statute authorizes the Court to "frame rules for carrying out its functions" and in particular to "lay down rules of procedure". These rules of procedure, which are norms of a "delegated character",[777] are designed to fill gaps left by the

774 So also *Y. Shany*, Jurisdiction and Admissibility, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013, 779 (787).

775 *J.-P. Cot/S. Wittich*, 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. 68, para. 11.

776 So also *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 110.

777 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 3, Ch. 16, § 255.

Court's Statute.[778] However, the extent of the Court's delegated powers is not clear. The Informal Inter-Allied Committee[779] distinguished between "fundamental points of principle" which must be decided by the Court's Statute (and thus by the States Parties) and other procedural matters which are left to be decided by the Court.[780] What seems clear from the gap-filling function of the Rules of the Court is that the Court may not create rules that are in conflict with its Statute.[781] Whether the Rules are binding on the States Parties to the ICJ Statute is a matter of dispute.[782] On the one hand, the States Parties have not given their consent to the express terms of the Rules which argues against any binding force. However, they have given their consent to delegate to the Court the power to lay down procedural rules by including Article 30 in the Court's Statute which in turn has binding effect.[783] The Court has dealt with this question pragmatically in its judgment in the *Northern Cameroons* case:

> "The Court cannot be indifferent to any failure, whether by Applicant or Respondent, to comply with its Rules which have been framed in accordance with Article 30 of its Statute."[784]

As the Rules constitute the Court's written, generalized, and practical interpretation of the UNC and the Statute, the ICJ will likely follow them and

778 *H. W. Thirlway*, 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 30, para. 6.

779 The "Informal Inter-Allied Committee" was an independent group of experts during the Second World War that set itself the task of conceptualizing the organization of the International Court of Justice, in particular by assessing whether the structures of the PCIJ should be maintained. On this, see *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 1, Ch. 2, § 6.

780 Ibid., Vol. 3, Ch. 16, § 255.

781 Cf. *H. W. Thirlway*, 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 30, para. 7.

782 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 3, Ch. 16, § 255.

783 *Thirlway* argues that because of the States Parties' consent to the PCIJ Statute, the Rules are also binding, see *H. W. Thirlway*, 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 30, 4.

784 *Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections)*, Judgment, ICJ Reports 1963, 15 (27).

only depart from them in special circumstances.[785] Thus, the Court's Rules at least constitute an important source of guidance when interpreting the UNC and the ICJ Statute.

Article 102 paras. 2 and 3 of the Rules is particularly important for the purposes of this analysis. The provision stipulates:

> "The Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable. For this purpose, it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States.
> When an advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply, as also the provisions of these Rules concerning the application of that Article."

Article 102 para. 2 of the Rules takes up the phrasing employed in Article 68 ICJ Statute ("shall also be guided by…"). The key consideration shall be whether the request "relates to a legal question actually pending between two or more States".

Article 102 para. 3 specifies that in such instances the Court shall apply Article 31 ICJ Statute which allows each disputing party in contentious proceedings before the Court to appoint a judge *ad hoc*. Two important takeaways may be drawn from this reference: Firstly, Article 102 clearly expresses the ICJ's understanding that its advisory jurisdiction may extend to legal questions which form the subject-matter of an inter-state dispute.[786] The ICJ thus believes that inter-state disputes are not categorically excluded from its advisory jurisdiction. Secondly, the only provision the Court shall apply according to Article 102 para. 3 of the Rules when advisory opinions concern pending inter-state disputes is Article 31 ICJ Statute. Notably, Article 102 para. 3 does not refer to Article 36 ICJ Statute which stipulates the contentious jurisdiction's consent requirement. *E contrario*, the Court does not assume that Article 36 applies to the Court's advisory opinion procedure, even if an opinion is requested upon a legal question pending between two or more states. The Rules of the Court thus also speak in

785 *M. N. Shaw*, Rosenne's Law and Practice of the International Court: 1920-2015, 5th ed 2016, Vol. 3, Ch. 16, § 255.

786 *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, paras. 27–30.

favor of a broad understanding of the Court's advisory jurisdiction which does not require state consent when addressing inter-state disputes. The Rules of the Court thus do not provide a legal basis for the Eastern Carelia doctrine.[787]

## III. Subsequent agreements and subsequent practice

Further guidance on the meaning of Article 96 UNC and Article 65 ICJ Statute could be drawn from subsequent agreements regarding the interpretation of the provisions (Article 31 para. 3 lit. a VCLT) and subsequent practice in the application of the provisions (Article 31 para. 3 lit. b VCLT). Constituent instruments of international organizations have the unique quality that they regularly create new subjects of international law. As such, they are inherently forward-looking and practice-oriented. This finds expression in the particular importance of the subsequent agreements and subsequent practice of the parties.[788]

### 1. Subsequent agreements relating to the use of ICJ advisory opinions to settle international disputes

Article 31 para. 3 lit. a VCLT allows recourse to subsequent agreements between the parties to a treaty as a method of interpreting a treaty.[789] As *Wolfrum* pointed out, there are several international treaty provisions which provide for the recourse to ICJ advisory opinions as a means to settle international disputes.[790] The Headquarters Agreement between the United States of America and the United Nations contains a dispute settlement

787 Cf. Ibid., paras. 27–30.

788 Cf. *R. Kolb*, The International Court of Justice, 2013, 1060; *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. 33; *N. Blokker*, Constituent Instruments, in: J. K. Cogan/I. Hurd/I. Johnstone (eds.), The Oxford Handbook of International Organizations, 2016 (955 et seq.).

789 Art. 31 para. 3 lit. a VCLT stipulates: "There shall be taken into account, together with the context: […] a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions."

790 *R. Wolfrum*, Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes, in: R. Wolfrum/I. Gatzschmann (eds.), International Dispute Settlement: Room for Innovations?, 2013, 35 (48).

provision, according to which any dispute between the United Nations and the United States concerning the agreement shall be decided by an arbitral tribunal.[791] If a proceeding is pending before the arbitral tribunal, the UNGA and the USA may ask the ICJ for an advisory opinion on any legal question arising in the course of such a proceeding and the arbitral tribunal shall render its decision "having regard to the opinion" of the ICJ.[792] Disputes between the United Nations and States Parties to the "Convention on the Privileges and Immunities of the United Nations" are also settled by recourse to the ICJ's advisory procedure.[793] Furthermore, advisory opinions of the ICJ reviewing the activity of the ILO Administrative Tribunal are binding under the ILO Statute.[794] *Wolfrum* argued that these examples demonstrate that the ICJ may issue advisory opinions to settle international disputes.[795] However, one may equally conclude from these examples that where states intend for ICJ advisory opinions to be used in such a manner, a special agreement to that extent is required which expresses the States Parties' consent to it.

### 2. Subsequent practice in the application of Article 96 UNC and Article 65 ICJ Statute

The subsequent practice in the application of the UNC and the ICJ Statute – by the UNGA in requesting advisory opinions, by the states in voting for the UNGA request and in participating in the advisory proceedings and by the ICJ in giving the requested opinions – may provide further guidance as to the question if advisory opinions may be used to settle inter-state disputes.

791 Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, 31 October 1947, Art. VIII Section 21(a).

792 Ibid., Art. VIII Section 21(b).

793 Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15, Art. VIII Section 30.

794 Statute of the Administrative Tribunal of the International Labour Organization, 9 October 1946, Art. XII.

795 *R. Wolfrum*, Advisory Opinions: Are they a Suitable Alternative for the Settlement of International Disputes, in: R. Wolfrum/I. Gatzschmann (eds.), International Dispute Settlement: Room for Innovations?, 2013, 35 (48).

Subsequent practice as a method of treaty interpretation is codified in Article 31 para. 3 lit. b VCLT[796] and applies to the interpretation of constituent instruments of international organizations.[797] The ICJ[798] (and the PCIJ before it[799]) regularly examined the subsequent practice of the parties in the application of a treaty to determine the "true meaning"[800] of a treaty provision. The idea of Article 31 para. 3 lit. b VCLT is that the parties as the "masters of the treaty"[801] collectively have the legal capacity to authentically interpret the treaty's provisions.[802] This collective will, or in the words of Article 31 para. 3 lit. b VCLT "agreement of the parties", is expressed through "subsequent practice in the application of the treaty". There must

796 Art. 31 para. 3 lit. b VCLT stipulates: "There shall be taken into account, together with the context: […] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

797 See ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, 2018, A/73/10, Conclusion 12 para. 1.

798 *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment, ICJ Reports 1949, 4 (25); *Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment, ICJ Reports, 192 (206–207); *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Merits)*, Judgment, ICJ Reports 1962, 6 (33–35); *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151 (160–161); *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Jurisdiction and Admissibility)*, Judgment, ICJ Reports, 392 (408-413, paras. 36-47); *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, ICJ Reports 1994, 6 (34-37, paras. 66-71); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66 (75, para. 19); *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, ICJ Reports 1999, 1045 (1076, para. 50).

799 *Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, Advisory Opinion, PCIJ Series B 1922, 8 (39–41); cf. *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, PCIJ Series A 1929, 93 (119–120).

800 *Competence of the ILO in Regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, Advisory Opinion, PCIJ Series B 1922, 8 (39).

801 See *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2. ed., 2018: Art. 31, para. 77.

802 *Villiger*, Mark Eugen (Hg.): Commentary on the 1969 Vienna Convention on the Law of Treaties 2009, Art. 31, para. 16; *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2. ed., 2018: Art. 31, para. 77.

be uniform and repeated practice to which all parties to the treaty have expressly or implicitly consented.[803]

While the wording of Article 31 para. 3 lit. b VCLT is clear that there must be agreement of the parties, the provision does not explicitly state whose practice is the relevant practice. There are potentially three different sources of practice[804]: the practice of the States Parties to the treaty,[805] the practice of the organization and its organs[806] and a combination of the two[807].[808]

803 *M. E. Villiger*, in: M. E. Villiger (ed.), Commentary on the 1969 Vienna Convention on the Law of Treaties, 2009: Art. 31, para. 22; *A. Aust*, Modern treaty law and practice, 3rd ed. 2013, 215; see, however, *Dörr* who argues for a more flexible approach, which allows for a lower threshold of practice and agreement which then results in a lower "interpretative value", see *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2. ed., 2018: Art. 31, 80 et seq.

804 See *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, 12, para. 30 et seq.

805 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment, ICJ Reports 1998, 275 (305, paras. 65 ff.).

806 *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, ICJ Reports 1950, 4 (9); *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative*, Advisory Opinion, ICJ Reports 1960, 150 (168–169); *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151 (175); *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities*, Advisory Opinion, ICJ Reports 1989, 177 (194, para. 48); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66 (74-75, para. 19).

807 *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 (22); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (149–150).

808 See also ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, 2018, A/73/10, Conclusion 12 para. 2: "Subsequent agreements and subsequent practice of the parties under article 31, paragraph 3, or subsequent practice under article 32, may arise from, or be expressed in, the *practice of an international organization* in the application of its constituent instrument." (emphasis added).

a) UNGA requests for advisory opinions on inter-state disputes

Several requests for an advisory opinion by the UNGA explicitly concern the rights and obligations of specific states in the context of a pending inter-state dispute. Such requests could be regarded as a form of subsequent practice of the UN in the application of the UNC and ICJ Statute.

The ICJ regularly examines the practice of the organization in applying its constitutive instrument when interpreting that treaty.[809] A notable example is the ICJ's interpretation of Article 27 para. 3 UNC.[810] By relying on the practice of the organization to determine how far its conferred competences extend, the ICJ allows the organization significant influence on the interpretation of its own powers. This creates a certain tension between the principle of conferred powers and the implied powers doctrine.[811] To prevent the organization from assuming powers by way of subsequent practice without the consent of the States Parties to the constituent instrument, Article 31 para. 3 lit. b VCLT further qualifies the required practice: The practice must establish the *agreement* of the parties regarding the interpretation of the provision.

The practice of an organization in the application of a treaty is regularly the combination of a multitude of individual decisions of its organs. These decisions are the result of the decision-making process of the respective organ as determined by the organization's constitutive instrument. The Member States have given their consent to the constitutive instrument, and they are generally involved in the organization's decision-making process, so that the decisions of the organization are an expression of the will of the Member States. The resulting practice of the organization thus reflects the

809 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66 (75, para. 19); *A. von Arnauld*, Völkerrecht, 5. ed. 2023, 51, para. 126.

810 According to Art. 27 para. 3 UNC, decisions by the UNSC on non-procedural matters require the "affirmative vote of nine members including the concurring votes of all permanent members". The ICJ interpreted the words "concurring votes" in accordance with the practice of the UNSC and its permanent members as meaning "non-rejection". Thus, if a permanent member wishes to prevent a UNSC resolution, it must actively vote against the decision, i.e. veto it. See *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 (22, para. 22).

811 Cf. *A. von Arnauld*, Völkerrecht, 5. ed. 2023, 51, para. 126. On the implied powers doctrine, see *supra*: § 5 Section B.II.

agreement of the Member States on the interpretation of the constitutive instrument. This inference of consent is unproblematic if the respective decision is taken unanimously.[812]

The situation becomes less clear when decisions are reached by majority vote. According to *Amerasinghe*, majority vote decisions can constitute relevant state practice if the decision is supported by a large majority of the Member States of the organization.[813] He argues that the Member States have given their consent to the decision-making process of the organization at the time of signing the treaty and thus have accepted that decisions can be reached against their will with a simple majority.[814] The decision is thus an expression of the implicit consent of the Member States. If the majority decision is opposed by a large number of Member States, however, such implicit consent may not be assumed. According to *Amerasinghe*, one can assume that the Member States have implicitly agreed that a small opposition cannot prevent the organization from forming a certain practice but if a larger number of Member States oppose a decision, practice cannot be formed.[815]

*Amerasinghe's* view is based on the idea that the subsequent practice of the organization, despite the contrary vote of some Member States, still represents the agreement of the Member States of the organization because the outvoted Member States implicitly consented to the decision-making process at the time of the conclusion of the treaty. However, it seems that this implicit consent is given to all decisions that have been reached in accordance with the procedural rules laid down in the constituent instrument. To distinguish, as proposed by *Amerasinghe*, between decisions made by a large majority (which represent the agreement of the parties) and a decision made by a small majority (which does not), seems inconsistent.

*Amerasinghe's* argument raises another question: How does the implicit consent to the decision-making process at the time of the conclusion of the treaty relate to the explicitly expressed disapproval of the outvoted states at the moment of the vote? In other words, can implicit consent

812 Cf. Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, ICJ Reports 2014, 226 (257, para. 83).

813 *C. F. Amerasinghe*, Principles of the institutional law of international organizations, Second edition 2005, 51. See also *Loizidou v Turkey*, Judgment of 23 March 1995, Series A, no. 310, paras. 79–89, where the ECtHR relied on "practice denoting *practically* universal agreement amongst Contracting Parties" (emphasis added).

814 Ibid., 53.

815 Ibid., 54.

to the procedure outweigh explicit dissent when it comes to identifying the states' agreement on treaty interpretation? In particular if the organization's competences (possibly even in its relations to its Member States) are further expanded through the subsequent practice, the assumption of such far-reaching implicit consent seems questionable.[816] The implicit consent to the procedure seems to be only that: a consent to the decision-making procedure of the organization. The decisions made by the organization in this way may result in a subsequent practice of the organization (see above). However, this practice – if it is not supported by all Member States – does not represent the agreement of the Member States regarding the interpretation of the treaty provisions as required by Article 31 para. 3 lit. b VCLT.[817]

Some commentators argue that the term "agreement" in Article 31 para. 3 lit. b VCLT constitutes a lower threshold than in the context of lit. a of the same provision.[818] However, even according to this view "agreement" in lit. b requires the absence of dissent.[819] Such absence of dissent can only be assumed for acts of international organizations if there are no contrary acts or statements by the States Parties.[820] As soon as there are dissenting votes of individual Member States, dissent exists. Only if the practice of the organization can be traced back to decisions that are supported by all Member States, can it be ensured that a change of the organization's powers through subsequent practice is an expression of the will of the State Parties.

816 So also Dörr, who argues that the practice of an organization is only relevant "if it is not counteracted by acts or representations of the parties to the treaty in question", see *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2. ed., 2018: Art. 31, para. 87.

817 Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, ICJ Reports 2014, 226 (257, para. 83); Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, Separate Opinion Spender, 182 (191–192); cf. Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, Dissenting Opinion Fitzmaurice, 198 (201–202). See also *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, 30; *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2. ed., 2018: Art. 31, para. 88.

818 *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2. ed., 2018: Art. 31, para. 87, citing *Kasikili/Sedudu Island Case (Botswana v. Namibia)*, Judgment, ICJ Reports 1999, p. 1045 (1087), para. 63.

819 Ibid., para. 88.

820 Ibid., para. 88.

UNGA requests for advisory opinions on legal questions relating to pending inter-state disputes which are not passed unanimously thus do not constitute practice of the UN which establishes the agreement of the States Parties. Such practice could, however, be used as a supplementary means of interpretation according to Article 32 VCLT.[821] The ICJ has relied on UNGA resolutions that were passed against the opposition of individual Member States as supplementary means of interpretation under Article 32 VCLT.[822]

b) Practice of the Court

The ICJ has held on multiple occasions that by giving an advisory opinion it participates in the activities of the UN.[823] One could thus be tempted to regard the ICJ's advisory practice as subsequent practice in the application of Article 96 UNC, Article 65 ICJ Statute. However, relying on judicial pronouncements as subsequent practice in the sense of Article 31 para. 3 lit. b VCLT poses challenges.

First, the ICJ Statute clearly sets out the legal effects of the Court's pronouncements. Article 59 ICJ Statute stipulates that the "decision of the Court has no binding force except between the parties and in respect of that particular case". Accordingly, only decisions of the Court[824] have binding force and this binding force extends only to the parties of a case and in relation to a particular case. Outside these confines, judicial pronouncements of the ICJ have no binding force. Allowing judicial pronouncements of the Court to constitute subsequent practice in accordance with Article 31

821 *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, 17-19, para. 49-51; *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2. ed., 2018: Art. 31, para. 90.

822 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (149); *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, 18.

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

824 "Decisions" in the sense of Article 59 ICJ Statute are the final judgements on the merits of a case, judgments on preliminary objections as well as certain orders, 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. 35–36.

para. 3 lit. b VCLT would circumvent the express provisions within the ICJ Statute governing the legal effects of ICJ decisions (and advisory opinions).

Secondly, while the ICJ is an organ of the UN, it is not a collective organ in which the UN members are represented. Instead, it is composed of independent judges (Article 2 ICJ Statute). As such, their conduct cannot be attributed to the States Parties to the UNC and ICJ Statute and therefore cannot constitute a practice of the organization capable of establishing the agreement of the States Parties. The ILC held in its Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties (2018) that the pronouncements of expert treaty bodies cannot constitute subsequent practice under Art 31 para. 3 lit. b VCLT.[825] The reason for this lies in the fact that these bodies are composed of independent experts acting in their personal capacity, whose views are not attributable to States Parties.[826] While the ILC Conclusions did not expressly address independent expert bodies that are organs of an international organization (such as the ICJ), the same considerations apply *mutatis mutandis*.[827] The ILC emphasized that the "relevance of a pronouncement of an expert treaty body for the interpretation of a treaty is subject to the applicable rules of the treaty".[828] The same is true for pronouncements of the ICJ whose legal effects are governed by the ICJ Statute.

The ILC stated in their Conclusions that the pronouncements of UN treaty bodies, while not constituting subsequent practice themselves, may *give rise* to the practice of States Parties or the UN, for example in the form of actions taken in response to the respective pronouncement.[829] Applied to the advisory proceedings of the ICJ, the views expressed by the States Parties during the advisory proceedings and their actions taken in response to advisory opinions can constitute subsequent practice in the sense of Article 31 para. 3 lit. b VCLT.

825 ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, 2018, A/73/10, Conclusion 13 para. 3 and commentary to Conclusion 13 para. 10.

826 *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2. ed., 2018: Art. 31, para. 85.

827 ILC, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, with commentaries, 2018, A/73/10, Commentary to draft conclusion 13 para. 4.

828 Ibid., Conclusion 13 para. 2.

829 Ibid., Conclusion 13 para. 2, commentary to Cocnlusion 13 para. 7.

However, the practice of the States Parties to the ICJ Statute on the question whether ICJ advisory opinions may address the subject-matter of pending bilateral disputes is far from uniform.

### c) Practice of States Parties

Whenever a state invoked the Eastern Carelia doctrine to challenge the admissibility of a request for an advisory opinion, the ensuing arguments between the participating states did not center on the question whether the Court may use its advisory procedure to settle an inter-state dispute. Instead, those states that urged the Court to give the requested opinion argued either that there was no inter-state dispute to begin with or that the object and purpose of the request was not to settle such a dispute.

The *Chagos* case provides the most recent example of this dynamic. The United Kingdom argued that the request for an advisory opinion related to a purely bilateral dispute between the UK and Mauritius.[830] In response, Mauritius argued that the request did not relate to a bilateral matter at all, but to the broader frame of reference of decolonization, which directly relate to the work of the UNGA.[831] Both states thus accepted the premise that advisory opinions in general ought not address purely bilateral disputes. This is in line with the majority of states participating in the *Chagos* advisory proceeding. While there was a disagreement whether the Court ought to give the requested advisory opinion or not, the vast majority of states phrased their arguments within the framework of the Eastern Carelia doctrine.[832]

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830 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United Kingdom, para. 7.15; Written Comments of the United Kingdom, para. 3.3.

831 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* Written Statement of Mauritius, paras. 5.29 – 5.35; Written Comments of Mauritius, para. 2.13.

832 See ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Australia, paras. 32–48; Written Statement of Brazil, paras. 11–12; Written Statement of Chile, para. 9; Written Statement of Cyprus, paras. 26–27; Written Comments of Cyprus, paras. 5–6; Written Statement of Djibouti, paras. 22–23; Written Statement of France, paras. 6, 19; Written Statement of Lesotho; Written Statement of Liechtenstein, para. 16; Written Statement of the Marshall Islands, paras. 15–16; Written Statement of Mauritius, paras. 5.29 – 5.35; Written Comments of Mauritius, para. 2.13; Written Statement of Namibia; Written Comments of Nicaragua, paras. 15–16; Written Statement of

However, not all states accepted this premise: some states did not refer to the Eastern Carelia framework at all,[833] others rejected the doctrine entirely,[834] or proposed a different framework.[835] Germany, for example, argued that the question was not whether the Court was entitled to give an advisory opinion on purely bilateral matters, but whether one can presume that the requesting UN organ intended to focus its question on bilateral aspects of the legal question. Germany argued that since one may presume that requesting organs request advisory opinions only to the extent that it is necessary for their work, the Court ought to focus its response on matters that are "necessary and relevant for the General Assembly to exercise its own competences."[836]

The *Chagos* case thus demonstrates that there is no uniform practice among States Parties to the ICJ Statute on the question whether advisory opinions may be used to settle inter-state legal disputes *vel non*. Interpreting Article 96 UNC and Article 65 ICJ Statute in accordance with Article 31 para. 3 lit. b VCLT thus provides no clear guidance on the question whether ICJ advisory opinions may address pending bilateral disputes without the consent of the disputing states.

## IV. Object and purpose

Article 31 para. 1 VCLT stipulates that the provisions of a treaty are to be interpreted in light of the treaty's "object and purpose". A treaty's "object" describes its content, whereas its "purpose" is what the parties to the treaty

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Niger; Written Statement of China, paras. 15–18; Written Statement of the Republic of Korea, para. 16; Written Statement of Russia, para. 17; Written Statement of Serbia, para. 25; Written Statement of the United Kingdom, para. 7.15; Written Comments of the United Kingdom, para. 3.3, Written Statement of the United States of America, paras. 3.3, 3.20 et seq.; Written Comments of the United States of America, paras. 2.12 et seq.

833 See ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statements of India, Madagascar, the Netherlands, the Seychelles, and Vietnam.

834 See ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Guatemala, paras. 22–23; Written Statement of South Africa, para. 52.

835 See ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Germany, paras. 39–40, 48.

836 Ibid., para. 48.

aim to achieve by concluding the treaty.[837] In practice, however, there is no sharp distinction between the two elements.[838] Instead, ICs usually identify the treaty's aim and then interpret the provisions of the treaty in a way that best achieves this aim.[839] The use of the singular in Article 31 para. 1 VCLT ("its object and purpose") also indicates that it is the interpreter's task to find a single overarching object and purpose of the treaty, i.e., a singular *telos* which (most of) the treaty provisions aim to advance.[840] Particularly, when it comes to interpreting the constituent instruments of international organizations, ICs have shown a tendency to apply a teleological interpretation.[841] In general, all provisions of a treaty are relevant when interpreting a treaty's object and purpose.[842] However, usually the treaty's title, its preamble as well as the type of treaty (for example a boundary treaty instead of a trade treaty), provide a good indication about the aim the parties try to achieve.[843]

Interpreting Article 96 UNC and Article 65 ICJ Statute in accordance with the instrument's object and purpose supports a broadly defined subject-matter advisory jurisdiction that extends to inter-state disputes. The purpose of the UN as enshrined in Art. 1 UNC is to maintain peace and security (Article 1 para. 1 UNC), develop friendly relations among nations (Article 1 para. 2 UNC), and to promote economic, social, cultural, and humanitarian co-operation and human rights (Article 1 para. 3 UNC). The UN's focus on peace and security is further reflected in the Charter's preamble which declares as an "end" of the UN to "save succeeding generations from the scourge of war".

Article 1 para. 1 UNC particularly highlights as the organization's aim "to bring about by peaceful means, and in conformity with the principles

837 *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2. ed., 2018: Art. 31, para. 54.
838 Ibid., para. 54.
839 Ibid., paras. 52-54.
840 Ibid., para. 54.
841 See for example *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174 (174); *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1954, 47 (47); *J.-M. Sorel/V. Eveno Boré*, in: O. Corten/P. Klein (eds.), The Vienna Conventions on the law of treaties, 2011: Art. 31, para. 14; *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2. ed., 2018: Art. 31, para. 56.
842 *O. Dörr*, in: O. Dörr/K. Schmalenbach (eds.), Vienna Convention on the Law of Treaties, 2. ed., 2018: Art. 31, para. 55.
843 Ibid., para. 55.

of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

The responsibility for the maintenance of peace and security lies with the UNSC and the UNGA, the UNSC having the primary (Article 24 para. 1 UNC), the UNGA having a complimentary responsibility (Articles 11, 12 UNC) for this. To this end, the UNSC may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute (Article 34 UNC), call upon the parties to an international dispute to settle their dispute by peaceful means (Article 33 para. 2 UNC), recommend appropriate procedures or methods of adjustment (Articles 36–38 UNC), or make binding decisions under Chapter VII. Likewise, the UNGA may discuss any questions relating to the maintenance of international peace and security brought before it by members of the UN, by the UNSC, or – under certain conditions – by a non-Member State (Article 11 para. 2 UNC).

In order to perform these dispute-prevention and dispute-settlement functions, the two UN organs need a profound understanding of the respective international dispute they are dealing with. Regularly, inter-state disputes revolve around legal questions. Article 96 UNC gives the two UN organs a tool to receive legal guidance and to adapt their conduct accordingly in order to address a certain dispute more effectively.[844] As the ICJ has continuously stated since 1950, it has a duty to support the political organs of the UN in their functions by giving advisory opinions:

"the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused."[845]

An interpretation of Article 96 UNC in light of the UNC's object and purpose to prevent and resolve inter-state disputes argues for an extensive subject-matter advisory jurisdiction which allows the Court to address legal questions that arise within the context of a pending inter-state dispute. After all, it is pending inter-state disputes and not abstract legal questions which are likely to endanger international peace and security.

844 *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. 7.

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

## V. Preparatory work of the UNC and ICJ Statute

While the grammatical and contextual interpretation of Article 96 UNC and Article 65 ICJ Statute argues for a broad subject-matter advisory jurisdiction extending to inter-state disputes, taking into account subsequent practice casts some doubt on this finding. Recourse to the preparatory works of the respective provisions as supplementary means of treaty interpretation under Article 32 lit. a VCLT may resolve this remaining ambiguity.[846]

Several states have invoked the difference in wording between Article 14 sentence 3 of the Covenant of the League of Nations (which laid out the PCIJ's advisory jurisdiction), on the one hand, and Article 96 UNC and Article 65 ICJ Statute, on the other hand, to argue that pending bilateral disputes fall outside the ICJ's subject-matter advisory jurisdiction. Whereas the PCIJ's advisory jurisdiction under Article 14 of the League's Covenant extended to "any dispute or question", Article 96 UNC and Article 65 ICJ Statute refer to "any legal question". While the word "any" seems to indicate a particularly broad subject-matter jurisdiction, the comparison between the two texts could also indicate the opposite interpretation. One could argue that the deletion of the reference to "disputes" in the UNC and the ICJ Statute indicates the drafters' intention to frame the ICJ's advisory jurisdiction more narrowly and exclude pending disputes from the Court's advisory jurisdiction *ratione materia*e.

Germany argued along these lines during the *Chagos* advisory proceeding:

> "In contrast to the Covenant of the League, Art. 96 of the Charter of the United Nations does not refer to disputes, but rather to 'any legal question'. This constitutes a deliberate alteration of the terms of that provision allowing the almost obvious assumption that under the system of the Charter a bilateral dispute should not be made the subject of a request for an advisory opinion."[847]

846 On the drafting history of the ICJ Statute, see also *M. Lando*, 61 CJTL 1 (2023), 67 (89 et seq.).

847 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of Germany, para. 43.

The United States of America presented a similar argument in the same proceeding:

> "The Court's advisory jurisdiction is limited to "any legal question" asked by an authorized U.N. organ or agency. This language reflects a deliberate decision by the drafters of the Statute of the Court to adopt a narrower formulation of the provision granting advisory jurisdiction as compared to that of the Permanent Court."[848]

Both states argue that there was a "deliberate decision" to exclude disputes from the Court's advisory jurisdiction.

At first glance, the references to the change in wording seem persuasive. The deletion of the express reference to disputes could indicate the intention of the drafters of the UNC and ICJ Statute to exclude dispute from the Court's advisory jurisdiction *ratione materiae* and thereby create a stricter separation between the Court's contentious procedure and its advisory opinion procedure. However, a closer look at the drafting history of Article 96 UNC and Article 65 ICJ Statute reveals that the change in wording was not meant to restrict the ICJ's advisory jurisdiction.

The current wording of Articles 96 UNC, 65 para. 1 ICJ Statute was drafted and agreed upon by Committee IV/1 during the San Francisco Conference of 1945. Committee IV/1 dealt with the judicial organization of the envisioned new organization. Several states made propositions for the Court's advisory jurisdiction. Norway for example proposed that the UNGA should have the power to request advisory opinions "on any legal question where it needs an authoritative opinion, including questions relating to the interpretation of the Charter".[849] At another occasion Norway referred to the right of the UNGA to request advisory opinions on "any legal question arising in matters on which it has the right to make recommendations."[850] As illustrated above, the UNGA may make recommendations on inter-state disputes, which would mean that it could also request advisory opinions on such disputes.

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848 ICJ Pleadings, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Written Statement of the United States of America, para. 3.6.

849 United Nations Conference on International Organization, Comments on the Dumbarton Oaks Proposals submitted by Norway, 6 May 1945, Doc. 2, G/7(j), Vol. 3, 356.

850 United Nations Conference on International Organization, Suggested Modifications to Dumbarton Oaks Proposals submitted by Norway, Doc. 2, G/7(n)(1), Vol. 3, 6.

Similarly, the Netherlands proposed that "[t]he Court shall give an advisory opinion on any legal question referred to it by the General Assembly or the Security Council".[851]

With respect to the UNSC, Norway stated:

> "The authority for the Security Council to request an advisory opinion of the International Court as formulated in the proposals must apply to legal questions arising out of any dispute. But the Security Council should have a similar authority to request an opinion of the Court also concerning legal questions unconnected with any particular dispute."[852]

Ecuador expressly stated that both organs should have the right to request advisory opinions on disputes:

> "All disputes between the States, whatever their nature, are justiciable before the International Court of Justice. The Security Council or the General Assembly shall be empowered to refer to the Court, for advice, questions brought in any controversy."[853]

None of these proposals saw it as problematic that the Court could issue advisory opinions on existing inter-state disputes. Some, like the Norwegian and the Ecuadorian proposals even made express references to the use of advisory opinions on matters arising out of concrete legal disputes. These proposals were also not challenged by other states for extending the Court's advisory jurisdiction to inter-state disputes.

Amongst the various proposals, Committee IV/1 decided to vote in favor of a joint Colombian-Cuban proposal which changed the wording to "any legal question".[854] Nothing indicates that this change in wording was moti-

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851 United Nations Conference on International Organization, Amendments to the Dumbarton Oaks Proposals submitted by the Netherlands, 1 May 1945, Doc. 2, G/7(j), Vol. 3, 327.

852 United Nations Conference on International Organization, Comments on the Dumbarton Oaks Proposals submitted by Norway, 6 May 1945, Doc. 2, G/7(j), Vol. 3, 360.

853 United Nations Conference on International Organization, Proposal submitted by Ecuador, 1 May 1945, Doc. 2, G/7(p), Vol. 3, 436.

854 The joint Columbian-Cuban proposal read:
"[To be inserted into the UNC, now Art. 96 UNC]: The General Assembly and the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
[Art. 65 para. 1 ICJ Statute]: The Court may give an advisory opinion on any legal question at the request of whoever may be authorized by the Charter of the United Nations to make such a request.",

vated by the desire to restrict the Court's advisory jurisdiction, nor are there any indications that the participants even discussed that the change in wording could have such an effect. The wording of Article 65 ICJ Statute was then slightly modified by a Canadian proposal.[855] This resulted in the text of Article 96 UNC, Article 65 ICJ Statute as it is today.

The verbatim records show that no delegate argued that the modification of the text constituted a narrowing of the Court's advisory jurisdiction *ratione materiae*. As Judge *Schwebel* pointed out, the new wording was adopted without any analytical discussion about the difference between the old and the new wording.[856] As such, the change in wording from "dispute or question" in Article 14 of the League's Covenant to "any legal question" in the UNC and ICJ Statute cannot be considered a deliberate attempt to curtail the Court's advisory jurisdiction or to create a sharper distinction between the Court's advisory and contentious jurisdictions. Instead, the delegates understood the wording as a continuation of the broad advisory jurisdiction of the PCIJ. The drafting history of Article 96 UNC and Article 65 ICJ Statue thus indicates that the drafters of the UNC and ICJ Statute intended the ICJ to be able to address inter-state disputes through its advisory jurisdiction irrespective of state consent.[857]

## VI. Interim conclusions on state consent

A grammatical interpretation of Article 96 UNC and Article 65 ICJ Statute does not yield a clear result whether the ICJ may use its advisory procedure to address inter-state disputes without state consent. On the one hand, the provision's wording is broad. Legal questions which form the subject-matter of an inter-state dispute clearly fall within the purview of "any legal question". On the other hand, the wording "any legal question" *prima*

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United Nations Conference on International Organization, Sixteenth Meeting of Committee IV/1, 31 May 1945, Doc. 714, IV/1/57, Vol. 3, 241–2.

855 The Canadian proposal substituted the word "whoever" by the words "whatever body" and added the words "or in accordance with" after the words "authorized by", United Nations Conference on International Organization, Nineteenth Meeting of Committee IV/1, 7 June 1945, Doc. 828, IV/1/67, Vol. 3, 286.

856 *S. M. Schwebel*, Was the Capacity to Request an Advisory Opinion Wider in the Permanent Court of International Justice than it is in the International Court of Justice?, in: S. M. Schwebel (ed.), Justice in International Law: Selected Writings of Judge Stephen M. Schwebel, 1994, 27 (59–60).

857 So also *M. Lando*, 61 CJTL 1 (2023), 67 (98).

*facie* seems narrower than the wording employed in the Covenant of the League of Nations which described the PCIJ's advisory jurisdiction which explicitly referred to disputes ("dispute or question"). Interpreting the two provisions in line with the UNC's and ICJ Statute's object and purpose supports the conclusion that the ICJ is free in answering any legal question that is referred to it by an authorized organ, even if it relates to a pending inter-state dispute. Considering the power and duty of the UNSC and UNGA to monitor and resolve any situation or dispute which could threaten international peace, legal questions at the heart of inter-state disputes are an important subject-matter for the ICJ to address within its advisory jurisdiction. While the recourse to subsequent practice in the application of the two provisions does not provide clear guidance, the provisions' drafting history argues in favor of a broad jurisdiction of the Court. In particular, the change in wording between the League's Covenant and the UNC was not intended to limit the Court's capacity to address inter-state disputes.

In sum, Article 96 UNC and Article 65 ICJ Statute do not prevent the ICJ from addressing inter-state disputes by means of its advisory procedure, irrespective of state consent.[858] Considering that the ICJ's jurisdictional framework thus does not oblige the Court to reject requests for advisory opinions on inter-state disputes, the question becomes what justifies the Court's Eastern Carelia doctrine? The answer may lie in a more abstract notion: the Court's "discretion" to refuse any request for an advisory opinion that is not in line with the Court's judicial function.

### *E. Admissibility of the request and the Court's "discretion"*

In addition to having jurisdiction to issue a particular advisory opinion, the Court must be satisfied that the request for such an advisory opinion is *admissible*. The admissibility of a request refers to a broader category of grounds why the Court should or should not give the requested opinion.[859]

858 So also *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 131; *M. Lando*, 61 CJTL 1 (2023), 67 (131 et seq.); see however *R. Kolb*, The International Court of Justice, 2013, 1073.

859 *Y. Shany*, Jurisdiction and Admissibility, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013, 779 (787); on the admissibility in the context of the ICJ's advisory procedure, see *R. Kolb*, The International Court of Justice, 2013, 1081 et seq.; *R. Kolb*, The Elgar companion to the International Court of Justice, 2014, 270 et seq.

To put it differently, admissibility concerns the *exercise* of jurisdiction.[860] While the Court must assess its jurisdiction *proprio motu*, it typically addresses questions of admissibility only if a participant in the proceeding raises an objection in this regard.[861] An exception are matters which concern the protection of the Court's judicial function, which the Court has a duty to address.[862]

The ICJ derives its power to decide matters of admissibility from Article 65 ICJ Statute. The Court thus found that Article 65 "gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request."[863] The ICJ regularly refers to its power to refuse certain requests for an advisory opinion as a matter of "discretion". The Court thus held in its *Chagos* opinion:

> "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."[864]

However, both the discretionary nature and the extent of the ICJ's power to refuse certain requests for an advisory opinion are contested. To approach this question, the study first examines the historical context of the current debate by assessing the PCIJ's power to refuse requests for an advisory opinion (*infra* I.). It then compares these findings with the ICJ's own position on its "discretion" (*infra* II.) and the scholarly debate on the matter (*infra* III.).

860 *Y. Shany*, Jurisdiction and Admissibility, in: C. Romano/K. J. Alter/Y. Shany (eds.), The Oxford Handbook of International Adjudication, 2013, 779 (787).

861 *R. Kolb*, The International Court of Justice, 2013, 203.

862 Ibid., 203.

863 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, ICJ Reports 1950, 65 (72).

864 With further references *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (113, para. 64); *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).

## I. "Discretion" of the PCIJ under the League's Covenant

Just like today regarding the ICJ, the question of discretion was also a point of contention regarding the PCIJ.[865] This debate was sparked by the difference in wording between the English and French versions of Article 14 sentence 3 of the Covenant of the League of Nations. The respective versions read:

> "The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."
> "Elle donnera aussi des avis consultatifs sur tout différend ou tout point, dont la saisira le Conseil ou l'Assemblée."

The English wording "may give" implied a discretionary character of the Court's advisory competence. In contrast, the French wording "donnera" by using the indicative future tense could be understood as denying the Court any freedom of decision when a request for an advisory opinion is made.[866] The Treaty of Versailles stipulated that the English and the French version of the Covenant were equally authentic.[867] Because of this, both versions are assumed to be equally authoritative.[868] On interpreting treaty provisions that have different authentic texts, the PCIJ found in its 1924 *Mavrommatis Palestine Concessions* case that "where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intentions of the Parties."[869]

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865 With further references, see *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 (49). Most commentators at the time agreed that the Court had discretion to refuse requests for an advisory opinion, see with further references *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 143.

866 Cf. *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 (49).

867 The Annex to the Treaty of Versailles (after Art. 440) contains the following sentence: "THE PRESENT TREATY, of which the French and English texts are both authentic, shall be ratified."

868 Cf. Art. 33 para. 1 VCLT: "When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail."

The matter of discretion was addressed by Judge *Moore* in his aide-mémoire which he presented during the drafting process of the first Rules of the Court in 1922.[870] Highly critical of the idea of conferring an advisory jurisdiction on the PCIJ, he argued that Article 14 of the Covenant did not impose on the Court an unconditional obligation to give an advisory opinion.[871] Moore argued that the wording "donnera" does not imply a duty of the Court to reply, as such a duty would have been indicated much more clearly by the term "elle devra donner". Because of this, the wording "may be interpreted more liberally.[872] Moore's grammatical interpretation seems rather result-oriented for one could equally make the opposite argument saying that if the parties intended for discretion of the Court, they could have added the word "peut".

However, Moore's teleological argument merits further attention as it lies at the heart of today's arguments in favor of a discretionary power of the Court to refuse certain requests for an advisory opinion. *Moore* argued that a duty to reply regardless of the circumstances of the request would be "inconsistent with and potentially destructive of the judicial character" of the Court.[873] *Moore* highlighted the fact that the Committee of Jurists when drafting the PCIJ Statute could not agree on a provision governing the PCIJ's advisory function and proposed to leave the question of how to deal with requests for advisory opinions to the practice of the Court.[874]

The 1929 revision of the PCIJ Statute[875] introduced an Article 65 which took up the wording of Article 14 of the Covenant but aligned the English and French wording to "may give" and "peut donner", respectively. The States Parties to the PCIJ Statute seem to have taken inspiration from *Moore's* analysis of Article 14. The 1929 revision could thus be understood as emphasizing the PCIJ's discretionary power to refuse certain requests for an advisory opinion.

869 Mavrommatis Palestine Concessions (Greece v. United Kingdom), Judgment, 1924, PCIJ Series A, no. 2, 19.
870 *J. B. Moore*, The question of advisory opinions, 1922, PCIJ Series D. No. 2.
871 Ibid., 397.
872 Ibid., 384.
873 Ibid., 384–385.
874 Ibid., 396, 398.
875 Resolution Concerning the Revision of the Statute of the Permanent Court of International Justice, adopted by the Assembly of the League of Nations, 14 September 1929, PCIJ Series D. No. 1, Statute and Rules of the Court, fourth edition (April 1940), 8. On the drafting history of the PCIJ Statute, see §1.B.IV.

However, the 1929 revision only resolved the uncertainty surrounding the difference in wording between the English and French versions. It did not clarify the meaning of the wording "may give". The original proposal for Article 14 sentence 3 of the Covenant did not contain the wording "may give" but "shall give".[876] Similarly a proposal by the Advisory Committee of Jurists to include an Article in the PCIJ Statute on the Court's advisory jurisdiction which would have employed the wording "shall give" was not adopted by the Assembly of the League.[877] The decision not to adopt the stricter wording "shall give" indicates the intention of the parties to confer upon the Court a certain flexibility in the exercise of its advisory jurisdiction.

In contrast, *Abi-Saab* argued that the word "may" was merely inserted in Article 14 to emphasize that the PCIJ may give advisory opinions at all, an activity which was beyond the regular functions of a court of law.[878] *Abi-Saab* argued that while the settlement of disputes was a "normal function of a court of law", the advisory jurisdiction was so novel that it required an express authorization.[879] The word "may" was thus not intended to define this jurisdiction but merely to authorize it.[880]

## II. The ICJ's standard of "discretion"

The ICJ summarized its standard of discretion in the 2019 *Chagos* advisory opinion:

> "The fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it: "The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that 'The

876 *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 143.

877 Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, p. 567, https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf.

878 *G. Abi-Saab*, On Discretion: Reflections on the nature of the consultative function of the International Court of Justice, in: L. Boisson de Chazournes/P. Sands (eds.), International law, the World Court of justice and nuclear weapons, 1999, 36 (38); see also *R. Kolb*, 12 AJICL (2000), 799; *R. Kolb*, The International Court of Justice, 2013, 1085.

879 *G. Abi-Saab*, On Discretion: Reflections on the nature of the consultative function of the International Court of Justice, in: L. Boisson de Chazournes/P. Sands (eds.), International law, the World Court of justice and nuclear weapons, 1999, 36 (38).

880 Ibid., 38.

> Court *may* give an advisory opinion ...' (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met." [...] 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. [...] The Court is, nevertheless, mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused". Thus, the consistent jurisprudence of the Court is that only "compelling reasons" may lead the Court to refuse its opinion in response to a request falling within its jurisdiction."[881]

The ICJ relies on a grammatical as well as a functional interpretation of Article 65 ICJ Statute to establish that it has discretion in the exercise of its advisory jurisdiction. According to the ICJ, the word "may" signifies discretion.

By linking the Court's discretionary power to the Court's character as the principal judicial organ of the UN (Article 92 UNC) and its judicial function, the Court bases its discretionary power on a normative foundation, one that is rooted in a functionalist understanding of the powers of the Court. The Court as an organ of the UN does not only have the powers which are expressly conferred upon it, but also all those powers which are necessary for the proper exercise of its powers and functions.[882] Situations may arise in which giving an advisory opinion conflicts with the effective exercise of the Court's judicial function. In such situations the Court needs to have the power to refuse such a request. Rooting the Court's discretion in a functionalist reading of the Court's powers does not only lead to an extension of the Court's powers, it also limits them. The Court may only use its discretionary power for the purpose of protecting its judicial

881 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (113, paras. 63-65) (references omitted).

882 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174 (182); *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66 (78-29, para. 25); *N. M. Blokker*, International Organizations or Institutions, Implied Powers (last updated 2021), in: A. Peters/R. Wolfrum (eds.), The Max Planck Encyclopedia of Public International Law, 2008 (3 et seq.); *M. N. Shaw*, International law, 7. ed. 2014, 946; *A. von Arnauld*, Völkerrecht, 5. ed. 2023, 50, para. 125.

function. Unless the Court's judicial function is impaired, the Court may not refuse to give a requested advisory opinion. The functionalist argument has a third consequence to which the Court alluded on another occasion: When the judicial function of the Court is at stake, the Court not only has the power but also the duty (or obligation[883]) to exercise its discretion in order to refuse a request for an advisory opinion. The Court has the "duty to satisfy itself, each time it is seised of a request for an opinion, as to the propriety of the exercise of its judicial function."[884]

It becomes apparent that the Court does not understand its "discretion" as a freedom of choice. Instead, *whether* and *to which extent* the Court may exercise its discretion is determined by the discretion's function which is the protection of the integrity of the Court's judicial function.[885] Unless the integrity of the Court's judicial function is at stake, the Court is obliged to give the requested advisory opinion as part of its duty to participate in the activities of the UN. Therefore, only "compelling reasons"[886] may lead the Court to refuse the requested advisory opinion.

Some commentators have referred to the Court's general willingness to respond to requests for advisory opinions as "sheepish contrition"[887] towards the requesting organ. However, one could also understand the Court's narrow interpretation of its discretionary power as an effort to strengthen its advisory function. By defining the exclusionary grounds narrowly, the Court gives states and other actors less room to argue for the rejection of an advisory opinion. Only if there is an unresolvable conflict between its advisory activity and its other functions may and must the

883 *M. Virally*, La notion de fonction dans la théorie de l'organisation internationale, in: M. Virally (ed.), Le droit international en devenir, 1990 (paras. 73-78).

884 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136 (157, para. 45); *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403 (416, para. 31); *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. 5.

885 The Court's position on its discretionary power is an example for what M. Virally described as the three normative characteristics of functionalism which are authorization, limitation and obligation, see *M. Virally*, La notion de fonction dans la théorie de l'organisation internationale, in: M. Virally (ed.), Le droit international en devenir, 1990 (51 et seq.).

886 With further references, see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, 95 (113, para. 65).

887 *R. Kolb*, The International Court of Justice, 2013, 1084.

Court refuse an advisory opinion. Such a stance seems less "sheepish" and more self-assertive.

## III. Views in legal doctrine on the "discretion" of the ICJ

*Kolb* identified three "currents of opinion" in legal doctrine regarding the Court's discretion to refuse requests for an advisory opinion: the "discretionalist school", the "eclecticist school", and the "school of denial".[888] Only the discretionalist school argues that the Court has complete freedom of choice to give or deny an advisory opinion, while the other two currents believe in some form of legal determination of the Court's power to give advisory opinions.

### 1. Discretionalist school

The representatives of the "discretionalist school"[889] advocate for an absolute freedom of the Court when giving advisory opinions.[890] The Court may weigh the arguments in favor and against the giving of the requested advisory opinion on a case-by-case basis, without being restricted to legal considerations alone.[891] An undercurrent of this school argues that certain arguments rank higher than others, in particular the protection of the integrity of the Court's judicial function and the Court's independence from the political organs of the UN.[892]

888 Ibid., 1086–1089.

889 Ibid., 1086.

890 *H. Kelsen*, The law of the United Nations, 2. ed. 1951, 549; *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 142; cf. *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. 32.

891 See *Oellers-Frahm* who argues that certain cases, which are situated between law and politics, may force the Court to find "pragmatic solutions that may be disappointing from the legal perspective", see *K. Oellers-Frahm*, in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), The Charter of the United Nations, 3. ed., 2012: Art. 96, para. 22.

892 *Kolb* refers to the Individual Opinion by Judge *Anzilotti* in the case on the *Consistency of certain Danzig legislative decrees with the Constitution of the Free City*, PCIJ Series A/B, No. 65, 61, see *R. Kolb*, The International Court of Justice, 2013, 1087; see also *M. Pomerance*, The advisory function of the International Court in the League and U.N. eras, 1973, 279 et seq.

*Pratap*, one of the representatives of this group, defines discretion as the "right of the Court to refuse an opinion if it considers that there are reasons which make it improper to accede to the request."[893] In contrast to other commentators, *Pratap* speaks of a "right" of the Court rather than a power or duty.

*Pratap* distinguishes between two types of discretion of the Court: statutory discretion under Article 65 ICJ Statute and discretion in the exercise of judicial powers or inherent powers as a Court of Justice.[894] The statutory discretion, *Partap* argues, is expressly conferred upon the Court by Article 65 ICJ Statute, according to which the Court "may give an advisory opinion" (instead of "shall give").[895] *Pratap* relies on *Kelsen* who argued that by virtue of its statutory discretion "the Court is only authorized, not obliged, to give advisory opinions. The Court may, for reasons completely within its discretion, refuse to give an advisory opinion requested in conformity with the Charter."[896]

This broad statutory discretion is contrasted in *Pratap's* writing with the Court's narrow discretion in the exercise of its judicial powers. The Court possesses this second type of discretion as an expression of its character as a court of justice.[897] The Court's discretion in the exercise of its judicial powers exists so as to allow the Court to protect the integrity of its judicial character.[898] If giving an advisory opinion contradicts the Court's judicial character, the Court must exercise its judicial power so as to refuse the requested advisory opinion.[899]

According to *Pratap,* the Court's statutory discretion goes beyond what the Court can do in the exercise of its judicial powers.[900] Under its statutory discretion, the Court may refuse requests in situations which do not affect its judicial character, for example when the Court fears that its response would adversely affect the resolution of the underlying dispute or if contentious proceedings were pending on the same matter.[901]

893 *D. Pratap*, The advisory jurisdiction of the International Court, 1972, 142.
894 Ibid., 142.
895 Ibid., 145.
896 Ibid., 145, citing *H. Kelsen*, The Law of the United Nations, 2. ed. 1951, 549.
897 Ibid., 142.
898 Ibid., 145–150.
899 Ibid., 142.
900 Ibid., 150–151.
901 Ibid., 151.

### 2. Eclecticist school

The representatives of the "eclecticist school"[902] argue for an objectivized discretion of the Court.[903] They accept that the Court has discretion, but they argue that this discretion finds its limits in what the Court refers to as "compelling reasons".[904] In other words, the discretion of the Court is not free but limited to the achievement of certain functions, chief among them the protection of the Court's judicial function.

*Keith* argues that the Court, as a principal organ of the UN is bound by the general provisions governing the work of the UN, in particular the purposes and principles of the UN as laid out in Articles 1 and 2 UNC.[905] This requires the Court to cooperate with the other UN organs and UN Member States.[906] At the same time, the UNC and the ICJ Statute – in particular in light of its drafting history – require that the Court must always – even when giving advisory opinions – act judicially.[907] To ensure that the Court can fulfill this obligation, the Court has discretion.[908] *Keith* argues that the Court's character as a court of justice determines how the Court must exercise its advisory function.[909] One consequence of this is that the Court's advisory function must follow the same procedural safeguards as the Court's contentious procedure which include requirements of notification and publicity of the proceedings, the right of interested parties to present their position, and the requirement to have a sufficient factual basis on which to base the opinion.[910]

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902 *R. Kolb*, The International Court of Justice, 2013, 1087.

903 *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 142 et seq.; *H. Mosler*, in: B. Simma/H. Mosler/R. Bernhardt (eds.), Charta der Vereinten Nationen, 1991: Art. 96, para. 23; *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, 41 et seq.

904 *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 142 et seq.; *H. Mosler*, in: B. Simma/H. Mosler/R. Bernhardt (eds.), Charta der Vereinten Nationen, 1991: Art. 96, para. 23; *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, 42.

905 *K. J. Keith*, The extent of the advisory jurisdiction of the International Court of Justice, 1971, 146.

906 Ibid., 146.

907 Ibid., 152.

908 Ibid., 151.

909 Ibid., 155.

910 Ibid., 155–156.

*Rosenne* locates the Court's discretion entirely within the powers expressly conferred upon the Court by its Statute. The permissive wording of Article 65 gives the Court a general discretion, while Article 68 additionally confers upon the Court a broad discretion regarding the procedure to be applied in any given case.[911] *Rosenne* identifies two principles which "guide the Court in the exercise of its discretion":

> "The first is the principle originally laid down in the answer given to the Council of the League of Nations in the *Eastern Carelia* case that the Court, being a court of justice, cannot, even in giving advisory opinions, depart from the essential rules guiding its activity as a Court. The second, which is unique to the present Court, is that since the Court is a principal organ of the United Nations, it is under a duty to co-operate with other organs; consequently, a request for an advisory opinion should not in principle be refused, and only compelling reasons (*raisons décisives*) should lead the Court to refuse to give the requested opinion."[912]

At the same time, *Rosenne* criticizes the Court's duty to respond because it "implies three presumptions, that the resolution adopting the request was *intra vires* the requesting organ, that the question was a legal question, and that the question was not directed to the settlement of an international dispute between two international entities acting on the international level."[913] *Rosenne* therefore speaks of a rebuttable presumption in favor of giving requested opinions. Once the Court's competence is challenged, it must "adopt positive arguments to establish it, and especially that there are no compelling reasons for it to decline to render a requested opinion."[914]

911 *S. Rosenne*, The law and practice of the International Court, 1920-2005, 4th ed. 2006, 975.
912 Ibid., 976.
913 Ibid., 992.
914 Ibid., 992.

### 3. School of denial

The representatives of the "school of denial"[915] argue that the Court has no discretion when giving advisory opinions.[916] The core argument is that, being a judicial body, the ICJ can reject a request for an advisory opinion exclusively based on legal considerations.[917] *Kolb* therefore argues in favor of replacing the term discretion with the term 'propriety'.[918] According to *Kolb*, the term 'propriety' conveys more clearly that the Court's decision whether to give an advisory opinion is limited to an assessment of the proper course of action for a court of justice.[919]

Similarly, *H. Lauterpacht* recognized that there were certain limits to the ICJ's duty to reply to requests for an advisory opinion. However,

> "these limits are of a legal character; they are determined by the fact that the Court is the judicial organ of the United Nations and that in acting in an advisory capacity it must act in accordance with its judicial character, the requirements of its Statute, and the principles of international law. The Court has not considered itself free to decline to render an advisory opinion on account of political considerations or for reasons of its own convenience."[920]

*Abi-Saab* is another prominent critic of the Court's "discretion" when giving advisory opinions.[921] He argued that the Court's references to "discretion" are not meant to convey an unfettered discretion to refuse a request for an advisory opinion for reasons of convenience or opportunity.[922] Such an interpretation could not be reconciled with the remainder of the Court's *dicta* in this context.[923] *Abi-Saab* points to the *Certain Expenses* advisory opinion in

915 *R. Kolb*, The International Court of Justice, 2013, 1088.
916 *H. Lauterpacht*, The development of international law by the International Court, 2. ed. 1958, 250; *G. Abi-Saab*, Les exceptions préliminaires dans la procédure de la Cour internationale, 1966, 152–153; *R. Kolb*, 12 AJICL (2000), 799; with further rerefernces *R. Kolb*, The International Court of Justice, 2013, 1088–1094.
917 *R. Kolb*, The International Court of Justice, 2013, 1088–1089.
918 *R. Kolb*, The Elgar companion to the International Court of Justice, 2014, 274.
919 Ibid., 274.
920 *H. Lauterpacht*, The development of international law by the International Court, 2. ed. 1958, 250.
921 *G. Abi-Saab*, On Discretion: Reflections on the nature of the consultative function of the International Court of Justice, in: L. Boisson de Chazournes/P. Sands (eds.), International law, the World Court of justice and nuclear weapons, 1999, 36.
922 Ibid., 42–43.
923 Ibid., 42–43.

which the Court emphasized that as a principal organ the reply to a request for an advisory opinion constitutes the Court's participation in the activities of the UN and may only be refused when there are compelling reasons.[924] According to *Abi-Saab*, the word "compelling" negates any choice on the part of the Court.[925] Additionally, the Court referred to the inherent limitations of the judicial function as "imperative".[926] As the Court can only refuse requests for advisory opinions when there are "compelling" or "imperative" reasons, the Court does not enjoy unfettered discretion which would leave room for considerations of opportunity or convenience.

However, *Abi-Saab* argues, the Court has a wide margin of appreciation of the general considerations of admissibility of a request which includes the propriety of giving the requested advisory opinion.[927] Propriety, according to *Abi-Saab*, "is subject to the test of what is proper for a judicial organ to do, that is, what is compatible with the judicial function."[928] To act according to these requirements, the Court has a "special duty of vigilance" to ensure that the inherent limitations of the judicial function are not trespassed when giving advisory opinions.[929] *Abi-Saab* also highlights the fact that the Court has continuously regarded its advisory activity as part of its judicial function. The exercise of this function cannot be guided by opportunity or convenience "[f]or – unlike a right, which is a power or a faculty its holder can exercise or not exercise, keep or abandon – a function combines a power with a charge or an obligation to exercise it in the pursuit of a specific finality."[930]

Arguing along similar lines, *Kolb* proposes to distinguish between two concepts based on the degree of freedom an organ enjoys when making decisions: discretion in the proper sense of the term and a rule-based duty of

924 Abi-Saab cites *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, ICJ Reports 1962, 151 (155).
925 *G. Abi-Saab*, On Discretion: Reflections on the nature of the consultative function of the International Court of Justice, in: L. Boisson de Chazournes/P. Sands (eds.), International law, the World Court of justice and nuclear weapons, 1999, 36 (49).
926 Abi-Saab cites *Northern Cameroons (Cameroon v. United Kingdom) (Preliminary Objections)*, Judgment, ICJ Reports 1963, 15 (30).
927 *G. Abi-Saab*, On Discretion: Reflections on the nature of the consultative function of the International Court of Justice, in: L. Boisson de Chazournes/P. Sands (eds.), International law, the World Court of justice and nuclear weapons, 1999, 36 (44–45).
928 Ibid., 44.
929 Ibid., 45.
930 Ibid., 44.

appreciation.[931] Discretion is the freedom to decide between two or more options without this decision depending on objective, previously defined reasons.[932] A discretionary decision is only guided by "simple opportunity" or "political reasons".[933] Discretion, according to *Kolb*, always requires a "residuum of free choice" beyond purely legal considerations.[934] A decision is not discretionary in this sense, if the outcome of the decision is determined by a rule, regardless of how broadly defined and subject to interpretation it may be.[935] Instead, the organ applying such a rule is under a rule-based duty of assessment.[936] While this duty of assessment may be subject to a wide margin of appreciation, it is not a discretionary decision.[937]

Applying these considerations to the ICJ's advisory function, *Kolb* argues that the Court's decision whether to grant a requested advisory opinion is entirely determined by a legal norm, according to which the Court must protect the integrity of its judicial function.[938] The Court's decision on the admissibility of the request is the result of a legal rather than a political assessment.[939] There is no categorical difference between this assessment and other considerations of admissibility, other than the relative vagueness of the norm to be applied (i.e., the integrity of the Court's judicial function).[940] However, *Kolb* argues that this only means that the Court has a wider margin of appreciation when making its legal assessment.[941] The Court cannot refuse an advisory opinion based on extra-legal reasons, just as the Court cannot decide *to give* an advisory opinion if this would harm the Court's judicial function.[942] As *Kolb* rightly points out, if the Court refused to give an advisory opinion and thereby refused to perform a judicial task for reasons beyond legal considerations, the Court would

931 *R. Kolb*, The International Court of Justice, 2013, 1091.
932 Ibid., 1091.
933 *R. Kolb*, The Elgar companion to the International Court of Justice, 2014, 274.
934 *R. Kolb*, The International Court of Justice, 2013, 1092.
935 Ibid., 1091.
936 Ibid., 1091.
937 Ibid., 1091.
938 Ibid., 1092.
939 Ibid., 1092.
940 Ibid., 1092–1093; *R. Kolb*, The Elgar companion to the International Court of Justice, 2014, 274.
941 *R. Kolb*, The International Court of Justice, 2013, 1092–1093; *R. Kolb*, The Elgar companion to the International Court of Justice, 2014, 274.
942 *R. Kolb*, The International Court of Justice, 2013, 1092–1093; *R. Kolb*, The Elgar companion to the International Court of Justice, 2014, 274.

act politically rather than judicially.[943] This would contradict rather than strengthen the integrity of the Court's judicial function.

## IV. Interim conclusions

The Court's power to refuse requests for advisory opinions must be considered in light of its character as an organ of the UN. As an organ of the UN the ICJ exists because the UN's Member States intended for the Court to pursue certain objectives. In the case of the UN, these objectives include the maintenance of international peace and security, the development of friendly relations among states and international cooperation (Article 1 UNC). To contribute to the attainment of these objectives, the UN Member States have given the Court certain functions and equipped it with certain powers which allow the Court to exercise these functions. The powers of the Court exist solely for the purpose of exercising its functions. Article 96 UNC and Article 65 ICJ Statute confer upon the ICJ the function to assist the other UN organs in their work by issuing advisory opinions on any legal question requested by them. The Court does not have the *right* to give advisory opinions but the *function* to do so.[944] Functions, in contrast to rights, confer upon the respective organ a duty to act in accordance with the relevant function.[945] Since the organ of an international organization has the duty to perform its functions, the non-performance of a function, such as the advisory function, requires a legal justification.[946] The legal justification identified by the Court for refusing certain requests for an advisory opinion is the protection of its judicial function. All of these considerations are best encapsulated by *Kolb's* concept of a rule-based duty of appreciation. The next and decisive question is then: What is the Court's judicial function and how can the giving of an advisory opinion negatively affect the Court's judicial function?

943 *R. Kolb*, The International Court of Justice, 2013, 1093–1094.
944 Ibid., 1093–1094.
945 *M. Virally*, La notion de fonction dans la théorie de l'organisation internationale, in: M. Virally (ed.), Le droit international en devenir, 1990 (73–78).
946 Cf. Ibid., para. 73.