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THIS ISSUE INCLUDES CONTRIBUTIONS BY

José E Alvarez Róisín Burke Treasa Dunworth
Carolyn M Evans Amelia Keene

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CONTENTS

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The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington, New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

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TE WĀNANGA O NGĀ KAUPAPA TURE Ā IWI O AOTEAROA

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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THE FORGOTTEN POTENTIAL OF THE ADVISORY JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS AS A CHECK ON THE ACTIONS OF INTERNATIONAL ORGANISATIONS

Amelia Keene*

This article seeks to address the widely acknowledged legal accountability gap for IOs by suggesting that the advisory jurisdictions of international courts and tribunals offer possible accountability mechanisms that have been underestimated by the literature. The article notes the limited alternatives for holding IOs to account through domestic or other international fora. It maps and compares the advisory jurisdictions of a number of different international courts and tribunals, before examining in greater detail how advisory opinions in the Permanent Court of International Justice and International Court of Justice were able to constrain the exercise of IO powers. It responds to the criticisms of commentators who have characterised the ICJ's advisory jurisdiction as being episodic, ineffectual, and enabling of unfettered IO powers, noting some of the inherent limitations of advisory opinions, but arguing that their full potential has not yet been explored.

I INTRODUCTION

There is a widely acknowledged legal accountability gap for international organisations (IOs).[1] Yet the potential of the advisory jurisdictions of international tribunals to address that accountability

* Amelia Keene is an Associate Legal Officer at the International Court of Justice but writes in a personal capacity. This article was originally conceived as a joint project with Sir Kenneth Keith and was co-presented at the "International Organisations and the Rule of Law: Perils and Promise" Symposium (Victoria University of Wellington, 7 December 2015). The author is grateful for Sir Kenneth Keith's comments, as well as to the enduring influence of his book on the ICJ's advisory jurisdiction. Thanks also to comments from Symposium participants.

1 See most recently Devika Hovell "Due Process in the United Nations" (2016) 110 AJIL 1.

gap has been forgotten or minimised by the academy, practitioners and the IOs themselves. This article will map the potential of the advisory jurisdictions of different international courts, particularly the International Court of Justice (ICJ). This potential is particularly important since there are limited other ways to hold IOs to account through court proceedings. Most of the courts surveyed do not allow IOs direct access in contentious cases,[2] and IOs will also usually have immunity before national courts.[3]

This article has five parts. After this introduction, Part II notes the accountability challenge facing IOs and the potential role of the advisory jurisdiction within an international rule of law framework. Part III maps the advisory jurisdictions available to check actions of IOs. Part IV takes the case study of the ICJ to illustrate how an advisory jurisdiction can be used to check the exercise of IO powers. That contrasts with current academic discourse, which suggests that the ICJ's advisory jurisdiction is episodic,[4] ineffectual[5] and enabling of unfettered IO powers.[6] Finally, Part V will assess some of the limitations of advisory jurisdictions as a means of accountability.

II RULE OF LAW FOR INTERNATIONAL ORGANISATIONS

Any attempt to define the rule of law is fraught with questions. Should a thin, formalistic definition of the rules of laws be adopted, or a thick, substantive human rights definition infused with democratic values?[7] Those questions are just as complicated when one speaks of the

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2 In particular, see Statute of the International Court of Justice, art 34. The European Union is an exception, since it is able to be a party before the World Trade Organization Dispute Settlement Body (WTO DSU) as a member State, and to be a party before the International Tribunal for the Law of the Sea (ITLOS) as a party to the United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature, 10 December 1982, entered into force 16 November 1994), annex 9.

3 Charter of the United Nations, art 105; Convention on the Privileges and Immunities of the United Nations 1946 1 UNTS 15 (opened for signature 13 February 1946, entered into force 17 September 1946); and Convention on the Privileges and Immunities of the Specialized Agencies 1947 33 UNTS 261 (opened for signature 21 November 1947, entered into force 2 December 1948). See also the various agreements entered into directly between the Organisation and the State, for example Agreement between the Government of Libya and the United Nations concerning the status of the United Nations Support Mission in Libya (2012) UNJY 13 (signed 10 January 2012, entered into force 10 January 2012) [Libya–United Nations Status Agreement], art 50. Many agreements provide for private law disputes to go to a Claims Commission or Arbitration, see for example art 55 of the Libya–United Nations Status Agreement.

4 Benedict Kingsbury, Nico Krisch and Richard B Stewart "The Emergence of Global Administrative Law" (2005) 68(3) LCP 15 at 45.

5 Martti Koskenniemi "Advisory Opinions of the International Court of Justice as an Instrument of Preventive Diplomacy" in Najeeb Al-Nauimi and Richard Meese (eds) *International Legal Issues Arising under the United Nations Decade of International Law* (Martinus Nihjoff, Leiden, 1995) 599 at 602.

6 Eyal Benvenisti *The Law of Global Governance* (Publications of the Hague Academy of International Law, Brill, Leiden, 2014) at 92; Jan Klabbers "The Life and Times of the Law of International Organizations" (2001) 70 Nord J Intl L 287 at 300.

7 Kenneth J Keith "The International Rule of Law" (2015) 28 LJIL 403.

international rule of law, a term of increasing currency, but about which there remains significant ambiguity.[8] The 2014 General Assembly resolution on the rule of law reaffirms that "human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations".[9] Yet its focus is on encouraging compliance by states with international law.[10] Rule of law compliance by international organisations has tended to be peripheral to this conversation.[11]

The type of accountability that this article focuses on falls within a narrower conception of the international rule of law, meaning it is not necessary to delve further into the question of its substantive content. The international rule of law is equally applicable to states and to international organisations at the international level, and accountability mechanisms are a core part of that rule of law. This is in keeping with the suggestion of the International Law Association's Committee on Accountability of International Organisations:[12]

> The starting point for the rules and recommended practices is that, as a matter of principle, accountability is linked to the authority and power of an IO. Power entails accountability, that is the duty to account for its exercise.
>
> …
>
> Procedural and substantive limitations on the institutional and operational authority and power of IO-s and treaty-organs can be derived from two sources: from primary rules of international and domestic law, and from the rules of the IO, meaning, in particular, the constituent instrument, decisions and resolutions adopted in accordance with them and established practice of the Organisation, including mechanisms for supervision and monitoring.

At a minimum, any conception of accountability requires that international organisations abide by the applicable legal rules and are held to account when they do not. The normative conception of

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8 See for example *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General* S/2004/616 (2004); *Strengthening and coordinating United Nations rule of law activities: Report of the Secretary-General* A/63/226 (2008) at [74]; and *The rule of law at the national and international levels* GA Res 69/123, A/Res/69/123 (2014).

9 *The rule of law at the national and international levels*, above n 8, at 1.

10 See also *Statement by the President of the Security Council* S/Prst/2014/5 (2014).

11 But see *Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels* GA Res 67/1, A/Res/67/1 (2012) at [2], recognising that "the rule of law applies to all States equally, and to international organizations" and also recalling the role for the advisory jurisdiction of the International Court of Justice; see also Kenneth J Keith, "The World Community and its Laws" (2006) 22 NZULR 2; and Robert McCorquodale "Defining the International Rule of Law: Defying Gravity?" (2016) 65 ICLQ 277.

12 Franklin Berman and others *Accountability of International Organisations: Final Report* (International Law Association, London, 2004) at 5-6.

the role of global administrative law proposed by Kingsbury, Krisch and Stewart has three parts: "internal administrative accountability, protection of private rights or the rights of States, and promotion of democracy".[13] Within this conception, the advisory opinion can be used to advance internal administrative accountability, particularly through "ensuring the legality of administrative action",[14] and may also be relevant to protecting the rights of States (and, occasionally, individuals). However, it is unlikely to assist directly in the third conception, the promotion of democracy.

Those scholars who discuss the advisory jurisdiction in the context of IO accountability are sceptical whether it offers any meaningful mechanism through which to ensure the legality of administrative action by international organisations. Kingsbury, Krisch and Stewart note that:[15]

> Few such reviewing bodies function on a global level: the major general instance of review remains the episodic jurisprudence of the International Court of Justice on the legality of acts of international organizations, a jurisprudence that continues to leave some issues unresolved, including the Court's capacity to review Security Council action by reference to the U.N. Charter or other rules of international law.

Benvenisti writes off the advisory jurisdiction in stronger terms as being complicit in the unchecked expansion of international organisations, arguing that the ICJ's doctrine of implied powers has replaced the ultra vires doctrine.[16] He goes on to argue that the difficulty of attributing action to IOs:[17]

> … together with the general "unbridled enthusiasm for international organizations",[18] led the Permanent Court of International Justice (PCIJ) and the ICJ to adopt an interpretative approach to the constitutive treaties that has expanded IGOs' authority far beyond the original texts. It did so by adopting the doctrine of "effective interpretation" to examine the boundaries of an IGO mandate, and by recognizing that IGOs had in addition to explicit authorization also "implied powers".

No one has considered the combined potential of all of the advisory jurisdictions.[19] This article argues that the jurisdictions have the potential to be an integral part of the accountability matrix for IOs, by particular reference to the past operation of the advisory jurisdiction in the PCIJ and ICJ.[20]

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13 Kingsbury, Krisch and Stewart, above n 4, at 43.

14 Kingsbury and others, above n 4, at 43.

15 Kingsbury, Krisch and Stewart, above n 4, at 45.

16 Benvenisti, above n 6, at 92.

17 At 94–95.

18 Klabbers, above n 6, at 300.

19 For a brief overview, see Chittharanjan Félix Amerasinghe *Jurisdiction of International Tribunals* (Martinus Nijhoff, The Hague, 2003) at ch 12.

III ADVISORY JURISDICTIONS OF INTERNATIONAL TRIBUNALS

The aim of this section is to map the various advisory jurisdictions of the different courts and tribunals, to demonstrate that the breadth of potential for the advisory function is not limited by the jurisdiction of the ICJ, but must take into account the expanding advisory jurisdictions of other tribunals in relation to international organisations.

A International Court of Justice

Under the Covenant of the League of Nations, requests for advisory opinions could be made by the Assembly or the Council of the League of Nations.[21] By contrast, the Charter of the United Nations (Charter) expanded the list to include not only the General Assembly and the Security Council, but also, as provided in art 96(2):[22]

> Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Thus, the Court's advisory function was broadened to also allow references by certain international organisations. Article 65(1) of the Statute of the International Court of Justice (ICJ Statute) complements art 96 of the Charter. It reads:[23]

> 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.

In order to be capable of making a request, the organisation must be an organ or a specialised agency, it must be authorised by the Charter or the General Assembly, and it must request an opinion on a legal question. In the case of a specialised agency and other United Nations organs, the question must also arise within the scope of its activities.[24]

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20 See also the President's recent speech to the Sixth Committee: Ronny Abraham, President of the International Court of Justice "Speech to the Sixth Committee of the General Assembly" (New York, 6 November 2015). Judge Abraham noted that the contribution of the Court to the development of the institutional law of the United Nations has principally been made through advisory opinions and that: "The decisions of the Court have also allowed it to clarify the functions and attributions of the principal organs of the United Nations, as well as the limits of their respective functions".

21 Covenant of the League of Nations, art 14.

22 Charter of the United Nations, art 96(2).

23 Statute of the International Court of Justice, art 65(1).

24 Charter of the United Nations, art 96(2).

The drafters, in establishing the advisory jurisdiction, were influenced both by the need to provide a method of accountability for IOs and by the experience of the PCIJ. Thus, the Report of the Informal Inter-Allied Committee on the Future of the PCIJ in 1944 sets out:[25]

> Secondly, it is clear that a General International Organisation, if it possesses anything in the nature of a regular Constitution, will require authoritative legal advice on points affecting the Constitution, the rights and obligations of Member States and the interpretation of the instrument setting up the Organisation. There are distinct limits to the extent to which such matters can be dealt with internally (*e.g.*, by the legal section of the Organisation's Secretariat) or by such means as reference to an *ad hoc* committee of jurists. League experience has shown the necessity of having an authoritative standing tribunal to which, in suitable cases, questions of this kind can be referred for an opinion. On this ground alone, therefore, we think that the jurisdiction of the Court to give advisory opinions must be retained.

The *Yearbook of the International Court of Justice* provides a list of the international organisations entitled to request an advisory opinion;[26] it includes 15 specialised agencies, and the International Atomic Energy Agency.[27] The advisory jurisdiction is particularly significant for IOs, since only states, and not IOs can be party to contentious cases before the Court.[28] The Court has been careful in its interpretation of which IOs could make a request, ensuring that it is both procedurally and substantively competent.[29]

The Court retains a discretion to determine whether, in the exercise of its judicial function, it is appropriate for it to heed a request for an advisory opinion. The Court applies a presumption of co-

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25 William Malkin and others *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice* (His Majesty's Stationery Office, Miscellaneous No 2, 10 February 1944) at [67]; see also Geoffrey Marston "The London Committee and the Statute of the International Court of Justice" in Vaughan Lowe and Malgosia Fitzmaurice (eds) *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, Cambridge, 1996) 40 at 51 and Stephen 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 Stephen M Schwebel *Justice in International Law: Selected Writings of Judge Stephen M Schwebel* (Cambridge University Press, Cambridge, 1994) 27 at 52–55.

26 "Annex 13(A)" in *Yearbook 2012–2013* (International Court of Justice, The Hague, 2016) at 166-167.

27 On the power of the International Atomic Energy Agency (IAEA) to request an advisory opinion see Kenneth J Keith *The Extent of the Advisory Jurisdiction of the International Court of Justice* (AW Sijthoff, Leyden, 1971) at 40–41.

28 Statute of the International Court of Justice, art 34(1) reads: "Only states may be parties in cases before the Court." Article 35(1) provides: "The Court shall be open to the states parties to the present Statute". Article 36(1) then provides: "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force".

29 Keith, above n 27 at 45; and *German Settlers in Poland (Advisory Opinion)* (1923) PCIJ (series B) No 6 at 18–26. See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO request) (Advisory Opinion)* [1996] ICJ Rep 66.

operation, according to which, "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".[30] The Court will only refuse to do so where there are "compelling reasons"[31] and, in practice, has never exercised its discretion to refuse such a request. The ICJ has only once declined to give an opinion, in response to a request concerning nuclear weapons by the World Health Organisation (WHO), but this was because it concluded that the WHO did not have the power to make the request.[32] The PCIJ also refused to issue an opinion in the *Eastern Carelia* case,[33] but this was on the basis that the Council of the League did not have the power under the Covenant to seek the opinion,[34] rather than being an instance where it refused to exercise its discretion.[35] The Court will not decline to give an advisory opinion simply because the heart of the case is a legal dispute between two parties, one or both of which has not consented to the contentious jurisdiction of the Court.[36]

Proposals to broaden the range of bodies that can refer a matter for an ICJ advisory opinion, such as authorising the Secretary-General to make requests,[37] have not gained any traction, and the framework of the advisory jurisdiction remains substantially the same today as it was envisaged in 1945.

B International Tribunal on the Law of the Sea and the Seabed Disputes Chamber

In contrast to art 191 of United Nations Convention on the Law of the Sea (UNCLOS), which grants an advisory jurisdiction in relation to the Seabed Disputes Chamber of the International

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30 *Interpretation of Peace Treaties (Advisory Opinion)* [1950] ICJ Rep 65 at 71.

31 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 at 27 [*Namibia* opinion]; and *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 at 21 [*Western Sahara*].

32 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO request) (Advisory Opinion)*, above n 29.

33 *Status of Eastern Carelia (Advisory Opinion)* (1923) PCIJ (series B) No 5 at 29.

34 *Western Sahara*, above n 31, at 23–24.

35 For a detailed discussion, see generally Keith, above n 27; and Kenneth J Keith "The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections" (1996) 17 AYBIL 39.

36 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136 [*Wall* opinion] at [50]. A similar approach to consent is adopted in the Inter-American Commission on Human Rights: *Restrictions to the Death Penalty (Advisory Opinion)* (1983) IACHR (series A) No 3 at 22.

37 Michla Pomerance "The Advisory Role of the International Court of Justice and its 'Judicial' Character: Past and Future Prisms" in AS Muller, D Raic and JM Thuranszky (eds) *The International Court of Justice: Its Future Role After Fifty Years* (Martinus Nijhoff, Leiden, 1997) 271 at 322.

Tribunal for the Law of the Sea (ITLOS),[38] neither UNCLOS nor the Statute of the International Tribunal for the Law of the Sea (ITLOS Statute) provides for an advisory function for ITLOS itself.[39] This has not prevented ITLOS from asserting its own advisory function, first in its rules,[40] and then confirmed in the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* opinion. The Sub-Regional Fisheries Commission (SRFC) had requested this opinion pursuant to a treaty that provided the Conference of Ministers of the SRFC could request advisory opinions of ITLOS.[41]

A number of States participating in the case argued strongly that ITLOS did not have an advisory jurisdiction. China argued that art 21 was qualified by the condition that the application had to be submitted in accordance with UNCLOS and was limited to contentious disputes in the same way as art 36(1) of the ICJ Statute.[42] The United Kingdom argued ITLOS was not empowered to hear advisory opinions, noting that the matter had simply not been discussed by States during the drafting of UNCLOS or of the ITLOS Statute.[43] Both China and the United Kingdom suggested that any implied powers of ITLOS must be ancillary to its primary jurisdiction.[44] On the other hand, New Zealand accepted that art 21 of the Statute was sufficiently broad to include advisory opinions submitted under an agreement specifically conferring such jurisdiction on the Tribunal,[45] which perhaps reflected a strategic decision that the Tribunal was unlikely to decline jurisdiction so that efforts would be better spent focusing on the merits.

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38 United Nations Convention on the Law of the Sea, above n 2, art 191; the only opinion which did not involve IOs was *Responsibilities and obligations of States with respect to activities in the Area (Advisory Opinion)* [2011] ITLOS Rep 10.

39 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (Advisory Opinion)* ITLOS 21, 2 April 2015 [*SRFC Opinion*] at [53].

40 Rules of the International Tribunal for the Law of the Sea (adopted 28 October 1997), art 138(1),: "The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion." The Statute of the International Tribunal for the Law of the Sea [ITLOS Statute], art 16 provides that the Tribunal may frame rules for carrying out its functions, in particular rules of procedures.

41 Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Fisheries Commission (signed 8 June 2012, entry into force 16 September 2012), art 33.

42 *SRFC Opinion (Written Statement of the People's Republic of China)* 26 November 2013 at [35]–[36].

43 *SRFC Opinion (Written Statement of the United Kingdom)* 28 November 2013 at [6]–[8].

44 *SRFC Opinion (Written Statement of the United Kingdom)* at [11]–[12]; and *SRFC Opinion (Written Statement of China)*, above n 42, at [56]–[62].

45 *SRFC Opinion (Written Statement of New Zealand)* 27 November 2013 at [10].

In the event, ITLOS confirmed that it did have jurisdiction, reasoning sparsely that its jurisdiction extended, under art 21, to "all matters specially provided for in any other agreement which confers jurisdiction on the Tribunal"[46] and that "matters" in that context was broader than simply "disputes" and thus could include advisory opinions.[47] It rejected any analogy with the ICJ that might suggest a contrary conclusion.[48]

The ITLOS advisory opinion is important in two respects. First, it confirmed that it had an advisory jurisdiction, reasoning in a way that may have implications for the jurisdiction of the ICJ, as addressed below. Secondly, it dealt with the substantive responsibility of the European Union, demonstrating the potential of the ITLOS advisory jurisdiction to deal with questions of IO responsibility under UNCLOS.

One of the questions asked of ITLOS was:[49]

> Where a fishing license is issued to a vessel within the framework of an international agreement with the flag State or with an international agency, shall the State or international agency be held liable for the violation of the fisheries legislation of the coastal State by the vessel in question?

The Tribunal answered by reference to the particular case of the European Union, which had specified that it had exclusive competence to issue fishing licences, stating that:[50]

> … an international organization which in a matter of its competence undertakes an obligation, in respect of which compliance depends on the conduct of its member States, may be held liable if a member State fails to comply with such obligation and the organization did not meet its obligation of 'due diligence'.

Despite its answer being phrased as generally applicable, the Tribunal avoided discussion of the responsibility of other IOs, and did not engage with the International Law Commission's *Articles on the responsibility of international organisations*.[51] Moreover, the case of the European Union is clearly sui generis, as it may also separately be a party to contentious cases before ITLOS.[52] Nevertheless, the question and answer are phrased generally so as to constitute an instance of the

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46 ITLOS Statute, art 21.

47 *SRFC* Opinion, above n 39, at [56].

48 At [57].

49 At [64].

50 At [168].

51 International Law Commission "Draft articles on the responsibility of international organizations" adopted by the General Assembly in *Resolution adopted by the General Assembly on 9 December 2011* GA Res 66/100, A/Res/66/100 (2012).

52 See *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union) (Order of Discontinuance)* [2009] ITLOS Rep 7.

advisory jurisdiction being used to confirm the circumstances in which the international responsibility of an IO may be invoked for wrongful acts.

As for the jurisdiction question, the interest here is what implications the decision has for the ICJ. The legal frameworks for the two courts are similar, but not identical. The ITLOS Statute is silent on advisory opinions and UNCLOS recognises an advisory jurisdiction only for the Seabed Disputes Authority. By contrast, the ICJ Statute is not silent on the question of advisory opinions; instead both the ICJ Statute and the Charter expressly recognise an advisory jurisdiction for the Court by a specific route. Arguably, it would undermine the meaning of those provisions to find that an alternative route to advisory jurisdiction existed by dint of art 36(1) of the ICJ Statute. Yet the broad terms of art 36(1) might support this alternative route, since it is almost identical to art 21 of the ITLOS Statute. Article 36(1) arguably creates two routes for the ICJ's jurisdiction. First, it comprises "all cases which the parties refer to it" and secondly, "all matters specially provided for in the Charter of the United Nations *or* in treaties and conventions in force".[53] This would seem to suggest that the Charter does not have to be invoked where a treaty provides for an advisory opinion to be requested of the ICJ.

It has never been argued before the ICJ that an advisory jurisdiction arises through art 36(1). Most constitutive treaties that provide for advisory opinions require that they will be requested by a body authorised by the General Assembly, or by the General Assembly.[54] Some treaties do not specify this, but refer to art 65 of the Statute, making it difficult to argue that an advisory opinion could be requested under art 36(1). For instance, the Agreement between the United Nations High Commissioner for Refugees and the Government of Nicaragua 1990 provides that:[55]

> In the event of a dispute between UNHCR and the host country, concerning legal questions, an advisory opinion shall be requested for any question of law that may arise, pursuant to Article 96 of the Charter and to Article 65 of the Statute of the Court. The opinion of the Court shall be accepted by the Parties as binding.

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53 Statute of the International Court of Justice, art 36(1) (emphasis added).

54 See for example Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986) 25 ILM 543 (opened for signature 21 March 1986, not yet in force), art 66(2)(b): such a request must be made through the Security Council or General Assembly; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1582 UNTS 95 (opened for signature 20 December 1988, entered into force 11 November 1990), art 32(3) provides that a regional economic integration organisation may request the Economic and Social Council to request an advisory opinion.

55 Agreement between the United Nations High Commissioner for Refugees and the Government of Nicaragua 1582 UNTS 76 (signed 1 November 1990, entered into force 1 November 1990), art 16.

There are many such provisions. The most interesting example, no longer in force, was in the Statute of the International Labour Organization Administrative Tribunal (ILOAT Statute), which seemed to contemplate direct reference to the ICJ by the relevant IO, providing:[56]

> In any case in which the Executive Board of an international organization which has made the declaration specified in article II. paragraph 5, of the Statute of the Tribunal challenges a decision of the Tribunal confirming its jurisdiction, or considers that a decision of the Tribunal is vitiated by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted by the Executive Board concerned, for an advisory opinion, to the International Court of Justice.

In the *IFAD* opinion, which interpreted that ILOAT Statute, the ICJ did not expressly address this issue. It made clear that its jurisdiction was based on "the relevant provisions of the Charter, the Statute of the Court and the authorization given under the Relationship Agreement", under which the Fund was authorised by the General Assembly to request an advisory opinion on the validity of the decision given by ILOAT.[57] Not all IOs which have access to ILOAT are specialised agencies or so authorised,[58] so, at the time of the opinion, the potential existed for a case to be brought that could only arise under the art 36(1) route of jurisdiction. The Court in the *IFAD* opinion concluded that art 12 of the Annex placed certain limits on the scope of its power to review ILOAT decisions, but that it could not act to *broaden* the Court's jurisdiction beyond the scope of the Statute and Charter.[59] However, it did not address the question of whether art 36(1) of the Charter would enable a direct reference. The future of art 12 was put in question by the strong concerns expressed in the *IFAD* opinion about the inequality of access to the Court that it establishes.[60] Immediately before this article went to publication, the Statute was amended to remove the offending article, but there is no suggestion it was removed because of concerns about the validity of the art 36(1) route for IOs

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56 Statute of the International Labour Organization Administrative Tribunal, annex I, art 12(1) (repealed).

57 *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion)* [2012] ICJ Rep 10 at 22 [*IFAD* opinion].

58 A full list of organisations recognising the membership of the ILOAT is available at: International Labour Organization <www.ilo.org>. It includes, for instance, the European Organization for Nuclear Research (CERN), the International Criminal Police Organization (Interpol), and the International Criminal Court, as well as NGOs such as the International Federation of Red Cross and Red Crescent Societies, or the Global Fund to Fight Aids, Tuberculosis and Malaria. None of these have General Assembly authorisation to request opinions and it is unlikely that they could be so authorised.

59 *IFAD Opinion*, above n 57, at [28].

60 At [39], [44] and [48]; see also Declaration of Judge Greenwood.

that were not "specialised agencies".[61] Article 36(1) could be considered as a possible direct route to the Court for IOs, especially those outside the United Nations umbrella, when drafting new constitutive agreements for IOs or amending existing ones. It could also be considered when drafting new treaties, especially those that may implicate IOs but also for treaties generally.

C European Court of Justice

The European Court of Justice does not have a general advisory jurisdiction. However, it is worth noting that it has issued an important advisory opinion rejecting the proposal of the European Union to accede to the European Convention on Human Rights.[62] This was requested pursuant to art 218(11) of the Treaty on the Functioning of the European Union,[63] which stipulates a procedure for agreements between the Union and IOs, including the possibility of an advisory opinion.[64] A similar opinion was issued in 1996.[65] The ECJ held that the European Union did not have the power to so accede under the legal framework, placing particularly weight on the inter-relationship between the ECJ and the European Court of Human Rights (ECHR). If the European Union were to accede, this would make ECHR binding on the ECJ, which is meant to be the ultimate arbiter of European Union law. Thus, the ECJ through its advisory function restricted the actions of the European Union, which accepted the ruling as decisive on the matter.

D European Court of Human Rights

The European Court of Human Rights has a limited ability to issue advisory opinions under art 47 of the European Convention on Human Rights. Article 47 provides that the Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the

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61 "Resolution concerning the Statute of the Administrative Tribunal of the International Labour Organization" (International Labour Conference, Provisional Record, 105th Session, Geneva, May–June 2016). See the new Statute of the Administrative Tribunal, available at <www.ilo.org>.

62 Opinion 2/13 *Re accession to European Convention on Human Rights* [2015] 2 CLMR 21 (CJEU).

63 See Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C326/1 at 47.

64 Article 218(11).

65 Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759.

interpretation of the Convention and the Protocols thereto.[66] However, its jurisdiction is restricted by the condition that such an opinion may not deal with:[67]

> … any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

Thus, art 47 establishes a jurisdiction with one hand, before effectively taking much of it away with the other. Few legal questions concerning the interpretation of the Convention might arise that do not deal with the content or scope of the rights or freedoms established by it. Nevertheless, two questions relating to IOs charged with applying the Convention have resulted in opinions.

The two opinions of the Court deal with legal questions arising out of the list of candidates submitted for election as judges to it.[68] The first opinion concerned Malta, which had submitted a list of all male candidates. The list was rejected by the President of the Parliamentary Assembly on the basis that it did not meet an Assembly Resolution requiring at least one candidate to be female. Nowhere in the European Convention was it stated that gender balance was a requirement for nomination.[69] The Court's opinion held that exceptions must be allowed where a Contracting Party could otherwise not put forward a candidate satisfying the requirements of the Convention.

Two years later, the Court was again asked to rule on certain procedural questions relating to the withdrawal of lists of proposed judges, which was governed by Assembly resolutions.[70] The Court stated that it could not express a view on the consistency between the Convention and resolutions of the Assembly, but noted that it could be called on to interpret resolutions.[71] It confirmed that the

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66 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222 (opened for signature 4 November 1950, entered into force 3 September 1953) as amended by its Protocols [European Convention on Human Rights], art 47, conferring upon the European Court of Human Rights competence to give advisory opinions. See Protocol 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1496 UNTS 245 (opened for signature 6 May 1963, entered into force 21 September 1970), art 1.

67 Article 47(2); the Court used this latter ground to reject the first request for an advisory opinion it received: *Decision on the Competence of the Court to give an Advisory Opinion* Grand Chamber, ECHR 2 June 2004 at [34].

68 *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (No 1)* Grand Chamber, ECHR, 12 February 2008; and *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights (No 2)* Grand Chamber, ECHR 22 January 2010.

69 European Convention on Human Rights, above n 66, arts 21 and 22.

70 *Advisory opinion on the election of judges (No 2)*, above n 68, at [6].

71 At [34].

Assembly had "a certain latitude" in the absence of more detailed provisions in the Convention.[72] However, rather than interpreting the resolutions, or dealing with their validity, it instead relied on principles emanating from the Convention.[73] It confirmed that a time-limit for the submission of a list of judges must be fixed by the Assembly and that lists cannot be withdrawn after that date, "in the interests of legal certainty and the transparency and efficacy of the election procedure",[74] noting that a normal election procedure is "essential for the proper functioning of the Convention system".[75]

Both cases can be seen as instances of a soft dialogue between the Court and the Assembly. The Court in the first opinion stated that the Assembly had to provide exceptions, without expressly stating that the resolution was inconsistent with the Convention. In the second opinion, it affirmed the rules in the resolutions in terms of the principles of the Convention, without explicitly reviewing their compatibility. But in both cases the Convention was put at the centre of the analysis, resulting in a restrained check on the powers of the Assembly in the first opinion.

Notwithstanding these cases, the potential jurisdiction of the ECHR to check the actions of IOs remains limited by the terms of Protocol 2. Although there have been a number of proposals to broaden this jurisdiction,[76] none would extend it to IOs, and its scope is likely to remain limited, at least in as long as the European Union is not a party to the Convention. The most recent reform proposal is Protocol No 16, which opened for signature in October 2013 but still required 10 ratifications to enter into force as at the date of this article.[77] It would allow the highest national courts to direct requests to the ECHR for an advisory opinion on a concrete case before rendering judgment, in the hope of improving the dialogue between the ECHR and the national courts;[78] but it is unlikely to provide any new avenue for opinions relating to IOs.

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72 At [43].

73 At [48].

74 At [47].

75 At [48].

76 See Andrew Drzemczewski "Advisory Jurisdiction of the European Human Rights Court: A Procedure Worth Retaining?" in Antônio A Cançado Trindade (ed) *The Modern World of Human Rights: Essays in Honour of Thomas Buergenthal* (Inter-American Institute of Human Rights, San José, 1996) 493 at 503–504.

77 "Chart of signatures and ratifications of Treaty 214: Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms" Council of Europe website <www.coe.int>.

78 Janneke Gerards "Advisory Opinions, Preliminary Rulings and the New Protocol No 16 to the European Convention of Human Rights: A comparative and critical appraisal" (2014) 21 MJ 630 at 632.

E Inter-American Court of Human Rights

The American Convention on Human Rights, which entered into force in 1975, establishes the Inter-American Court of Human Rights, and endows it with a broad advisory jurisdiction through art 64 of the Convention:[79]

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

Article 64(1) is most relevant for our purposes. Its "other treaties" wording has been interpreted broadly to cover "any treaty as long as it is directly related to the protection of human rights" and as long as one of the Members is an American State.[80] An organ may only request an opinion on a matter falling within its sphere of competence. The jurisprudence of the Inter-American Court on Human Rights (IACHR) around what constitutes the "sphere of competence" of an organisation is similar to that established in the ICJ. The IACHR requires that the organ show that it has a "legitimate institutional interest" in the question posed.[81] An advisory opinion may also be requested by any member as to whether its domestic laws are consistent with the international law instruments.[82]

The Court has paid close attention to the jurisprudence of the ICJ in interpreting its advisory competence,[83] confirming that its power is discretionary despite the fact that art 64(1) does not state whether the Court may or must reply. This aligns it with art 64(2), which confirms that there is, at least, such a discretion when a State makes the request.

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79 American Convention on Human Rights 1144 UNTS 143 (opened for signature 22 November 1969, entry into force 18 July 1978) art 64.

80 *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Article 64 of the American Convention on Human Rights) (Advisory Opinion)* (1982) IACHR (series A) No 1 at [21].

81 *The Effects of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75) (Advisory Opinion)* (1982) IACHR (series A) No 2 at [14].

82 American Convention on Human Rights, above n 79, art 64(2).

83 See Alexandre Kiss "The Impact of Judgments and Advisory Opinions of the PCIJ-ICJ on Regional Courts of Human Rights" in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds) *Liber Amicorum: Judge Shigeru Oda* (Kluwer Law, The Hague, 2002) vol 2, 1469 at 1471–1476.

Although any organ may request an advisory opinion from the IACHR,[84] in practice, requests are made either by states or the Inter-American Commission on Human Rights.[85] The Commission can not only make a request, but is also empowered to deal as an organ of first instance with charges alleging violations of human rights by a State Party to the Convention, which raises possible conflict issues.[86]

It is beyond the scope of this article to comprehensively review the extensive advisory jurisprudence of the IACHR as it relates to IOs.[87] But it suffices to note, as the Court itself has done,[88] that the jurisdiction is wide and that the Court conceptualises it as being a limited review function:[89]

> … one of the Court's attributes is to monitor the legality of the Commission's actions as regards processing matters that are being heard by the Court. … This does not necessarily mean reviewing the proceedings before the Commission, unless there has been a grave error that violates the right to defense of the parties.

The IACHR advisory jurisdiction can be used to determine whether an advisory matter is within the competence of an organisation, and to determine whether that organisation is complying with its human rights obligations. It otherwise has limited potential for IOs.

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84 Charter of the Organization of American States 119 UNTS 3 (opened for signature 30 April 1948, entered into force 13 December 1951), art 10. Article 51 sets out the following organs: the OAS General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission on Human Rights, the General Secretariat, the Specialized Conferences, and the Specialised Organisations, which include the Inter-American Commission of Women, the Pan-American Health Organization, the Inter-American Children's Institute, the Pan American Institute of Geography and History, the Inter-American Indian Institute, and the Inter-American Institute for Cooperation on Agriculture. See Thomas Buergenthal "The Advisory Jurisdiction of the Inter-American Court of Human Rights" in Thomas Buergenthal (ed) *Contemporary Issues in International Law: Essays in Honour of Louis B. Sohn* (Engel, Kehl am rhein, 1984) 129.

85 Jo Pasqualucci "The Advisory Practice and Procedure of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law" [2002] 38 Stan J Intl L 241 at 255. See also Jo Pasqualucci *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd ed, Cambridge University Press, Cambridge, 2013) at 40–46.

86 See Buergenthal, above n 84, at 135.

87 See generally Dinah Shelton "The Jurisprudence of the Inter-American Court of Human Rights" (1996) 10 Am U Intl L Rev 333.

88 *Restrictions to the Death Penalty (Advisory Opinion)*, above n 36, at [42].

89 *Castañeda Gutmán v Mexico (Preliminary Objections, Merits, Reparations and Costs)* (2008) IACHR (series C) No 184 at [40].

F African Court of Human and Peoples' Rights

The newest advisory jurisdiction was established by the Protocol to the African Charter on Human and Peoples' Rights in 2004.[90] Article 4 provides for the advisory jurisdiction as follows:[91]

> 1 At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.
>
> 2 The Court shall give reasons for its advisory opinions provided that every judge shall be entitled to deliver a separate or dissenting decision.

This advisory jurisdiction is broader than that of any other human rights court. Any member state, the African Union, any organ of the African Union, or any organisation recognised by it, may request an opinion. The request does not explicitly have to be within the competence of the organ or organisation requesting it. Moreover, the Court has adopted a broad interpretation of the word "organ", such that it suffices that an entity has been treated as an organ by the political organs of the African Union in practice; no formal decision is required.[92] The loose language of art 4(1), "any African organization recognized by the OAU", also opens up the possibility of African non-governmental organisations making advisory requests. Three requests by NGOs are currently pending before the Court, so the scope of this provision is still to be determined.[93]

The only limitation in art 4 is that the matter must not be related to a matter being examined by the Commission, which will depend on how active the Commission is and how close the subject matter of the opinion must be to the matter before the Commission. In practice, the question has been dealt with by institutional communication between the Court and the Commission, where the Court requests the Commission to inform it if the matter is currently before it.[94] This is problematic

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90 Anne Pieter van der Mei "The Forgotten Power: The Advisory Jurisdiction of the African Court on Human and Peoples' Rights" (2007) AFLA Quarterly 31 at 31.

91 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art 4.

92 *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights (Advisory Opinion)* (2014) African Court on Human and Peoples' Rights No 2/2013 at [56].

93 *Request for an Advisory Opinion made by the Coalition on the International Criminal Court Ltd* No 1/2014; *Request for an Advisory Opinion made by The African Movement for Human Rights Defence* No 2/2014; and *Request for an Advisory Opinion made by The Socio- Economic Rights and Accountability Project (SERAP)* No 1/2013. All cases were still pending at the time this article was finalised in June 2016.

94 See for example *Request for Advisory Opinion by Socio-Economic Rights and Accountability Project (Order)* (2013) No 1/2012 at [4]–[5].

from a rule of law perspective, because it allows the Commission to avoid scrutiny by simply claiming that the matter is pending. In practice, the Court has not reviewed such claims, simply accepting the Commission's assessment at face value.[95]

To date, there have been nine requests for opinions. One was withdrawn, one resulted in an opinion, three are pending, three were struck-off for procedural shortcomings, and the final request was dismissed because the matter was before the Commission. It remains to be seen how the African advisory jurisdiction will develop. But it has the potential to apply broadly with impacts not only for IOs requesting advice, but also for other members of civil society, or States, who wish to establish whether African IOs have met their human rights obligations. This will be so particularly if the Court adopts a wide definition of the term "any African organization recognized by the OAU" to include NGOs.

IV THE ADVISORY JURISDICTION OF THE ICJ AS A CHECK ON INTERNATIONAL ORGANISATIONS

The article will henceforth focus on the advisory opinions of the ICJ, since it is the most mature advisory jurisdiction. Its advisory opinions can be divided into two categories.[96] The first is opinions dealing with employment issues, such as the *IFAD* opinion,[97] and reviews of decisions of the United Nations Administrative Tribunal.[98] The second is those that have dealt with the law as it relates more specifically to the operation of IOs. From the point of accountability of IOs, this second category is of the greater interest.

Advising IOs on the scope and limits of their powers was a central part of the advisory work of the PCIJ. Manley Hudson noted in 1945 that one of the three main categories of its cases involved "requests related to problems involved in the functioning of special international organizations" and that "the Court thus facilitated the successful conduct of their activities".[99] A substantial core of the advisory work of the PCIJ concerned the powers of IOs,[100] either because this was the subject of the

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95 See *Request for Advisory Opinion by Pan African Lawyers' Union and Southern African Litigation Center (Order of Discontinuance)* (2013) No 2/2012, finding that the case could not continue because the matter was pending before the Commission.

96 Eduardo Jiménez de Aréchaga "The Participation of International Organizations in Advisory Proceedings before the International Court of Justice" in *Il Processo Internazionale: Studi in Onore di Gaetano Morelli* (Giuffrè, Milano, 1975) vol 4, 413 at 419–420.

97 *IFAD* opinion, above n 57.

98 *Application for Review of Judgement No 333 of the United Nations Administrative Tribunal (Advisory Opinion)* [1987] ICJ Rep 18; and *Application for Review of Judgement No 273 of the United Nations Administrative Tribunal (Advisory Opinion)* [1982] ICJ Rep 325.

99 Manley O Hudson "Advisory Opinions" (1945) 108 World Affairs 227 at 227.

100 The opinions that fall into this category include: *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture (Advisory Opinion)* (1922)

request,[101] or because the Court had to determine the competence of the League in order to accept the request.[102] It was for this reason that the advisory opinion was carried over to the ICJ, where the tradition of constitutional interpretation continued. Sloan and Hernandez argue that "the Court has called for the decisions of the principal organs to be presumed *intra vires;* moreover, it has consistently found the presumption to be borne out".[103] However, as they admit, the picture is more nuanced than that. Benvenisti argues that the ICJ's doctrine of "effective interpretation" which includes "implied powers" alongside those explicitly authorised in the original texts,[104] has granted "almost unfettered discretion", such that IOs "should not be bothered by legal restraints and picky courts".[105] Rather, a full survey of the history of advisory opinions on IOs before the Court shows that it has not always implied into the relevant treaty the power for the organisation to do as it wishes. In some cases, the advisory opinion has operated to restrain the IOs from acting in a certain way, and the Court has not consistently found the decisions of specialised organs to be *intra vires*.

The foundational case is the *Reparations* opinion.[106] This was significant in that it established that the United Nations, and by extension, IOs, have legal personality, meaning that the United Nations "is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims".[107] Unlike a state,

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PCIJ (series B) N 2; *Competence of the ILO to Examine Proposal for the Organization and Development of the Methods of Agricultural Production (Advisory Opinion)* (1922) PCIJ (series B) N 3; *Eastern Carelia*, above n 33; *German Settlers in Poland*, above n 29; *Acquisition of Polish Nationality (Advisory Opinion)* (1923) PCIJ (series B) N 7; *Interpretation of Article 3, Paragraph 2 of the Treaty of Lausanne (Advisory Opinion)* (1925) PCIJ (series B) N 12; *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer (Advisory Opinion)* (1926) PCIJ (series B) N 13; *Jurisdiction of the European Commission of the Danube (Advisory Opinion)* (1927) PCIJ (series B) N 14; *Jurisdiction of the Courts of Danzig (Advisory Opinion)* (1928) PCIJ (series B) N 15; and *Minority Schools in Albania (Advisory Opinion)* (1935) PCIJ (series A/B) N 64.

101 As in, for instance, *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture (Advisory Opinion)*, above n 100; *Competence of the ILO to Examine Proposal for the Organization and Development of the Methods of Agricultural Production (Advisory Opinion)*, above n 100; *German Settlers in Poland*, above n 29; *Polish Nationality*, above n 100; *Treaty of Lausanne*, above n 100; and *Minority Schools in Albania* above n 100.

102 See for example *Eastern Carelia*, above n 33.

103 James Sloan and Gleider I Hernández "The Role of the International Court of Justice in the Development of the Institutional Law of the United Nations" in Christian J Tams and James Sloan (eds) *The Development of International Law by the International Court of Justice* (Oxford University Press, Oxford, 2013) 197 at 199.

104 Benvenisti, above n 6, at 92–95 (footnotes omitted).

105 At 92.

106 *Reparation for injuries suffered in the service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.

107 At 179.

however, the rights and duties of the United Nations "must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice".[108] The Court thus concluded that the United Nations could bring its own claim for reparations for damage caused to its agent. This decision was a prerequisite for accountability. If the United Nations was an international person, then it did not only have rights, but also duties and responsibilities. It could sue, and be sued, since the "correlative of legal personality and a capacity to present international claims is responsibility".[109] The Court concluded that these duties would be interpreted in line with the United Nations' constituent documents and developing practice. Thus, the opinion opened the door to holding the United Nations accountable for wrongs committed by the United Nations, at least for a failure to observe its constituent document.

The *Interpretation of the Agreement of 25 March 1951 between the World Health Organisation and Egypt* case is important not because it was a case of the Court checking the actions of an IO, but because the Court was prepared to imply more restrictive (not just permissive) terms into the relevant constitutional documents.[110] The WHO exercised its authority granted by the General Assembly to ask for an opinion to try and break the political deadlock over the location of the WHO regional office in Egypt. The Arab States wished to transfer the office out of Egypt in protest of Egypt's relationship with Israel. The question was whether this was permissible under the WHO's 1951 Headquarters Agreement with Egypt.

The Court confirmed that it is not confined to the question asked. Instead it stated that the "true legal question" was:[111]

> What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected?

This changed the focus of the case away merely from the 1951 Agreement to also include applicable general principles of international law, such as art 56 of the International Law Commission's *Draft articles on the law of treaties between States and international organizations or between international organizations*.[112] The Court concluded that there was an obligation on both parties to co-operate in good faith with respect to the transfers of the Regional Office from Egypt.[113]

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108 At 180.

109 James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012) at 196.

110 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73 [*Agreement between the WHO and Egypt*].

111 At [35].

112 *Draft articles on the law of treaties between States and international organizations or between international organizations* [1982] vol 2, pt 2 YILC 17 at [63].

113 *Agreement between the WHO and Egypt*, above n 110, at [48].

It found that this included an obligation to give a reasonable period of notice to the other party for the termination of the existing situation, noting that "what is reasonable and equitable in any given case must depend on its particular circumstances".[114] Such a notice period was not in the text of the Headquarters Agreement. Rather, the Court implied it. This case shows that limitations can also be implied into IO constitutions in appropriate circumstances. There are at least six Headquarters Agreements that provide a right to request an advisory opinion with the authorisation of the General Assembly.[115] For those that do not, the relevant IO remains able to ask the General Assembly to request an opinion on its behalf.

The advisory jurisdiction was used to restrict the powers of the WHO in the *Nuclear Weapons* opinion, where the Court rejected its request for an opinion on nuclear weapons on the basis that weaponry came outside the mandate of the WHO, which was limited to dealing with human health.[116] The Court concluded that the WHO was authorised to make requests pursuant to art 96(2) of the Charter.[117] The question posed was:[118]

> In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?

Despite its emphasis on the health and environmental effects of using nuclear weapons, the Court held that it was outside the scope of the activities of the WHO, which, as defined in art 1 of its constitution, was to focus exclusively on health, such that the legality or not of acts causing a risk to health was immaterial to its purposes.[119] Thus, the Court confirmed a principle of speciality applicable to IOs. It also confirmed the ultra vires doctrine, noting that the fact that the resolution may have been passed by the World Health Assembly, and thus was presumptively *intra vires*, did not deprive the Court of the ability to determine whether it was within the WHO's mandate.[120]

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114 At [49].

115 The *ICJ Yearbook* lists six such Headquarters Agreements providing for an advisory opinion reference, including for instance: Agreement between the Government of Chile and the United Nations Economic Commission for Latin America regulating conditions for the operation, in Chile, of the Headquarters of the Commission 314 UNTS 49 (signed 16 February 1953, entered into force 23 September 1954) art 9, s 21; and Agreement regarding the Headquarters of the United Nations Economic Commission for Africa, Ethiopia–United Nations 317 UNTS 101 (signed 18 June 1958, entered into force 15 December 1958), art 9.

116 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (WHO request) (Advisory Opinion)*, above n 29.

117 At [12].

118 At [11].

119 At [21].

120 At [29].

The Court adopted a more explicitly "constitutional approach"[121] in its *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* opinion.[122] It affirmed the clear terms of art 28(a), which provides that not less than eight of the largest ship-owning nations shall sit on the Maritime Safety Committee. The Court said that the effect of an argument that eligibility to membership of the Maritime Safety Committee should be discretionary "would be to render superfluous the greater part of Article 28(a)".[123] Thus, the Court effectively held that the Committee had been unlawfully established, a ruling that was accepted by the Organisation, with the result that 'flags of convenience' States like Panama obtained a seat on the Committee, which in turn has subsequently expanded to become more representative.[124]

Benvenisti explains this departure from the "generally complacent approach" of the ICJ on the basis that it was an internal question of ultra vires, as opposed to an external question.[125] However, this distinction seems too neat. The *Maritime Safety Committee* decision had real (and external) implications for the States challenging the decision, such as Panama. In addition, the Court was also prepared to find that the WHO's request for an advisory opinion was not within the scope of its powers. The latter was, surely, an external question, since it did not have purely internal consequences. Standing back from these cases, the Court is clearly willing to apply the ultra vires doctrine.

The Court has also confirmed in strong terms that it has the power to interpret the Charter:[126]

> … it has also been maintained that the Court cannot reply to the question put because it involves an interpretation of the Charter. Nowhere is any provision to be found forbidding the Court, "the principal

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121 Jan Klabbers *An Introduction to International Organizations Law* (3rd ed, Cambridge University Press, Cambridge, 2015) at 89.

122 *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion)* [1960] ICJ Rep 150.

123 At 160.

124 *Report on request by the first Assembly for an Advisory Opinion of the International Court of Justice on the constitution of the Maritime Safety Committee* (Committee on Internal Market and Consumer Protection (IMCO), European Parliament, Res A II/Res 21, 1961). For an account, see Elihu Lauterpacht "The Legal Effect of Illegal Acts of International Organisations" in Robert Y Jennings (ed) *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (Stevens and Sons, London, 1965) 88 at 102–105. For a more recent assessment see Ademun-Odeke "From the 'Constitution of the Maritime Safety Committee' to the 'Constitution of the Council': Will the IMCO Experience Repeat Itself at the IMO Nearly Fifty Years On? The Juridical Politics of an International Organisation" (2007) 45 Tex Intl LJ 55.

125 Benvenisti, above n 6, at 147.

126 *Admission of a State to the United Nations (Charter Art 4) (Advisory Opinion)*, [1948] ICJ Rep 57 at 61 [*Admission of a State*].

> judicial organ of the United Nations", to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers.

This followed the consistent practice of the PCIJ in interpreting the constitutive documents of both the League and the International Labour Organization (ILO). The Court has also held the General Assembly to the terms of the Charter, beginning with the *Admissions* opinions.[127] In its 1948 opinion, the Court made clear that the conditions for admission laid down in art 4(1) of the Charter are exhaustive, such that it is not possible to superimpose other considerations upon them so as to prevent the admission of a complying application.[128] Political factors can only be taken into account to the extent that they are reasonably and in good faith connected to the conditions in that article. Importantly, the Court stressed that an IO, even a political organ, must comply with its constitution, noting that:[129]

> The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution. In this case, the limits of this freedom are fixed by Article 4 and allow for a wide liberty of appreciation.

The Court rejected the proposition that a member's consent to the admission of a new member could be made conditional on the admission of another member, noting that this "clearly constitutes a new condition, since it is entirely unconnected with those prescribed in Article 4".[130]

In its 1950 opinion, the Court determined whether a State could be admitted to the United Nations when the Security Council had transmitted no recommendation.[131] The Court determined that, as stated on the face of art 4, the General Assembly can only make such a decision on the recommendation of the Security Council.[132] It noted that "nowhere has the General Assembly received the power to change, to the point of reversing, the meaning of a vote of the Security Council".[133] Moreover, this interpretation was sustained by the manner in which the organs "have

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127 *Admission of a State*, above n 126; and *Competence of Assembly regarding admission to the United Nations (Advisory Opinion)* [1950] ICJ Rep 4.

128 *Admission of a State*, above n 126, at 62–63.

129 At 64.

130 At 65.

131 *Competence of Assembly regarding admission to the United Nations (Advisory Opinion)*, above n 127, at 7.

132 At 8.

133 At 10.

consistently interpreted the text" in practice.[134] Thus, the Court restricted the power of the General Assembly according to a strict textual interpretation, referring to the practice as an ancillary matter.

By contrast to the *Admissions* cases, where a proposed action was at issue, the Court has appeared more reluctant to declare existing resolutions to be invalid. Thus, it found that it had jurisdiction in the *Wall* request despite Israel's argument that the General Assembly had acted ultra vires in requesting the opinion because art 12(1) of the Charter precluded it from doing so, the Security Council being actively engaged with the Palestinian question. Alvarez notes that the effect of the *Wall* opinion has been to allow the practice of the General Assembly to turn art 12(1) of the Charter "into effectively a dead letter".[135] In the *Namibia* opinion, the validity of a General Assembly resolution was at play. A number of judges expressed the view that the words "affirmative vote" in art 27(2) were broad enough to include abstaining votes, such that the resolution had the requisite number of votes to pass, but that a different opinion might have been reached had the term used been more precise.[136] A similar reading of the *Wall* opinion is also available. There the Court determined that a request for an advisory opinion was technically not a "recommendation" and thus could not violate art 12(1) of the Charter.[137] It also referred to evolving subsequent practice and interpretation to mean that the words "is exercising the functions" meant "at this moment", noting that the General Assembly had increasingly dealt with the same matters in parallel.[138] Such interpretations stretch art 12(1), but the Court nevertheless reasoned within it. The interpretation of a constitutional document such as the Charter must be capable of evolution over time, within the constraints of its text.

Finally, in the *Effect of Awards of Compensation* decision, the Court determined in effect that the General Assembly was required to appropriate the money to pay for an award rendered by the Tribunal.[139] That opinion concluded in strong terms that "the General Assembly had not the right on any grounds to refuse to give effect to an award of compensation made by the Administrative Tribunal of the United Nations".[140]

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134 At 9.

135 *Wall* opinion, above n 36, at [25]–[28]; and José E Alvarez " Limits of Change by Way of Subsequent Agreements and Practice" in Georg Nolte (ed) *Treaties and Subsequent Practice* (Oxford University Press, Oxford, 2013) 123 at 127.

136 *Namibia* opinion, above n 31; and see also Alvarez, above n 135, at 127.

137 *Wall* opinion, above n 36, at [25].

138 At [27], citing *United Nations General Assembly: Official Records* A/C.3/SR.1637 (1968), at [9].

139 *Effect of Awards of Compensation made by the United Nations Administrative Tribunal (Advisory Opinion)* [1954] ICJ Rep 47.

140 At 62.

The final question that must be addressed is the extent to which the advisory opinion can be used to check the Security Council. The Security Council has thus far been subject to only very limited review by the Court, such that perhaps the most important check on its powers comes from its legal advisors behaving ethically to ensure that its powers are exercised in a principled and fair way.[141] Nevertheless, the Court has indirectly affirmed its ability to consider objections to resolutions of the Security Council.[142] In the *Namibia* opinion, the ICJ states: "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned".[143] But this was in a circumstance in which the legality of the General Assembly and Security Council resolutions was not the subject of the advisory question,[144] so this conclusion must be read in light of the fact that the question had not been posed. In any case, having so stated, the Court went on to consider the resolution in the exercise of its "judicial function".[145] Sloan and Hernandez argue that the Court could still declare an action of the Security Council to be contrary to the Charter or international law:[146]

> … one cannot characterize the Court's perception of its role as purely deferential, as its reticence does not settle the question of the relationship between the Council and the Court, which in fact is rather indeterminate, given the silence of the Charter and the Statute in relation to any such power.

The Court has not ruled out having to interpret Security Council and General Assembly resolutions, including at the provisional measures phase in *Lockerbie* and in the *Kosovo* opinion, where the Court directly engaged with the substance of Security Council resolutions.[147] Notwithstanding its dicta in the *Namibia* opinion, what the Court is doing does seem to amount to a quasi-judicial review mechanism. This conclusion is supported by the history of the Court's advisory jurisdiction being used as a mechanism to pronounce on IO powers. How far any such review might go will depend on the measure in question and the scope of the power being exercised.

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141 Keith, above n 7, at 416.

142 *Namibia* opinion, above n 31 at 45.

143 At 45.

144 At 45: "It was suggested that though the request was not directed to the question of the validity of the General Assembly resolution and of the related Security Council resolutions, this did not preclude the Court from making such an enquiry."

145 At 45.

146 Sloan and Hernández, above n 103, at 226.

147 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) (Preliminary Objections)* [1998] ICJ Rep 9; and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (*Advisory Opinion)* [2010] ICJ Rep 403 [*Kosovo* opinion] at 449–450.

V LIMITATIONS OF ADVISORY OPINIONS AS ACCOUNTABILITY MECHANISMS

A Requests for Opinions

One of the main limitations of the advisory opinion jurisdiction as a method for accountability is that authorisation to bring an opinion must be sought, with the General Assembly acting as a gatekeeper for most requests for ICJ opinions. As the Court observed in the *Case Concerning the Northern Cameroons*: "The Court may, of course, give advisory opinions – not at the request of a State but at the request of a duly authorized organ or agency of the United Nations".[148] Nothing prevents a State or other IO from requesting the General Assembly or Security Council to refer an advisory opinion on a legal question.[149] Indeed, most of the advisory opinions in the PCIJ originated at the request of a State or an IO, including six references from the ILO by 1938.[150] The requests were made with minimum discussion by the League Council, which acted merely as a conduit.[151] But today it may be politically more difficult for an affected individual, state, or IO to gather the necessary support for the General Assembly or Security Council to request an advisory opinion on its behalf.[152]

Happily, the most pronounced example of inequality of access to the advisory jurisdiction – that of the previous ILOAT appeal structure, where only the responding organisation had the power to request an opinion – is no longer in force.[153] This followed concerns about the resulting inequality of access expressed in the *IFAD* opinion.[154] But the limited ways to request an opinion may mean that it is difficult to get IOs, particularly the General Assembly, before the Court. Organisations that have allegedly acted unlawfully may not have an incentive to self-report and seek the advice of the ICJ, particularly if the practice has become ingrained within the internal culture of the organisation.[155] Indeed, the General Assembly has not referred a question of its competence for an

148 *Case concerning the Northern Cameroons (Preliminary Objections)* [1963] ICJ Rep 15 at 30.

149 Schwebel, above n 25, at 66.

150 *Case concerning the Northern Cameroons*, above n 148, at 32.

151 Schwebel, above n 25, at 41, 51-52.

152 Consider for example the efforts of Palau since 2011 to gather support in the General Assembly for a request of an advisory opinion on climate change.

153 Christian Vidal-León "Inequality of the Parties before the International Court of Justice: Reflections on the Appellate Jurisdiction over ILOAT Judgments" (2014) 5 JIDS 406 at 407 and 411.

154 *Judgement No 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Advisory Opinion)* [2012] ICJ Rep 10 at 31.

155 See Rosalyn Higgins "A comment on the current health of Advisory Opinions" in Vaughan Lowe and Malgosia Fitzmaurice (eds) *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, Cambridge, 1996) 567 at 576.

advisory opinion for 40 years,[156] but has instead focused on outward-facing opinions concerning the behaviour of other entities. It must be recognised that political factors play an important role in the small number of advisory requests to the Court. On the other hand, the Security Council remains able to refer a matter relating to the General Assembly and vice versa, which constitutes its own internal check. Moreover, the very possibility of a reference to the Court, however remote, may have a constraining influence on the behaviour of IOs and their legal counsel, encouraging the principle of legality to prevail.

B Authority of advisory opinions

One of the apparent limitations of the advisory function is that the advisory opinions are, for the most part, not binding. But the ICJ's opinions are generally seen as being extremely authoritative.[157] The Court is, after all, the principal judicial organ of the United Nations[158] and its opinions and judgments are taken seriously.[159] With few, but notable, exceptions, such as the *Wall* opinion, or the *Western Sahara* opinion, the majority of the Court's non-binding advisory opinions have been complied with. Non-binding advisory opinions may also have remedial qualities. The court may find that an IO has acted unlawfully, or that the proposed action would be unlawful.

There are a number of instances in which the opinions are binding and these invariably involve the responsibility of an IO. Opinions will be binding where drafters have included a provision to this effect in the relevant treaty that gives rise to the legal question referred to the Court. A number of treaties provide for binding advisory opinions,[160] such as certain headquarters agreements,[161] conventions on privileges and immunities[162] and some treaties.[163] The Court first dealt with the phenomenon of binding advisory opinions in 1956, in relation to art XII of the ILOAT Statute,

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156 The last opinion requested clearly entailing the competence of the General Assembly was the *Western Sahara* opinion in 1974; see *Western Sahara*, above n 31.

157 Klabbers, above n 6, at 233. Compare Koskenniemi, above n 5, at 617–619.

158 Charter of the United Nations, arts 7 and 92.

159 See generally Constanze Schulte *Compliance with Decisions of the International Court of Justice* (Oxford University Press, Oxford, 2004) which briefly deals with opinions (at 14–17).

160 For lists, see Keith, above n 27, at 240, n 15; and Robert Ago "'Binding' Advisory Opinions of the International Court of Justice" (1991) 85 AJIL 439, at 439, n 2–5.

161 For instance Agreement between the United Nations High Commissioner for Refugees and the Government of Nicaragua, above n 55, art 16.

162 Convention on the Privileges and Immunities of the United Nations, above n 3; and Convention on the Privileges and Immunities of the Specialized Agencies, above n 3.

163 See for example Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, above n 54 art 66(2); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, above n 54, art 32(3).

noting that it might have the effect of rendering its opinion binding, but this went beyond the scope of the Charter and ICJ Statute and thus did not affect the Court's functions.[164] That is, the Court opinion is not binding pursuant to the Charter or Statute, but may be binding pursuant to the third party agreement or treaty.[165] The ICJ confirmed this in its *IFAD* opinion, noting that its jurisdiction "is however subject to the effect in the present case of Article XII of the Annex to the Statute of the ILOAT",[166] under which the ILO and IOs have made the declaration recognising its jurisdiction may nonetheless challenge ILOAT decisions by requesting an advisory opinion, and that the option of the Court would be "binding". The Court stated:[167]

> … that [binding] effect goes beyond the scope attributed by the Charter and the Statute of the Court to an advisory opinion. It does not affect the way in which the Court functions; that continues to be determined by its Statute and Rules.
>
> It is the treaty that is binding, not the advisory opinion.

As authoritative as advisory opinions may be, the Court is only ruling on the legal position and is not ruling on how the IO must respond. It has never ruled that damages should follow, for instance. The response remains a political matter for the IO.[168] Thus, as a method of accountability, particularly where the IO has committed human rights breaches, it is incomplete.

C Participation of IOs in Proceedings

Another apparent limitation of bringing IOs before the Court is that they are not capable of being party to a contentious case. But, this is not necessarily a limitation. The ICJ can invite other bodies to participate in its advisory proceedings and has more flexibility than in its contentious jurisdiction. While the Rules and the Statute contemplate the participation of "public international organization[s]" in contentious cases,[169] arts 65 and 66 of the Statute use the broader term "international organization".[170] As well as ensuring that concerned IOs can participate in Court proceedings, it also suggests that non-governmental international organisations (NGOs) might also be invited to contribute. This was common in the PCIJ, in which representatives of international

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164 *Judgements of the Administrative Tribunal of the ILO upon complaints made against the UNESCO (Advisory Opinion)* [1956] ICJ Rep 77 at 84.

165 *IFAD* opinion, above n 57.

166 At [27].

167 At [28].

168 Lauterpacht, above n 124, at 101–102.

169 Statute of the International Court of Justice, art 34; and Rules of the International Court of Justice, arts 43 and 69.

170 Articles 65–66.

trade unions were asked to make observations on questions relating to the working of the ILO.[171] The International League for the Rights of Man was asked to provide a written statement in the advisory proceedings concerning the request of an opinion on the International Status of South West Africa.[172] Similarly, representatives for the nascent state of Kosovo were able to participate in the *Kosovo* opinion, under the description "the authors of the unilateral declaration of independence" of Kosovo;[173] and the Arab League participated in the *Wall* opinion. Such procedures might also be adopted in other tribunals in relation to their advisory function. On the other hand, for the most part, NGOs remain outside the Court. Thus, for instance, although the International Physicians for the Prevention of Nuclear War had played a substantial role in preparing the WHO request for the *Nuclear Weapons* opinion, its submitted brief was not admitted into the case file by the ICJ.[174]

D Alternatives

Of course, advisory jurisdictions are not available for every IO, and other, more direct or specific accountability mechanisms may exist. Some IOs have comprehensive judicial dispute settlement systems that do not contemplate the use of advisory opinions, most obviously the World Trade Organisation (WTO). The WTO itself is not subject to its Dispute Settlement Understanding, which contemplates a dispute between member States of the WTO, and is not directly subject to the advisory jurisdiction of the ICJ. Other IOs have established their own accountability mechanisms, notably the World Bank Inspection Panel, which handles complaints for public-sector projects; and the Independent Evaluation Office of the International Monetary Fund. Moreover, IO accountability can on occasion result from judicial decisions by international courts that do not have an advisory function.[175] But such examples are few and far between, do not cover the full scope of the activities of the IO in question and cannot fill the accountability gap for IOs. Neither, on their own, do the advisory jurisdictions. But they have the potential to be a bigger part of the answer than current commentary suggests.

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171 Jiménez de Aréchaga, above n 96, at 420. See for example *Interpretation of the Convention of 1919 concerning Employment of Women during the Night (Advisory Opinion)* (1932) PCIJ (series A/B) No 50, where the ILO, the International Federation of Trades Unions, the International Confederation of Christian Trades Unions and the International Organizations of Industrial Employers were invited to take part, and the first three stated a desire to submit written and oral statements to the Court.

172 *International Status of South West Africa (Pleadings, Oral Arguments, Documents)* [1950] ICJ Rep 128 at 327.

173 *Kosovo* opinion, above n 147.

174 Nicolas Leroux "NGOs at the World Court: Lessons from the past" (2006) 8 ICLR 203 at 215.

175 See for example *Prosecutor v Tadiç (Decision on Defence Motion on Jurisdiction)* ICTY (Trial Chamber) IT-94-1, 10 August 1995 at [6]–[39].

VI CONCLUSION

Jenks argued that one way to think about rule of law in international institutions is through a constitutional vocabulary.[176] The advisory jurisdiction of international courts can be understood as a form of constitutional or administrative review for IOs. While the opinions in the last decade have tended towards issues that are not directly related to the powers and activities of IOs, the core function and purpose of the advisory jurisdiction is to provide a mechanism for legal disputes within an organisation that cannot be otherwise resolved.

Notwithstanding the dicta in the *Namibia* opinion that the Court does not possess any powers of judicial review over United Nations organs,[177] in fact the body of opinions, including those of the PCIJ, suggests that the advisory jurisdiction does function as a method to review and constrain IO powers. The potential of the advisory jurisdiction is an important, although not complete, part of the answer to holding IOs to account for illegal actions. True, none of the international tribunals examined in this article retain a standing jurisdiction to review IOs at will and the scope of the different jurisdictions varies, with the ICJ retaining the broadest powers to check IO actions, particularly those of United Nations bodies. Yet nothing prevents any IO or other entity from making a request via the General Assembly, or potentially including in its constitutive document or international treaties a direct reference procedure that would test the potential of an art 36(1) advisory procedure under the ICJ Statute. The *Wall* and *Kosovo* cases also confirm that the General Assembly may make a request even where there are overlapping competences between the Security Council and the General Assembly.[178] This could include a challenge to the legality of a Security Council resolution that appeared to go beyond the scope of the Charter[179] or as contrary to rules of jus cogens. The survey of cases above was necessarily selective,[180] yet seen as a whole these cases amount to a complete rejection of the alleged peripheral role for advisory opinions.

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176 C Wilfred Jenks *The Common Law of Mankind* (Frederick A Praegar, New York, 1958) at 23–24 and 431–433. See also Guy Sinclair "The Common Law Constitutional Vision of C Wilfred Jenks" (paper presented at "International Organisations and the Rule of Law: Perils and Promise" Symposium, Victoria University of Wellington, 7 December 2015).

177 *Namibia* opinion, above n 31, at 88.

178 *Wall* opinion, above n 36; and compare *Kosovo* opinion, above n 147, Separate Opinion of Judge Keith, at [6] and [17].

179 See generally Jeremy Matam Farrall *United Nations Sanctions and the Rule of Law* (Cambridge University Press, Cambridge, 2007) at 73–75.

180 See also *Interpretation of Peace Treaties (Advisory Opinion)*, above n 30, at 71, reviewing the powers of the Secretary-General; *International Status of South-West Africa (Advisory Opinion)* [1950] ICJ Rep 128 at 144; *South-West Africa – Voting Procedure (Advisory Opinion)* [1955] ICJ Rep 67 at 78; and *Admissibility of hearings of petitioners by the Committee on South West Africa (Advisory Opinion)* [1956] ICJ Rep 23 at 32, delimiting the powers and duties of the General Assembly in relation to the matter of South West Africa.