The Advisory Jurisdiction of the International Court of Justice: Some Comparative Reflections

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Is the Giving of Advisory Opinions "Obviously not a Judicial Function"?

On two successive Sunday mornings in November 1607 King James I of England summoned to his Privy Council the common law judges including Sir Edward Coke, the Chief Justice of Common Pleas, and the ecclesiastics, including Richard Bancroft, the Archbishop of Canterbury.[1] The central question debated on those mornings arose from jurisdictional controversies between the Ecclesiastical High Commission and the Court of King's Bench: could the King himself decide which body had jurisdiction? The Archbishop had no doubt

> that the Judges are but the delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himself; ... this was clear in divinity, that such authority belongs to the King by the word of God in the Scripture.[2]

The Chief Justice flatly rejected that proposition:

> To which it was answered by me, in the presence, and with the clear consent of all the Judges of England, and Barons of the Exchequer, that the King in his own person cannot adjudge any case, ... but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England.[3]

The King was not to be rebuffed by this statement.

> He thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned of the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and

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1 The principal account which we have of the meetings is the Chief Justice's: *Prohibitions del Roy* (1607) 12 Co Rep 63, 77 ER 1342; the quotations in the text are from that source; Bowen CD, *The Lion and the Throne: The Life and Times of Sir Edward Coke 1552–1634* (1957), ch 22 draws as well on other contemporary accounts.

2 (1607) 12 Co Rep 63, 77 ER 1342.

3 *Ibid.*

> judgment of law, which law is an act which requires long study and experience, before that a man can attain to be cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace; with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*.[4]

That judicial ruling made on that extraordinary occasion was absolutely critical for constitutional government, the rule of law and the independence of the judiciary far beyond Whitehall Palace and down the centuries. To come to the specific subject matter of this paper, the ruling on a most fundamental issue was given by way of an opinion of the Judges to the King on the King's summons. The ruling was not given by a Court by way of a judgment sought in proceedings brought between parties and binding on them.[5]

In a report tabled in the Parliament at Westminster nearly 400 years later, the Law Commission of England and Wales has again recognised the practical value of advisory processes in public law cases. The Commission reported that in its extensive consultations there was widespread support for the High Court having the power to grant advisory declarations, provided that the jurisdiction was carefully exercised. Individuals and public authorities faced with the interpretation of complex statutes drafted in very general terms might be considerably helped by the exercise of a power to grant advisory opinions. Whether there is at present such a power in the law is unclear. Accordingly, the Commission has recommended that the High Court have explicit power to make advisory declarations on points of general public importance.[6]

Many other states, notably among common law countries Canada, likewise recognise the value of their courts being able to give advisory opinions, and increasingly international courts and tribunals have powers to give advice and opinions.[7]

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4 *Ibid*, at 1343.

5 There is a long history of the English Judges advising the Monarch and the House of Lords, eg Jay S, "Servants of Monarchs and Lords — The Advisory Role of Early English Judges" (1994) 38 *American Journal of International Legal History* 117; Vedeer, "Advisory Opinions of the Judges of England" (1900) 13 *Harvard Law Review* 358. As Jay shows some of the opinions gave rise to great controversy; for instance those in the *Ship Money* case led to articles of impeachment against most of the judges. See also the Judicial Committee Act 1833 s 4 which apparently was last invoked in 1958 in *Re Parliamentary Privilege Act 1770* [1958] AC 331; Lord Denning has recently published his 1958 memorandum indicating why he did not agree with the other six Law Lords in that case, [1985] *Public Law* 83; see also 10 *Halsbury's Laws of England*, 4th ed, para 781.

6 Law Commission, *Administrative Law — Judicial Review and Statutory Appeals* (1994 Law Comm 226) paras 8.9–8.14 and pp 128–29.

7 In addition to the instances noted in Keith KJ, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (1971), pp 16–18 are the power of the Inter-American Court on Human Rights, eg Buergenthal T, "The Advisory Practice of the Inter-American Human Rights Court" (1985) 79 *American Journal of International Law* 1, and of the Law of the Sea Tribunal; for valuable relevant discussions of the Canadian law and practice see Strayer BL, *The Canadian*

Yet there are those who contend that the giving of an advisory opinion is "obviously not a judicial function", to return to the heading of this section and quote John Bassett Moore, the first American Judge of the World Court.[8] Similarly, early in its existence, the United States Supreme Court refused to give advice to President Washington on 29 questions relating to the war in Europe and frequent transactions within American ports and limits. The Judges' reasons are brief, referring to the checking role of a court of last resort and to the express presidential power to call on the heads of the departments [by contrast to the Court] for an opinion.[9] The Australian High Court also held unconstitutional a statute which empowered it to hear and determine any question referred to it by the Governor-General about the validity of legislation. The judicial power, it ruled, was confined to the determination of an immediate right, duty or liability.[10] And the Informal Inter-Allied Committee on the future of the Permanent Court of International Justice, reporting in 1944, similarly began with a negative comment about an advisory role:

> Some of us were inclined to think at first that the Court's jurisdiction to give advisory opinions was anomalous and ought to be abolished, mainly on the grounds that it was incompatible with the true function of a court of law which was to hear and decide disputes.[11]

That Committee nevertheless proposed that the jurisdiction be retained and even extended.[12] And, to balance the earlier picture a little, Australian courts do give advisory opinions in various guises,[13] as do a number of state courts (as opposed to federal courts) in the United States.[14]

Constitution and the Courts, 3rd ed (1988), ch 9 and Hogg P, *Constitutional Law of Canada,* 3rd ed (1992), pp 185, 214–19. Major Canadian opinions of significant authority and effect include *Reference re Exemption of United States Forces from Canadian Criminal Law* [1943] SCR 483 and *Re Resolution to amend the Constitution* [1981] 1SCR 753.

8 Moore JB, "The Organization of the Permanent Court of International Justice" (1922) 22 *Columbia Law Review* 497 at 507.

9 The correspondence is included in *Hart and Wechsler's The Federal Courts and the Federal System,* 2nd ed (1973), pp 64–66; see also 66–74 and *Muskrat v United States* (1911) 219 US 346 on related practice.

10 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265, 266, discussed by Kirby J in *North Ganalanja Aboriginal Corporation v Queensland* (1996) 135 ALR 225 at 276–78 (HCA). To be compared with that position is the practice of the High Court in setting and deciding broad abstractly stated constitutional issues, often at first and last instance, eg *Theophanous v Herald and Weekly Times Ltd* (1994) 124 ALR 1. Consider as well the controversy about the decision of Sir Garfield Barwick, the Chief Justice of the High Court, to advise Sir John Kerr, the Governor-General, on the course to be followed to resolve the constitutional crisis in November 1975, eg Marr D, *Barwick,* rev ed (1992), pp 255–78.

11 (1945) 39 *American Journal of International Law* (Supp) 1 at 20–23, paras 65–75.

12 *Ibid.*

13 For example, Crawford J, *Australian Courts of Law,* 3rd ed (1993), pp 137, 192–93.

14 For example, n 9 above and the provisions and practice mentioned by Hudson and Frankfurter in their exchange, (1924) 37 *Harvard Law Review* 970 and 1002. See also Mason, "Extra — Judicial Work for Judges: The views of Chief Justice Stone" (1953) 67 *Harvard Law Review* 193.

The reasons for the disagreement are important for the justification, possible use and practical operation of the advisory jurisdiction of the International Court. The central reason appears to be that the advisory opinions are just that, advisory, and that they do not bind the parties. Indeed there are no parties. How can the advice be any more authoritative than that given by the Attorney-General (which, for instance, Sir Edward Coke had been just two years before he earned the King's fury on those Sunday mornings) to a national executive, or by the United Nations Legal Counsel to the political organs of the United Nations? What is a court doing giving such advice? Should the role not be left to those whose responsibility it is to give advice — the Attorney-General or Legal Counsel in particular?

That reasoning has at most only limited force in the case of the International Court's advisory jurisdiction for at least three reasons which are relevant to later parts of this paper. First, the opinion in practice is seen as having greater force than a simple opinion of a legal adviser. A court of pre-eminent authority in the international system has stated the law, in exercise of a major function of all senior courts additional to that of resolving disputes: to declare and develop the law for which they are responsible. After all, the *Case of Prohibitions*[15] is known not because of its disposition of a particular case (there wasn't one) or even the allocation of the particular jurisdiction between the ecclesiastical courts and the common law courts, but rather for its grand declaration made by the Chief Justice with the support of his colleagues, of constitutional principle, that the State is subject to the law.

The second reason is related to the first: the court, a "judicial organ", in exercising its advisory jurisdiction must remain true to its judicial character. It must follow a judicial procedure. It must be properly informed. It must give those interested in the issues presented to it a full opportunity to present their cases and to be heard — in practice in an adversary way. That process which is very different from that ordinarily followed by a legal adviser such as the Attorney-General adds greatly to the authority of the ruling.

A third reason, of varying application, concerns the importance in the particular case of the facts from which the question arises. It is relatively rare for a request to the International Court for an opinion to be considered detached from its facts. The judicial process, including argument based on the facts, helps avoid some of the fears expressed by the critics of advisory processes. One of those critics, Felix Frankfurter, was mainly concerned with opinions being given on the constitutionality of *proposed* legislation. Such opinions, he said, were not just advisory opinions. They were ghosts that slay, particularly when the legislation was held unconstitutional. By contrast, judgments given later, by reference to the developing facts, furnished abundant illustrations of a beautiful hypothesis being slayed by an ugly fact — to quote TH Huxley.[16]

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15 *Prohibitions del Roy* (1607) 12 Co Rep 63.

16 Note 14 above, 1008. See also Justice Brewer's emphasis on the need for a "real, earnest and vital controversy" in *Chicago and Grand Trunk Railway v Wellman* (1892) 143 US 339 at 345.

With that background, this paper considers in turn:

- the role of the consent of interested States to the exercise of jurisdiction — a matter related to the authority of the opinion;
- procedural matters, in particular the redrafting of the questions put to the Court — matters related to the authority of the opinion and its connection to the facts; and
- possible uses of the jurisdiction, especially as part of political processes to go back to Sir Edward Coke and his very angry King.

The last matter arises because of the limited use of the advisory jurisdiction in the last 25 years (from the 1920s to the 1960s the numbers of judgments and opinions was approximately equal decade by decade but since 1970 only 10 opinions have been or will soon be given, compared with 25 judgments); the proposals for greater use of the jurisdiction (for instance by authorising the Secretary-General to request opinions), and the two pending requests relating to the lawfulness of the use of nuclear weapons — probably the most challenging matter ever to be referred to the Court in its contentious or advisory jurisdiction.

Is the Consent of the Interested Parties Essential to the Exercise of Advisory Jurisdiction?

In 1923, in replying to the request for an opinion in the *Eastern Carelia* case, the Court cited "a fundamental principle ... of the independence of States":

> It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or arbitration, or to any other kind of peaceful settlement.[17]

Does that well established principle mean that the Court cannot respond to a request for an advisory opinion if a State party to the dispute which is the subject of the request does not consent to the request?

Twenty five years ago, the writer concluded that:

> the Court's advisory competence is not directly excluded by the fact that a State party to the dispute which has been referred to it does not agree to it giving an opinion. This lack of consent may, however, be relevant in two other ways:
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> first, if as a result of the lack of consent the requesting organ is incompetent to deal with the matter referred to the Court, the request is invalid and the Court will, for that reason, refuse to give an opinion;
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> second, the Court may consider that the non-cooperation of a disputant State prevents it from acting judicially or for other reasons makes it desirable for the Court to exercise its discretion under article 65 of the statute and refuse to give an opinion.[18]

Those conclusions were based on the provisions of the Charter and Statute (which do not require consent; the relevant articles provide for majority votes), the Court's Rules, the *Eastern Carelia, Mosul, Peace Treaties* and *Reservations*

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17 *Request for Advisory Opinion Concerning the Status of Eastern Carelia* (1923), PCIJ Ser B5, p 27.

18 Keith, n 7 above, p 124.

cases[19] (in all but the first of which an opinion was given notwithstanding the lack of consent) and other related material. The writer's discussion of the Court's discretion balanced its sense of its duty as an organ of the United Nations to reply to the request, in the absence of compelling reasons to the contrary, and its duty as a judicial body to remain true to its judicial character.

In the past 25 years, in a further three cases, States claiming to be parties to a dispute the subject of the request for an opinion, have objected to the Court giving an opinion. In all three — *Namibia, Western Sahara* and *Privileges and Immunities*[20] — the Court gave an opinion notwithstanding the objection.

The ruling on that matter was unanimous in the first and last cases. In the *Western Sahara* case there were three and two votes against answering the two questions put to the Court, but those dissents were not clearly based on a consent argument.

In the most recent of the rulings, *Privileges and Immunities*, the Court considered the consent issue in two distinct passages, one relating to its jurisdiction, the other to its discretion.[21] On jurisdiction, Romania, which was immediately involved in the matter referred to the Court, opposed the giving of an opinion on the grounds that it had made a reservation to the dispute settlement provision (conferring jurisdiction on the Court) of the Convention on the Privileges and Immunities of the United Nations. The request had not, however, been made under that provision. The Court, as in earlier cases, founded its jurisdiction on Article 96 of the Charter and Article 65 of the Statute. The jurisdiction:

> enables United Nations entities to seek guidance from the Court in order to conduct their activities in accordance with law. These opinions are advisory, not binding. As the opinions are intended for the guidance of the United Nations, the consent of States is not a condition precedent to the competence of the Court to give them. As the Court observed in 1950:
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> > The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers

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19 *Request for Advisory Opinion Concerning the Status of Eastern Carelia* (1923), PCIJ Ser B, No 5; *Article 3, Paragraph 2 of the Treaty of Lausanne (Frontier between Turkey and Iraq)* PCIJ Ser B 12, p 6; *Interpretation of Peace Treaties, Advisory Opinion,* ICJ Rep 1950, p 65; *Reservations to the Convention on Genocide, Advisory Opinion,* ICJ Rep 1951, p 15.

20 *Legal Consequence for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion,* ICJ Rep 1971, p 16, *Western Sahara, Order of 3 January 1975,* ICJ Rep 1975, p 12; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion,* ICJ Rep 1989, p 177.

21 *Privileges and Immunities*, ICJ Rep 1989, p 177.

> to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organisation, and, in principle, should not be refused. *(Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, ICJ Reports 1950*, p 71.)

This reasoning is equally valid where it is suggested that a legal question is pending, not between two States, but between the United Nations and a member State.[22]

That ruling did not, however, exhaust the matter since:

> While ... the absence of the consent of Romania to the present pendings can have no effect on the jurisdiction of the Court, it is a matter to be considered when examining the propriety of the Court giving an opinion.[23]

It then mentioned the "well settled" jurisprudence that it would give an opinion unless there are compelling reasons to the contrary. It continued:

> In the *Western Sahara* case the Court adverted to a possible situation in which such a "compelling reason" might be present. In that case, commenting on its observations in the *Interpretation of Peace Treaties* case, to the effect that its competence to give an opinion does not depend on the consent of the interested States, the Court observed:
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> > the Court recognised that lack of consent might constitute a ground for declining to give the opinion requested if, in the circumstances of a given case, considerations of judicial propriety should oblige the Court to refuse an opinion. In short, the consent of an interested State continues to be relevant, not for the Court's competence, but for the appreciation of the propriety of giving an opinion.
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> > 33. In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction. *(Western Sahara, Advisory Opinion, ICJ Reports 1975*, p 25, paras 32–33.)
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> 38. In view of the emphasis placed by Romania on its reservation to Article 30 of the General Convention and the absence of its consent to the present request for advisory opinion, the Court must consider whether in this case "to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent". The Court considers that in the present case to give a reply would have no such effect. Certainly the Council, in its resolution requesting the opinion, did

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22 *Ibid*, at 189.
23 *Ibid*, at 190.

> conclude that a difference had arisen between the United Nations and the Government of Romania as to the *applicability* of the General Convention in the case of Mr Mazilu. In the present case, the Court thus does not find any compelling reason to refuse an advisory opinion.[24]

The same framework and comparable analysis is to be found in the earlier *Western Sahara* case:

> the absence of an interested State's consent to the exercise of the Court's advisory jurisdiction does not concern the competence of the Council, but the propriety of its exercise.[25]

In its decision on the propriety of answering, the Court, in the paragraphs following that (33) already quoted above in the *Privileges and Immunities* opinion, characterised the matter referred to the Court:

> 34. The situation existing in the present case is not, however, the one envisaged above [in para 33]. There is in this case a legal controversy, but one which arose during the proceedings of the General Assembly and in relation to matters with which it was dealing.
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> ...
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> 39. The above considerations are pertinent for a determination of the object of the present request. The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court's opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an entirely different one: to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions concerning the decolonisation of the territory.
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> ...
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> 42. Furthermore, the origin and scope of the dispute, as above described, are important in appreciating, from the point of view of the exercise of the Court's discretion, the real significance in this case of the lack of Spain's consent. The issue between Morocco and Spain regarding Western Sahara is not one as to the legal status of the territory today, but one as to the rights of Morocco over it at the time of colonisation. The settlement of this issue will not affect the rights of Spain today as the administering Power, but will assist the General Assembly in deciding on the policy to be followed in order to accelerate the decolonisation process in the territory. It follows that the legal position of the State which has refused its consent to the present proceedings is not "in any way compromised by the answers that the Court may give to the questions put to it" *(Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, ICJ Reports 1950*, p 72).[26]

Those lengthy passages are quoted to make six points:

1. they consolidate the conclusion reached in 1971 that a lack of consent does not directly affect the jurisdiction of the Court to give an advisory opinion; that conclusion is supported by the fact that in six of the seven cases in

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24 *Privileges and Immunities*, ICJ Rep 1989, p 177 at 188–89, 191.
25 ICJ Rep 1975, p 12 at 20 citing the *Peace Treaties* case.
26 *Ibid,* at 25, 26–27.

which a State claiming to be a party to the dispute referred to the Court has objected to the giving of an opinion on the grounds that it has not consented, the Court has nevertheless given the opinions; the seventh, *Eastern Carelia*, is to be explained by the lack of competence of the *requesting organ* (the League Council) because of Russia's lack of consent; the lack of consent had no direct effect on the *Court's* jurisdiction;

2. the passages, along with the decision in the *Namibia* case,[27] nevertheless indicate that the lack of consent can lead as a matter of discretion to an opinion not being given if the issue on which the Court is ruling can be characterised as a dispute to the judicial settlement of which the State has not consented;
3. although the discretion in (2) has never been exercised the Court has reserved to itself a very broad discretion which might be related to the broad freedoms which final Courts often have not to consider cases on their merits: notwithstanding that reservation, probably all of the dissenting States would contend that a dispute to which they were party has in fact been submitted to judicial settlement without their consent; consider also cases such as the *Expenses* opinion[28] and the *Nuclear Weapons* requests where States with very strong interests in the issues were opposed both to the reference being made and to an opinion being given;
4. the Court appears to be very likely to consider that its characterisation of the requests — that they are for the purposes of the requesting organ which, after all, has decided that it requires the advice (and accordingly there is a duty to reply in the absence of compelling reasons) — overrides the possible characterisation as in (2);
5. it is significant that such an important principle as that of consent to jurisdiction arising out of the fundamental principle of independence is operating only at the level of discretion and not at the level of power — and has never, in fact, been effectively invoked at that level of discretion;
6. but the lack of impact of several of the opinions given against the protest of a dissenting disputant State does point to the difficult choices to be made; it does however seem to me that it would be hazardous in the extreme for the Court to speculate about that matter; the responsibility to invoke the jurisdiction must be left with the requesting organ.

Closely related to the willingness demonstrated in this range of cases to answer the request are the procedures followed by the Court in advisory cases. The existence of a dispute — or rather the exact character of the dispute — may affect the composition of the Court through its power to appoint judges *ad hoc*, the procedure it follows for instance in terms of participation in written and oral procedures, and the way it frames its answers to the request. The paper now turns to that last matter.

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27 ICJ Rep 1971, p 16.

28 *Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion,* ICJ Rep 1962, p 151; see eg Higgins R, *Problems and Process: International Law and How We Use It* (1994), pp 199–201.

What Freedom does the Court have in Formulating the Answer to the Request?

The basic procedural principle continues to be that the Court must keep true to its judicial character. That principle is reflected in the Statute, particularly Article 68 and its direction of the assimilation of the advisory process to the contentious, and in the practice as seen, for example, in the careful insistence on the equality of the parties in the administrative tribunal cases.

This paper gives attention to just one aspect of the Court's procedure: its formulation of the answers to the requests. That practice is directed to the two sides of the Court's advisory role: as a judicial organ it may wish to redraft the question since, to quote Judge Lauterpacht, "it is a matter of common experience that a mere affirmation or denial of a question does not necessarily result in a close approximation to truth";[29] and, as a United Nations organ, it will want to ensure so far as possible that its opinion is of use to the requesting organ. Those two influences appear in a review of the practice up to 1970.[30] They also appear in the practice of the following 25 years.

Of the eight requests answered between 1971 and 1989, five and as well one of the questions asked in another, invited *yes* or *no* answers, assuming that is that the question put did present a legal question which could be so answered. In all but one of those cases[31] the Court did in fact answer the question yes or no, in the precise terms put to it:

- The United Nations Administrative Tribunal did not on two occasions fail to exercise its jurisdiction or err on a question of law.[32]
- The United States was obliged to enter into an arbitration under the Headquarters Agreement with the United Nations concerning the Palestine Liberation Organisation office in New York.[33]
- The convention on the privilege and immunities of the United Nations was applicable to a particular person as an officer of the sub-Commission on the Prevention of Discrimination and Protection of Minorities.[34]
- The Western Sahara was not, at the time of colonisation by Spain, a territory belonging to no one (*terra nullius*).[35]

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29 *Admissibility of Hearings of Petitioners by the Committee on South West Africa Advisory Opinion,* ICJ Rep 1956, p 23 at 37.

30 *Privileges and Immunities*, ICJ Rep 1989, p 177 at 63–71.

31 The *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* ICJ Rep 1980, p 73; considered later, pp 52–53, below.

32 *Application for Review of Judgment No 158 of the United Nations Administrative Tribunal, Advisory Opinion,* ICJ Rep 1973, p 166 and *Application for Review of Judgment No 333 of the United Nations Administrative Tribunal, Advisory Opinion*, ICJ Rep 1987, p 18.

33 *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion,* ICJ Rep 1988, p 12; cf *United States v Palestine Liberation Organization* (USDC, SDNY) (1988) 27 ILM 1055.

34 *Privileges and Immunities* case, ICJ Rep 1989, p 177.

35 *Western Sahara* case, ICJ Rep 1975, p 12.

But in the other cases the questions did not allow such direct answers, either because of a deliberate choice made by the requesting organ or because of the assessment made by the Court of the question in its context.

The Court made such an assessment, that is to say that the question notwithstanding its form could not be answered in exactly the form in which it was presented, in the third of the cases challenging a judgment of the United Nations Administrative Tribunal.[36] The statute of the Tribunal provided that judgments of the Tribunal could be reviewed on the grounds *inter alia* that the Tribunal had erred on a question of law relating to the provisions of the Charter or had exceeded its jurisdictional competence. The question put to the Court was not so confined. Rather, it asked whether the Tribunal was warranted in determining that a certain General Assembly resolution could not be given immediate effect. The Court found that the question had been badly drafted. It did not appear to correspond to the intentions of the committee which requested the opinion. Accordingly, the Court, in the light of the discussions in that committee, interpreted the question as requiring it to determine with respect to the matters mentioned in the question whether the Tribunal had erred on a question of law relating to the provisions of the Charter or exceeded its jurisdictional competence.

The Court in interpreting the question in that way referred to its duty to reply and its reiterated statement that only compelling reasons would lead it to the client. It quoted from the opinion relating to the WHO-Egypt Agreement, discussed later in this paper, the following passage:

> If [the Court] is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request.[37]

It found no difficulty in terms of that proposition and the grounds of error of law and jurisdiction stated in the statute of the Administrative Tribunal when testing the issue raised.

In two other cases the requesting bodies asked the Court in substance to answer open-ended questions which did not themselves clearly incorporate elements of the possible answer.

In 1970 the Security Council of the United Nations asked the Court the following question:

> What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)?[38]

In Resolution 276 the Council referred to the decision of the United Nations that the mandate of South West Africa was terminated, it condemned South Africa's non-compliance with General Assembly and Security Council resolutions concerning the territory, and it declared in operative paragraph two that the continued presence of the South African authorities in Namibia was illegal and

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36 *Application for Review of Judgment No 273 of the United Nations Administrative Tribunal, Advisory Opinion,* ICJ Rep 1982, p 325.

37 *WHO-Egypt* case, ICJ Rep 1980, p 73 at 88, para 35.

38 *Namibia* case, ICJ Rep 1971, p 16 at 17.

that consequently all acts taken by the government of South Africa on behalf of or concerning Namibia after the termination of the mandate were illegal and invalid. As well, it called on all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with operative paragraph two of the resolution.

The Court stated its opinion in three paragraphs:

1. that the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus to put to an end its occupation of the territory;
2. that States Members of the United Nations are under obligation to recognise the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;
3. that it is incumbent upon States which are not members of the United Nations to give assistance, within the scope of sub-paragraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.[39]

This case of course gives rise to a great number of questions. For the present purposes it is enough to make two points. The first is by way of repetition: that the Court in effect had to write its own question in stating that more detailed answer.

The second point is that even that relatively detailed answer is in broad terms and is not capable of automatic application. For example, in paragraph 122 of the opinion, the Court qualified the conclusion stated in sub-paragraph (2) above. While on the one hand Member States are under an obligation to abstain from entering into bilateral treaty relations with South Africa, on the other hand in cases in which the Government of South Africa purports to act on behalf on or concerning Namibia with respect to multilateral treaties, the situation may be different:

> the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect.[40]

A little later in its opinion the Court further qualified any absolute understanding of the principle of non-recognition:

> In general, the non-recognition of South Africa's administration of the territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South African on behalf of or concerning Namibia after the determination of the Mandate are illegal and invalid, this invalidity cannot be

39 *Ibid,* at 58.
40 *Ibid,* at 55.

> extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory (para 125).[41]

Similar comments are made in separate opinions. Judge Dillard confined himself to "a few comments mainly of a cautionary nature" in respect of operative sub-paragraph (2). He commented that considerations of a practical and humanitarian nature are clearly involved in light of the economic interdependence of the two areas of South Africa and Namibia and their interlocking administrative structures. He gave an example:

> if a famine or a cholera epidemic were to break out in Namibia prior to the effective exercise of the control by the United Nations a measure of intergovernmental co-operation between South Africa and other states might well be required. Likewise if an official plane were grounded ... dealings would be needed between the government officials of both states. No implication of recognition flows from such a dealing .... It is needless to add examples which cover a wide spectrum of relations.[42]

Judge Petren referred in his separate opinion to other more mundane administrative acts:

> Customary usage does not seem to be the same at the administrative level [as opposed to the diplomatic and formal level], since necessities for practical or humanitarian nature may justify certain contacts, or certain forms of co-operation.
>
> A similar approach seems to prevail in relation to international agreements. While non-recognition seems not to permit the formal conclusion of treaties between governments, agreements between administrations, for instance on postal or railway matters, are considered to be possible. In the same way, the legal effect to be attributed to the decisions of the judicial and administrative authorities of a non-recognized State depends on human considerations and practical need.[43]

The cautionary comments in the opinion and in the separate opinions help make the point that a general answer given by way of an advisory opinion which looks to future activities in a complex situation may well have within it very appropriate elements of flexibility. It may not be possible to adopt an absolute position, in this case of complete non-recognition.

The second question asked by the General Assembly in respect of *Western Sahara* was:

> What are the legal ties between this territory [of Western Sahara] and the Kingdom of Morocco and the Mauritanian entity?[44]

The formal answer to that question is that there are legal ties between the territory and the Kingdom of Morocco and the Mauritanian entity of the kinds indicated in paragraph 162 of the opinion. That paragraph is the last paragraph of the substantive part of the opinion. It is as follows:

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41 *Ibid,* at 56.
42 *Ibid,* at 166–67.
43 *Ibid,* at 134.
44 ICJ Rep 1975, p 12 at 14.

> The materials and information presented to the Court show the existence, at the time of Spanish colonization, of legal ties of allegiance between the Sultan of Morocco and some of the tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. On the other hand, the Court's conclusion is that the materials and information presented to it do not establish any tie of territorial sovereignty between the territory of Western Sahara and the Kingdom of Morocco or the Mauritanian entity. Thus the Court has not found legal ties of such a nature as might affect the application of resolution 1514(XV) in the decolonization of Western Sahara and, in particular, the principle of self-determination through the free and genuine expression of the will of the people of the Territory.[45]

The most spectacular example of the rewriting of the question has been kept to last. It arose from the first request made by the World Health Assembly[46] — the only one it has made other than that relating to the legality of the use of nuclear weapons. It also concerned a complex political problem — in this case the relations between Egypt and other states of the Middle East following Egypt's signing of the Camp David Agreements. That action led among other things to a proposal to move the WHO's regional office from Alexandria. The questions put to the Court were as follows:

1. Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt?
2. If so, what would be the legal responsibilities of both the World Health Organization and Egypt, with regard to the Regional Office in Alexandria, during the two-year period between notice and termination of the Agreement?[47]

Question 1 might appear to attract a yes or no answer. The Court's answer (by 12–1) takes, however, more than half a page of the reports: it is to the effect that in the event specified in the request the legal principles and rules and the mutual obligations which they employ regarding consultation, negotiation and notice are those set out in an earlier paragraph (which runs for a page) and, in particular, the Opinion then sets out propositions relating in turn to consultation (not mentioned in the question), negotiation and notice. The Court had earlier said that "it is apparent that, although the questions ... are formulated in terms only of Section 37, the true legal question under consideration in the World Health Assembly is..." and the Court then reformulated the question in the way indicated at the beginning of this paragraph. It continued:

> This, in the Court's opinion, must also be considered to be the legal question submitted to it by the request. The Court points out that if it is to remain faithful to the requirements of its judicial character in the exercising of its jurisdiction, it must ascertain what are the legal questions really in issue in questions

45 *Ibid,* at 68.
46 *WHO-Egypt* case, ICJ Rep 1980, p 73.
47 *Ibid.*

> formulated in a request [citing *South West Africa Hearings, Expenses*]. It also points out in this connection that the Permanent Court of International Justice ... likewise found it necessary in some cases first to ascertain what were the legal questions really in issue in the questions posed in the request [citing *Jaworzina, Greco Turkish Agreement*]. Furthermore, as the Court has stressed earlier in this Opinion, a reply to questions of the kind posed in the present request may, if incomplete, be not only ineffective but actually misleading as to the legal rules applicable to the matter under consideration by the requesting Organization. For this reason, the Court could not adequately discharge the obligation incumbent upon it in the present case if, in replying to the request, it did not take into consideration all the pertinent legal issues involved in the matter to which the questions are addressed.[48]

The Court in this case as in others of redrafting demonstrated its willingness to help the requesting organ; it also reserved a freedom not to address aspects of the question which it might consider it ought to avoid. A final more technical comment might be made. In 1952 the General Assembly recommended that a proposal for a request for an opinion may be referred to the Sixth (Legal) Committee of the Assembly or a joint Committee of the relevant Committee and the Sixth Committee for advice on the legal aspects and the drafting of the request. That process has unfortunately not ever been followed.[49]

How Should the Court be Used, in Particular as Part of Political Processes?

Contentions that advisory opinions should not be requested or that the Court should not answer the request, are often put in terms of the alleged political character of the proposal or request. The Court and the requesting organs faced such arguments in relation to the first and most recent requests, in the *Admissions* case,[50] and the cases relating to the legality of the use of nuclear weapons.

The contention can take at least four different forms:

1. Is the (proposed) question a "legal question", in some inherent sense of that phase? If not, the requesting organ has no power to request the opinion and the Court is not competent to answer.
2. Because of the political context or the overall political character of the issues, should the authorised organ request the opinion? Here the issue is one of discretion rather than competence, and the discretion belongs to the requesting organ, not the Court.
3. Because of the political context or the overall political character of the issues, should the Court refuse to answer the question? Again, this is a matter of discretion, not competence, this time of the Court.
4. How is the Court, in dealing with the substance of the request, to determine the law? This question concerns judicial method: how, for instance, does the Court assess and take account of "the felt necessities of the time", or "elementary considerations of humanity", in resolving questions of law,

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48 *Ibid,* at 88–89. See similarly Judge El-Erian, pp 166–68, but compare Judge Morozov, pp 192–96.

49 See n 7 above, p 237.

50 *Admission of a State to the United Nations (Charter, Art 4),* ICJ Rep 1948, p 8.

including those relating to major issues of national and international security?

The Court has rejected all such arguments addressed to its competence and discretion, just as it has rejected all objections by dissenting States. The question in the *Admissions* case was whether the conditions for admission of a State to the United Nations States in Article 4 of the Charter were exhaustive. That question

> is and can only be a purely legal one. To determine the meaning of a treaty provision ... is a problem of interpretation and consequently a legal question.
>
> It has nevertheless been contended that the question put must be regarded as a political one and that, for this reason, it falls outside the jurisdiction of the Court. The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision.[51]

The Court has not simply rejected contentions which impugn the motives of the requesting organ. Rather, the motives may give real content to the Court's sense of obligation to the United Nations system, an obligation which the Court has formulated in these terms:

> The reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the organisation and, in principle, should not be refused.[52]

The Court has repeatedly said that only "compelling reasons" would lead it to refuse, and more recently in the *Western Sahara* case, in rejecting opposition to its giving an opinion, it emphasised the value that the requesting organ placed on having the opinion.[53]

The Court, in these cases, is being approached as part of a broader process which will generally and properly be characterised as "political". There is nothing remarkable in that. Indeed, the very idea of giving advice to the organs of the UN and to the specialised agencies will almost always carry that implication with it.[54]

That is notably the case with the present requests concerning nuclear weapons. The huge challenge presented by the development, testing, deployment and possible use of nuclear weapons has provoked a great variety of responses, internationally and nationally, by governments and others. This is not the occasion to assess or even catalogue the full range of those responses, but an historical parallel, along with some comments on the *Nuclear Tests* cases of

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51 *Ibid,* at 61.

52 *Peace Treaties,* ICJ Rep 1950, p 65 at 71.

53 ICJ Rep 1975, p 12 at 27, 36–37.

54 One possible exception was provided by the power of the Court to review decisions of the United Nations Administrative Tribunal by way of a binding advisory opinion given under the Tribunal's Statute. As from December 1995 that power no longer exists, GA Res 50/645. The review procedure was invoked only three times in 40 years and never with success.

1973–74 and 1995, hints at the role the Court might play complementary to other methods of handling such a highly political matter.[55]

In the mid-eighteenth and early nineteenth centuries, leading English and American judges were faced with very difficult questions about the legality of slavery. For the first 6 months of 1772 Lord Mansfield, who ordinarily decided cases with great expedition and no obvious strain, struggled hard with the parties to a proceeding brought before him to get them to compromise. He urged, as well, the need for parliamentary consideration of the wider set of issues; but the parties were firm to their purpose of obtaining a judgment and after a delay of three terms — in a *habeas corpus* case where time is usually of the essence — Lord Mansfield was compelled to give judgment discharging James Somersett. The judgment is, however, not remembered for that procedural and jurisdictional caution, but rather for the soaring rhetoric (at least in some reports) of its final sentences: The air of England is too pure for a slave to breathe; let the black go free.[56]

Over 50 years later, the 82 year old Lord Stowell, the great admiralty judge, in his final months in office, gave judgment in a novel case which he said occasioned him great trouble and anxiety.[57] In a lengthy judgment he decided that an Antiguan slave, who had spent a year in England and had returned to Antigua with her mistress, had not permanently lost her slave status in Antigua because of her English sojourn. Lord Stowell did not think the Mansfield judgment required that result. Again, he thought, these many questions of very serious import were entitled to the attentive consideration of the legislature, in part so that any change should be at the common expense of both countries and not simply the burden of the particular colony. In that preference for legislative action, his judgment is comparable to Lord Mansfield's. But not in rhetorical reference to principle. Rather, he emphasised the facts, including the tolerance by British authorities over the intervening generations of slavery in the colonies.[58]

The International Court in 1973–74 and then again in 1995, in the *Nuclear Tests* cases, was faced with strong arguments from a nuclear power which was also a permanent member of the Security Council and the major user of the Court over the first 50 years of its life that the matter of testing of nuclear weapons which gave rise to atmospheric fallout did not present legal issues and

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55 See eg the 1991 speech of Sir Robert Jennings, the President of the Court, to the General Assembly, *International Court of Justice Year Book 1991–92,* p 205 at 210.

56 *Somerset v Stewart* (1772) Lofft 1, 98 ER 499; *The Case of James Somersett* 20 St Tr 1; Megarry, *Miscellany-at-Law,* rev ed (1958), pp 127–28.

57 See his correspondence with Justice Joseph Story, Story W, *Life and Letters of Joseph Story* (1851), vol 1, pp 552–61.

58 *The Slave, Grace* (1827) 2 Hagg 94, 166 ER 179. On the slavery cases and more generally on the political use of litigation see Harlow C and Rawlings R, *Pressure through Law* (1992).

the Court did not have jurisdiction.[59] These matters of national security were simply not justiciable. Neither in 1974 nor in 1995 did the Court finally resolve these major issues either of jurisdiction or of substance. Rather, it determined in 1974 that the disputes, according to its particular characterisation of them, had been resolved at least for the time being by the unilateral promises of the French Government. The proceedings no longer had any object and the Court was not called upon to give decisions on them. Most of the French statements had been made after the oral argument ended in July of 1974. These judgments were not given until 20 December of that year — a very long delay for the preparation of such judgments and following a process which almost all the common law judges on the Court considered in breach of natural justice. Professor PH Kooijmans, who was then a State Secretary in the Dutch Government, recently gave a fascinating glimpse of that time in a tribute to Judge Manfred Lachs, the President of the Court during that phase:

> Judge Lachs came to see me more often than was necessary for consultations on the issue of the Court's seat in those days. There was another problem which troubled him deeply and again it was love for the Court which moved him. *The Nuclear Tests Cases* were pending before the Court; by applying the law strictly and basing itself faithfully on the closed categories of formal sources of law, the Court could easily — and from a legal point of view not incorrectly — have come to the conclusion that there was no legal impediment for France to continue to carry out its nuclear atmospheric tests. But maybe more than anybody else, Manfred Lachs was aware of the devastating effects such a decision could have for the reputation of the Court, as the General Assembly had pleaded in numerous resolutions for a discontinuance of such tests. Esteem for the Court in the international community could plummet to a new low. He realised that a [repetition] of 1966 [the rejection of the *South West Africa* proceedings on a very narrow technical ground] could be fatal for the Court and as the Court's President he hoped to avoid such an outcome. So he looked for other avenues but he wanted to try them out first. He needed a sounding board and because of the friendship which had grown between us, I happened to be that sounding board. During numerous get-togethers, luncheons, etc he argued and asked for my reactions and, although I never was sure which outcome he really wanted, during these conversations my admiration and respect grew; I had not only found a friend, but — even more important — a tutor, a guru. During these conversations I looked with new eyes at law as a social phenomenon. I learned to understand the function of the law not only as a conservating element but also as a vehicle for change.[60]

Under that presidency the Court, in December 1974, emphasised its role of peaceful settlement.

> While judicial settlement may provide a path to international harmony in circumstances of conflict, it is nonetheless true that the needless continuation of such litigation is an obstacle to such harmony.[61]

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59 *Nuclear Tests (Australia v France), Interim Protection, Order of 22 June 1973*, ICJ Rep 1973, p 99 at 135, 320, 324; and ICJ Rep 1974, p 253 at 457, 530, 535, discussed in (1984) 14 *Victoria University of Wellington Law Review* 345.

60 Kooijmans PH, *Law as a Vehicle for Change* (1994), pp 18–19.

61 ICJ Rep 1974, p 271 at 477.

The Court was able to take that approach by way of its particular characterisation of the matters referred to it by the applicant States and its interesting interpretation of the French statements, an interpretation which led it to conclude that France had bound itself not to test nuclear weapons in the atmosphere. It considered it could reach that conclusion without deciding that it had jurisdiction over the Applications.

That caution in a contentious proceeding directly confronting a nuclear power reappeared 21 years later when New Zealand in August 1995 required the Court to resume its examination of the application filed in 1973.

New Zealand argued that since France's testing in Mururoa and Fangataufa caused radiation to enter the wider environment it could take up the opportunity which the Court had reserved in December 1974 to ask the Court to re-examine the situation. In the first instance it sought interim measures of protection since the French testing programme (announced as the last) was imminent when the requests were filed last August. Contrary to principle, the rules and its completely uniform practice, the Court did not give priority to that request. Rather it asked New Zealand and France to address the question whether the main request for the examination of the situation which New Zealand had lodged fell within the scope of the paragraph in which the Court had reserved the possibility of New Zealand coming back to the Court in terms of the 1973 application and 1974 Judgment. There are signs in the Court's order and the accompanying declarations and opinions that having a hearing even on that matter was something that some members of the Court resisted. The Court did of course rule by a substantial majority (of 12–3) that the new request did not fall within the scope of the paragraph reserving the possibility of an examination of the situation. The Court in 1974 contemplated that New Zealand could return if France recommenced testing of nuclear weapons in the atmosphere; its 1995 testing was underground; the request must be rejected.[62]

There is much that can be said about the 1995 process and its broader political context and purpose. At this point, I would simply emphasise the considerable caution demonstrated in this area both in 1974 and in 1995 in respect of jurisdictional issues and accordingly although less directly in respect of nuclear weapons issues.

That caution is also to be seen in aspects of the processes followed in relation to the requests concerning the legality of the use of nuclear weapons. There are, for instance, the hesitations of the requesting organs — the proposals were considered by each Assembly during two sessions before the requests were made — the unprecedented delay by the Director-General of the World Health Organisation in sending the request to the Court, the Court's refusal of a request by

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62 Request for an examination of the situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand v France) Case Order of 22 September 1995*, ICJ Rep 1995, p 288. For a brief comment on that phase, the 1973–74 phases and the Nuclear Weapons requests see Keith in Jan–Feb (1996) *New Zealand International Review*. As on that occasion and an earlier one (n 59 above) the views I express here on the *Nuclear Tests* and *Weapons* cases are not to be attributed to anybody else.

the International Physicians for the Prevention of Nuclear War to participate in the written proceedings (although that body was the real originator of the request),[63] the lengthy times fixed for the filing of written statements and the unusual provision for written replies. On the matter of timing, it can be noted that before now all requests but one have been answered well within a year of being made, the shortest time being 55 days — only half the time the Director-General of the World Health Organisation took to get the first request from Geneva to The Hague.

As with the slavery cases in the English courts and the *Nuclear Tests* cases, the Court will be faced with the questions whether it can and should answer, what question it should answer (difficulty being caused by the wider questions asked by the General Assembly), and where it should draw its law from. In all respects, how is it to relate its role to that of the political organs of the organised world community?

I conclude first by recording my conclusion that Judge Moore was wrong — an advisory role can be properly exercised by courts, or at least by the International Court of Justice. I do not deny that jurisdiction is a difficult one and that it is not popular with States. Secondly, thinking more broadly about the judicial role, I mention a comment made in a lecture given on the 400th anniversary of the birth of that great and difficult Judge with whom I began and who also presided over his court in tumultuous times:

> Law must grow through the reinterpretation of the past, for only in such ways do judges and lawyers solve the paradox that law must be stable yet never stand still.[64]

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63 See Shelton D, "The Participation of Nongovernmental Organizations in International Judicial Proceedings" (1994) 88 *American Journal of International Law* 611.

64 Thorne SE, *Selden Society Lecture, 17 March 1952, Sir Edward Coke* (1957) 13. I am very grateful for comments on an earlier version of this paper by GP Barton QC who over 30 years ago supervised the thesis on which the book Keith, n 7 above, is based.