BRILL | NIJHOFF

THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 22 (2023) 234–272

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Not Just a Participation Trophy? Advancing Public Interests through Advisory Opinions at the International Court of Justice

Jane A. Hofbauer | ORCID: 0000-0002-0120-617X
Postdoctoral Researcher and Lecturer, Section for International Law and International Human Rights Law, Bundeswehr University Munich, Neubiberg, Germany
jane.hofbauer@unibw.de

Received 18 July 2022 | Accepted 27 February 2023 | Published online 21 July 2023

Abstract

International procedural law remains largely party-oriented and directed at the preservation of individual interests. A tension therefore arises when the ICJ is asked to adjudicate "public interest norms". Against this background, one might ask whether advisory opinions by the ICJ might serve as a more appropriate forum for protecting and enforcing public interests. Among others, they might prove better equipped for, *e.g.*, clarifying and interpreting public interest obligations without a breach thereof necessarily having already occurred, or in the case of breaches by multiple parties. However, among the generally low numbers of requests for opinions by the ICJ so far only two can be classified as "traditional public interest litigation". Recent initiatives on "community-oriented" interests have not (yet) moved forward, leaving their true potential open for debate.

The article focuses on the ICJ's procedural framework in advisory proceedings and its suitability as a forum for enforcing public interests. The argument is made that while indeed several rationales can be identified which make this procedure a seemingly well-suited format for public interest litigation, the filing of requests is often subject to political hurdles and dependent on the overall perception of the Court's exercise of its judicial function. This is rounded off by a discussion of different proposals and an assessment whether these might lead to a strengthening of the Court's competence when it comes to serving as a forum for "public interest litigation."

Published with license by Koninklijke Brill NV | DOI:10.1163/15718034-BJA10092
 | ISSN: 1569-1853 (print) 1571-8034 (online)

Keywords

public interest – advisory opinions – International Court of Justice – nuclear weapons – procedural rules – reforms – *actio popularis*

1 Introduction

Public interest litigation (*actio popularis*) is characterized by the fact that the "public, as a whole, becomes interested in the outcome of the proceedings and no member of the public has an interest in protection of such interests paramount to that of any other member of the public."[1] For a long time, the understanding was that such types of action were not part of international law,[2] for lack of the existence of a recognized "public", i.e. the international community,[3] as well as of obligations which might be considered in the "interest" of such community. The doubts relating to both reasons arguably have been dispersed. Not only has it become common to conceptualize the international legal order as an international (legal) community owed to an increased level of institutionalization, but this community is based on certain (also substantive) common principles and rules which are owed to all other members of the international community.[4] Depending on the chosen approach, such interests are sometimes also called public interests,[5] community interests, collective interest, common interests or even general interests,[6] and relate to those interests which are "over and above any interests of States concerned

1 Farid Ahmadov, *The Right of Actio Popularis before International Courts and Tribunals* (2018), 71.

2 *South West Africa Cases* (*Ethiopia v. South Africa; Liberia v. South Africa*) (*Second Phase*), *I.C.J. Reports 1966*, para. 88; see more recently Dissenting Opinion of Judge Xue in *Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), *I.C.J. Reports 2012*, para. 15.

3 Judge Fitzmaurice addressed this in his Dissenting Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*), *Advisory Opinion, I.C.J. Reports 1971*, 241 in relation to the argument on an inherent continuity between the League of Nations and the UN on the basis of an international community: "… the so-called organized world community is not a separate juridical entity with a personality over and above, and distinct from, the particular international organizations in which the idea of it may from time to time find actual expression."

4 *Barcelona Traction* (*Belgium/Spain*), *I.C.J. Reports 1970*, para. 33.

5 This goes hand in hand with the overall shift in focus on the "public" dimension of international law. See, e.g., Armin von Bogdandy, Philipp Dann and Matthias Goldmann, *Developing the Publicness of Public International Law* (2008), 3.

6 See also Ahmadov, *supra* note 1, 6, fn. 21.

individually".[7] They find protection in a number of treaties but also in general international law.[8]

Yet, international procedural law is still largely party-oriented and directed at the preservation of individual interests. It is largely conducted between those parties whose rights or interests have been harmed, even if it concerns matters which might be in the interest of the international community as well. It is only recently that the International Court of Justice (ICJ) has become more forthcoming in relation to standing on the basis of some *erga omnes partes* interests,[9] though it is clear that the ICJ does not (yet) perceive the nature of a norm itself (whether it constitutes a *jus cogens* norm or is of an *erga omnes* character) as sufficient to depart from the principles of consensual jurisdiction. Hence, insofar as the rules of standing remain unchanged, a tension may arise between the public interest norms which the Court may be asked to adjudicate and the traditionally bilateral nature of its procedures.[10] It follows that the often-noted assumption that "procedural law should follow substantive law"[11] seems to not be met by fact. Rather, the judicial policy of international courts and tribunals is often marked by considerable restraint and deference when it comes to procedural instruments which would allow for traditional means of public interest litigation (e.g., by allowing for intervention on behalf of an *erga omnes* interest,[12] or accepting *amicus curiae* submissions). This, paired with both the lack of a clear "individualized" interest and the associated political and diplomatic costs, frequently may discourage States from initiating inter-State litigation for the protection and enforcement of common/public interests.

Against this background, the question arises whether advisory opinions (AOs) by the ICJ might serve as an appropriate forum for protecting and enforcing public interests. In particular, AOs might prove better equipped for, e.g.,

7 ILC Commentary, ARSIWA para. 7 on Art. 48; see also Sarah Thin, "Community Interest and the International Public Legal Order", 68 *N.I.L.R.* (2021), 35, 40–41.

8 Giorgio Gaja, "The Protection of General Interests in the International Community", 364 *Recueil des cours* (2011), 9, 51 ff.

9 *Whaling in the Antarctic* (*Australia v. Japan: New Zealand Intervening*), *I.C.J. Reports 2014*, 226; *Obligation to Prosecute or Extradite*, *supra* note 2; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*The Gambia v. Myanmar*) (Request for the Indication of Provisional Measures: Order) (General List No. 178) (pending).

10 André Nollkaemper, "International Adjudication of Global Public Goods: The Intersection of Substance and Procedure", 23 *E.J.I.L.* (2012), 769, 771.

11 *Ibid.*, in reference to C. Wilfred Jenks, *The Prospects of International Adjudication* (1964), 184.

12 On this issue, see particularly also the profound contribution by Brian McGarry, "Obligations *Erga Omnes* (*Partes*) and the Participation of Third States in Inter-State Litigation" (in this Volume).

clarifying and interpreting public interest obligations without a breach thereof necessarily having already occurred, or in the case of breaches by multiple parties. Moreover, AOs can provide assistance by reaching a judicial determination on matters which help the international community in finding a response to a breach of public interests (e.g., through countermeasures or collective obligations of non-recognition). Recent developments in other *fora* – including the establishment of a Commission of Small Island States on Climate Change and International Law in 2021, requesting an AO by ITLOS under Article 2(2) of the COSIS Agreement in late 2022 or the request by Chile and Colombia to the Inter-American Court of Human Rights on climate change obligations in early 2023 – are premised on these points. However, among the generally low numbers of requests for AOs by the ICJ (28 as of early 2023), so far only two (one being rejected)[13] can be classified as traditional "public interest litigation", i.e. litigation which is directed primarily at protecting the interests of the international community at large (without any (parallel) individual legal interests of specific members).[14] The year-long campaign at the UN preceding negotiations on the most recent draft resolution requesting an AO on obligations and legal consequences arising in the context of climate change demonstrate the challenges in obtaining a majority vote in the often politically divided UNGA.

This article raises the question whether amendments or adaptions to the ICJ's procedural framework on AOs could increase its suitability as a forum for safeguarding and enforcing public interests. The argument is made that while indeed several rationales can be identified which make AOs generally a seemingly well-suited format for public interest litigation (Section 2), and the procedural framework of the ICJ in principle supports this conclusion (Section 3), the filing of requests is often subject to insurmountable political hurdles and dependent on the overall perception of the Court's exercise of its judicial function (Sections 4 and 5). This is rounded out by a series of reform proposals and suggestions of shifting judicial policy to a more liberal reading of the current procedural framework to strengthen the Court's advisory competence when it

13 *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*.

14 While other instances often emphasized the UN's institutional framework, several concerned general questions of international law, some of which related to *erga omnes* rights and obligations (particularly self-determination). In some assessments of "public interest litigation", these might also generally qualify thereunder. Given that these examples however nevertheless reflected certain individualized legal interests of – at minimum – the units claiming the right to self-determination (*Western Sahara, Wall, Kosovo, Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*), it was chosen to not consider them true public interest AOs.

comes to serving as a forum for "public interest litigation" (Section 6). A short conclusion follows.

2 The Role of AOs in International Dispute Settlement and Their Public Interest Character

The international legal order's adjudicative bodies have increased in number and institutional design over previous years. Dependent on their design and treaty framework, their role and function varies, particularly when it comes to questions exceeding the traditional dispute settlement function.[15] While the nature of international adjudication itself might be seen as sufficient to argue for "a wider systemic function extending beyond the resolution of disputes",[16] some international bodies have taken on this perspective more willingly.[17] On the other hand, the ICJ, in particular, has at times been criticized for not embracing this role, often confining itself – at least formally – to serving as a mere (bilateralist) dispute settlement body.[18] However, scholars have asserted that the ICJ's exercise of its advisory competence deviates from the narrow approach it follows in contentious proceedings,[19] thereby reinforcing the "communally-oriented UN system".[20] This will also affect the question as to what role AOs might play when it comes to public interest litigation.

AOs are opinions by judicial bodies which are issued at the request of an authorized body; at the international level, this might be an organ of an international organization (IO) (as is the case with regard to the ICJ), or also on behalf of States[21] or other entities. Of the approximately 20 standing international and regional adjudicative bodies in operation, the majority have the competence to issue advisory opinions (aside from international criminal

15 Stephan Wittich, "The Judicial Functions of the International Court of Justice", in Isabelle Buffard et al. (eds.), *International Law Between Universalism and Fragmentation* (2008), 981, 989.

16 Gleider Hernández, *The International Court of Justice and the Judicial Function* (2014), 586; Robert Kolb, *The International Court of Justice* (2013), 47.

17 *Ireland/UK*, ECtHR, App. No. 5310/71 (1977), para. 154.

18 See, e.g., *Northern Cameroons* (*Cameroon v. United Kingdom*), *I.C.J. Reports 1963*, 33–34; similarly *Nuclear Tests* (*Australia v. France*), *I.C.J. Reports 1974*, paras. 56–57; *Armed Activities on the Territory of the Congo* (*DRC v. Uganda*), *I.C.J. Reports 2005*, para. 26.

19 See, e.g., John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* (1999), 14.

20 Kolb, *supra* note 16, 1150.

21 See, e.g., Art. 47 ECHR, extended by Protocol No. 15.

bodies).[22] As is the case with the nature of international dispute settlement bodies generally, the precise role and function of advisory opinions will vary depending on the institutional framework in which they are embedded. That said, the primary purpose of such opinions is to respond to a legal question in a public manner. This also distinguishes AOs from the task of a permanent legal adviser established for the benefit of specific organs,[23] and reinforces the early twentieth century "peace through law" mission, which rested on the idea that the work of independent international judicial bodies could constitute a viable alternative to war.[24]

AOs are generally preceded by written and oral statements, potentially by a wide range of participants, and are directed towards the requesting organ. But even more so, they are directed at all members of the legal regime of which the issuing organ is part. Hence, by their very nature, AOs seem to fulfil the "public interest" task better than contentious proceedings.

Firstly, they increase the participatory role[25] of the "international community" by providing *locus standi* to other entities in international adjudicative *fora* than in contentious cases. IOs – though not without some criticism[26] – are generally viewed as representative of said community,[27] and those whose functions include "safeguarding the interest of the international community as

22 See the constituent documents of the Andean Court of Justice, Caribbean Court of Justice, Central American Court of Justice, CJEU, COMESA Court of Justice, EACJ, ECOWAS, ECtHR, EFTA Court, IACtHR, ICJ, ITLOS, WTO DSB. See also Hugh Thirlway, "Advisory Opinions", *M.P.E.P.I.L.* (2006), paras. 4 ff., noting that the advisory function is not an inherent element of the judicial function but must be expressly conferred.

23 Åke Hammerskjöld, "The Early Work of the Permanent Court of International Justice", 36 *H.L.R.* (1923) 704, 715–717.

24 Cf. Kolb, *supra* note 16, 1020; cf. Jane A. Hofbauer, "1918 – The League of Nations as a 'First Organized Expression of the International Community' and the Permanent Court of International Justice as its Guardian", 23 *A.R.I.E.L.* (2020), 3.

25 Christine Chinkin, "Increasing the Use and Appeal of the Court", in Connie Peck and Roy S. Lee (eds.), *Increasing the Effectiveness of the International Court of Justice* (1997), 43, 53.

26 See, e.g., Jan Klabbers, "What Role for International Organizations in the Promotion of Community Interests? Reflections on the Ideology of Functionalism", in Eyal Benvenisti and Georg Nolte (eds.), *Community Interests Across International Law* (2018), 86.

27 See, e.g., Pierre-Marie Dupuy, "The Constitutional Dimension of the United Nations Charter Revisited", 1 *Max Planck U.N.YB.* (1997), 1, 22, on the SC acting as a representative of the international community. Other examples include the International Seabed Authority, recognized in *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (*Request for Advisory Opinion submitted to the Seabed Disputes Chamber*) (2011) to act "on behalf" of mankind (para. 76). UNESCO was recognized as representing the international community in *Prosecutor/Ahmad Al Faqi Al Mahdi* (Reparations Order), ICC-01/12-01/15 (2017), para. 107.

a whole underlying the obligation breached"[28] are also called upon to invoke the responsibility of States when it comes to obligations breached which are owed to the international community as a whole. Yet, to date, there are hardly any appropriate *fora* available where IOs enjoy standing.[29] Also States have participated more broadly in ICJ advisory proceedings than in contentious cases. Thus, as of February 2023, the number of States (125), international organizations (10) and semi-State entities (2) which have addressed the Court in advisory proceedings is larger than in contentious cases (104), even if these far outnumber the number of advisory proceedings (157 versus 27).[30] This has led some to argue that "advisory proceedings may appear as a form of democratic aspiration by the international community, providing an opportunity for a transparent public debate based on legal considerations, rather than power politics."[31]

Second, they enable an "adjudicative approach" – i.e. a response through an exercise of the judicial function, guided by judicial independence and impartiality – to questions of international public interest. Thus, when it comes to the ICJ's AOs, the Court has repeatedly emphasized that they are part of its judicial function.[32] This means that "the Court's activity is identical. It consists of pronouncing on the law, that is, of interpreting legal rules, to clarify their applicability or application. In both [contentious and advisory cases], the Court is called upon to identify the abstract field in which the rules apply, their application to concrete situations, and/or the legal consequences flowing from their application."[33]

28 Art. 49(3) ARIO, corresponding to Art. 48 ARSIWA. The Commentary to ARIO particularly focuses on the EU's practice (para. 9 of the Commentary on Art. 49).

29 In some dispute settlement settings, this might concern the EU (e.g., in the WTO) as it is a party in its own right. ITLOS allows for some access of non-State actors, and some human rights bodies allow for direct access of NGOs.

30 Numbers obtained through information collected on the website of the Court, including (but not only) the *Yearbook of the I.C.J.* (2019–2020). The most recent pending AO proceedings in *Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* has not been counted.

31 Pierre d'Argent, "Article 65", in Andreas Zimmermann and Christian Tams (eds.), *The Statute of the International Court of Justice* (2019), 1783, 1810–1811.

32 *Certain Expenses of the United Nations, Advisory Opinion, I.C.J. Reports 1962*, 155; see also, e.g., Judge Lauterpacht's Separate Opinion in *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, 92: "Clearly, in order to reply to [the] question, the Court is bound in the course of its reasoning to consider and to answer a variety of legal questions. This is of the very essence of its judicial function which makes it possible for it to render Judgments and Opinions which carry conviction and clarify the law".

33 Kolb, *supra* note 16, 1020–1021.

Third, and closely linked to the second point, AO s strengthen the international rule of law by expanding the possibilities for subjecting international relations to judicial reasoning. Access to international dispute settlement *fora* constitutes an essential element in this regard.[34] On the one hand, advisory proceedings can be used to avoid procedural and litigation difficulties arising in connection with *erga omnes* obligations. For example, not only is it not necessary to find a suitable jurisdictional basis, obtain the consent of a reluctant respondent, or comply with the indispensable third party rule; asking for an AO on such matters also avoids the *erga omnes* interest being overshadowed by the "private" interest[35] or that the initiation of proceedings might serve as a frontage for some other intention of the State, thus deflecting interest from the interest of the international community. On the other hand, AO s can be used to request an interpretation on international law to further "global public policy".[36] Even if international courts seem to have become more forthcoming as regards the standing (of *States*) in case of *erga omnes* obligations, there is the risk of a lack of (political) incentives for a State or member of a group to initiate contentious proceedings owing to potential diplomatic fall-out.[37] Advisory proceedings are, however, not directly addressed to two litigating parties and can thus avoid – bilaterally – politically motivated litigation.[38] Moreover, as argued by Cot and Wittich, the principle *jura novit curia* "is applicable *a fortiori* in advisory proceedings which serve the public interest even more than

34 See also Kenneth J. Keith, "The International Rule of Law", 28 *Leiden Journal of International Law* (2015), 403.

35 A somewhat related point has been raised arguing that, in those cases in which obligations which are owed to the international community as a whole are breached, only the community "is the beneficiary of the obligations in question [and] individual States are not entitled to respond." Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (2005), 174 ff. (providing an overview of the debate).

36 Laurence Boisson de Chazournes, "Advisory Opinions and the Furtherance of the Common Interest of Mankind", in Laurence Boisson de Chazournes (ed.), *International Organizations and International Dispute Settlement: Trends and Prospects* (2002), 105, 107.

37 Following decades of reluctance to make reference to the ICJ in many groundbreaking documents, such as UNGA Resolution 2625, note the need to include in the Manila Declaration on the Peaceful Settlement of International Disputes, Annex to UNGA Resolution 37/10 (1982) a passage on the "friendliness" of proceedings (para. II.5). However, as underscored in Malcolm Shaw, *Rosenne's Law and Practice of the International Court 1920–2015* (2016), 124–125, this does not necessarily correspond to political practice and the "unfriendly perception" especially of unilateral applications to the ICJ.

38 This is not to say that voting on the request for an AO is not subject to a variety of political motives. The ICJ has, however, emphasized that these are not relevant for the performance of its judicial function. The Court's judicial policy, however, of course is impacted by the political implications a response might have and has at times been known to not address the full question (cf. *Kosovo*).

contentious proceedings",[39] the latter being subject to party autonomy and also at least indirectly guided by judicial economy. Advisory proceedings therefore work towards the clarification of certain aspects of law,[40] and oftentimes in their responses contribute to the development of international law.[41] The limit on this is outright judicial law-making, which courts have been careful to avoid directly engaging in.[42]

A fourth reason concerns the fact that AO s are an additional possibility of (multilateral) enforcement, thus the relevance of the contribution of participants goes beyond the act itself. Even though AO s generally are non-binding,[43] "it is equally recognized that an advisory opinion entails an authoritative statement of international law on the questions with which it deals. […] [J]udicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the 'principal judicial organ' of the United Nations with competence in matters of international law".[44] Kolb has suggested that deriving "from the duty of cooperation between the various organs of the UN" requesting organs must "duly take account"[45] of the given opinion and the "point of law decided by the Court's jurisdictional act […] becomes binding".[46] However, this will likely only apply in cases in which the organization has a direct interest in

39 Jean-Pierre Cot and Stephan Wittich, "Article 68", in Andreas Zimmermann and Christian Tams (eds.), *The Statute of the International Court of Justice* (2019), 1843, 1866–1867.

40 See, e.g., Karin Oellers-Frahm, "Lawmaking Through Advisory Opinions", in Armin von Bogdandy and Ingo Venzke (eds.), *International Judicial Lawmaking* (2012), 69, 80 ff., especially 86.

41 *Conditions of Admission of a State to Membership in the United Nations*, *Advisory Opinion*, *I.C.J. Reports 1948*, 68 (Individual Opinion of Judge Alvarez).

42 As noted by Hersch Lauterpacht (*The Development of International Law by the International Court* (1958), 76) – generally a proponent of a progressive Court –: "An international court which yields conspicuously to the urge to modify the existing law – even if such action can be brought within the four corners of a major legal principle – may bring about a drastic curtailment of its activity".

43 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*First Phase*), *Advisory Opinion*, *I.C.J. Reports 1950*, 71. It is, however, possible to depart from this rule in the form of a specific treaty provision. See, e.g., Art. IX, sec. 32 of the Convention on the Privileges and Immunities of the Specialized Agencies.

44 *Dispute Concerning Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean* (*Mauritius/Maldives*) (Preliminary Objections), 2021 ITLOS, paras. 202–203.

45 The requesting body generally issues some sort of resolution "taking note" or "affirming" the opinion, see, e.g., the GA Resolution following the *Nuclear Weapons* (Resolution 51/45 (1997)), *Wall* (Resolution ES-10/15 (2004)) and *Chagos* (Resolution 73/295 (2019)) opinions.

46 Kolb, *supra* note 16, 1097–1098.

the matter.[47] This notwithstanding, the legal effect of AOs is not so different from contentious cases. Obviously, the principle of *res judicata* will not apply, however, as opinions stemming from a court of law, it is unlikely the respective judicial body would depart from its opinion unless new facts or legal developments were argued.[48] As noted by Judge De Castro in *Namibia*: "the reasoning and operative part of an advisory opinion are, at least potentially, clothed with a general authority, even vis-à-vis States which have not participated in the proceedings, and may therefore contribute to the formation of new rules of international law."[49] Moreover, when it comes to *erga omnes* obligations, the ICJ does not shy away from establishing the responsibility of States for breaches committed, calling for cessation of such acts, and speaking out on the legal consequences for all States.[50] Political or diplomatic follow-ups on these pronouncements also often occur.[51]

Finally, their suitability for public interest litigation is reflected in the rules governing advisory proceedings, as addressed in the following.

3 The ICJ's Advisory Competence and Procedure, from a Public Interest Perspective

The ICJ's advisory competence is guided by Articles 65–68 ICJ Statute, Articles 102–109 Rules of Court (RoC) and Practice Direction XII. Additionally, further provisions of the Statute and Rules shall guide the Court "to the extent to which [the Court] recognizes them to be applicable" (Article 68 ICJ Statute, Article 102(2) Rules). The following provides an overview of key aspects of the ICJ's advisory procedure that are particularly conducive to foster public interest litigation.

3.1 *Jurisdiction* Ratione Personae*: Unrestricted Access by the General Assembly and Security Council*

Generally, the power of the General Assembly (GA) and Security Council (SC) to request an AO by the Court has been understood as unrestricted

47 Laurence Boisson de Chazournes and Antonella Angelini, "After 'The Court Rose': The Rise of Diplomatic Means to Implement the Pronouncements of the International Court of Justice", 11 *L.P.I.C.T.* (2012), 1, 33.

48 Cf. Kolb, *supra* note 16, 1096.

49 *Namibia*, *supra* note 3, 174 (Separate Opinion of Judge De Castro).

50 See, e.g., in *Wall* (paras. 148 ff.) and *Chagos* (paras. 177 ff.).

51 Boisson de Chazournes and Angelini, *supra* note 47, 37, mentioning, e.g., the registry for damages following *Wall*.

(Article 96 UN Charter). This applies with the small caveat that the question should relate to a matter that "falls within the UN's purview".[52] However, some States have argued that there needs to be a sufficient interest by the requesting organ.[53] The Court's majority has not supported this argument, but has also not entirely ruled it out.[54] As it stands, given that the UN today speaks on almost all questions of international concern, also where not explicitly mentioned in the UN Charter such as environmental matters, it is unlikely that the power of particularly the GA (with "residual jurisdiction"[55] on the basis of Article 10 UN Charter) but also the SC would in any way be curtailed by an assessment of their (primary) responsibility or interest in a public interest matter.

3.2 *A Request on "Any Legal Question"*

The ICJ's advisory subject matter jurisdiction relates to "any legal question" (Article 65(2) ICJ Statute). The emphasis on "legal question" is understood to be in juxtaposition to questions arising in relation to political matters.[56] However, as in the case of contentious cases, the fact that a question includes political aspects does not "deprive it of its character as a legal question."[57]

Public interests in international law often refer to those interests which are "over and above any interests of States concerned individually",[58] and have in many instances found protection in international treaties but also general international law. Hence, as long as the request is framed in legal terms and concerns aspects which are capable of some "objective legal determination",[59]

52 Kolb, *supra* note 16, 1038; Shaw, *supra* note 37, 297.

53 Note that – for strategic reasons – this is sometimes argued under the heading of "discretion".

54 This became relevant particularly in *Kosovo* where the Court noted that, while the General Assembly had created "a new agenda item for the consideration of the proposal to request an opinion from the Court" (para. 38), this did "not mean that the General Assembly [had] no legitimate interest in the question" (para. 40), emphasizing that the General Assembly had very broad powers to discuss matters within the UN's scope of activities. See, however, the Separate Opinion of Judge Keith and the Declaration of Judge Tomka, both arguing that there was a lack of "sufficient interest".

55 Kolb, *supra* note 16, 1040, in reference to *International Status of South West Africa*, where the General Assembly "inherited a function of the League of Nations".

56 Pierre d'Argent, "Article 96 UN Charter", in Andreas Zimmermann and Christian Tams (eds.), *The Statute of the International Court of Justice* (2019) MN 13, 15; d'Argent, *supra* note 31, 1795.

57 See also *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, *I.C.J. Reports 2010*, para. 27.

58 See *supra* note 7.

59 *South West Africa Cases*, *supra* note 2, 466 (Joint Dissenting Opinion of Judges Spender and Fitzmaurice).

there is in principle no barrier to constituting the basis for an advisory opinion. Furthermore, a legal question may concern, e.g., the compatibility with international law,[60] and should be "framed in terms of law and raise problems of international law".[61] The Court has also emphasized that the "references to 'any legal question' [...] are not be interpreted restrictively."[62] The question may relate to "factual issues",[63] be of a "historical character",[64] and may also be "abstract or otherwise".[65] Particularly, this latter category can prove essential in public interest AOs. Thus, in *Western Sahara*, the Court highlighted that there is no necessity of the request to relate to "existing rights",[66] or the opinion to pronounce "directly upon the rights and obligations of the States or parties concerned".[67] In contrast, the Court has declared contentious cases inadmissible *ratione materiae* when the dispute has become moot.[68]

3.3 *Discretion*

Article 65 ICJ Statute clarifies that the Court has discretion whether to exercise its jurisdiction ("may").[69] However, as is clear from the Court's practice, the Court's discretion is not unlimited but rather constrained, i.e. it will only decline responding to a request if "compelling reasons" are given.

While there are no clear-cut criteria for identifying "compelling reasons", it has been argued that these are "general considerations" relating to admissibility.[70] Unlike in contentious cases, these have not been specified into specific conditions yet, but similarly are geared at "safeguard[ing] the integrity

60 *Kosovo*, *supra* note 57, para. 25; *Nuclear Weapons*, *Advisory Opinion*, *I.C.J. Reports 1996*, para. 13.

61 *Western Sahara*, *Advisory Opinion*, *I.C.J. Reports 1975*, para. 15.

62 *Ibid.*, para. 18.

63 *Namibia*, *supra* note 3, para. 40.

64 *Western Sahara*, *supra* note 61, para. 18.

65 *Conditions of Admission*, *supra* note 41, 61.

66 *Western Sahara*, *supra* note 61, para. 19.

67 *Ibid.* However, the lack of "relevance or practical interest of the questions posed" (para. 20) could raise an issue of judicial propriety and lead the Court to decline the request.

68 *Northern Cameroons*, *supra* note 18, 33–34.

69 d'Argent, *supra* note 31, 1788. See also *Certain Expenses*, *supra* note 32, 155, emphasizing the "permissive character of Article 65". This was not so clear with regard to the PCIJ as the French version of Article 14 of the League of Nations Covenant read: "Elle donnera aussi des avis consultatifs sur tout différend ou tout point, dont la saisira le Conseil ou l'Assemblée". Article 65 ICJ Statute now reads "peut donner".

70 Cf. Georges Abi-Saab, "On Discretion. Reflexions on the Nature of the Consultative Function of the International Court of Justice", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999), 36, 43 ff.

of the Court's judicial function and its nature as the principal judicial organ of the United Nations".[71] Public interest AOs do not seem to raise any particular concerns that would warrant a change in judicial policy. Quite the opposite, in some instances they even seem to disperse threats to the judicial integrity of the Court, e.g., by focusing on the community interest attached to what might appear as a potential parallel bilateral dispute,[72] or by relying on an "abundance of material [...] presented before it"[73] to ensure sufficient information to "make findings as to the relevant factual issues".[74] There are nevertheless certain limits. For example, questions of propriety might arise, e.g., when responding to a request which proves "unsuitable to the role of a Court of Justice", such as asking for the precise manner in which legal obligations should be implemented.[75] The Court has also emphasized that it would not "anticipate the law before the legislator has laid it down".[76]

3.4 *Participants*

The "public interest suitability" of advisory proceedings further is evident in Article 66 ICJ Statute which is central in ensuring a broad range of participants, both to furnish information similar to an *amicus curiae* function,[77] and as a representation of the interests of the international community.[78] This begins with the transmission of the request to the Court by the UN Secretary-General (UNSG) (Article 104 RoC), as well as of "all documents likely to throw

71 *Kosovo*, *supra* note 57, para. 29.

72 See, e.g., *Western Sahara*, *supra* note 61, paras. 30–38, where the Court emphasized the broader frame of reference despite the fact that Morocco's Minister for Foreign Affairs had previously sent a communication to the Spanish Minister for Foreign Affairs suggesting the joint submission of the dispute to the ICJ (para. 26). See also d'Argent, *supra* note 31, 1807: "The common interest protected by *erga omnes* obligations, and the interest of the international community as a whole for compliance with them, overrides any bilateral concern, so that the circumvention argument should fail."; see also *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, *Advisory Opinion*, *I.C.J. Reports 2004*, paras. 46, 49.

73 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *Advisory Opinion*, *I.C.J. Reports 2019*, para. 73.

74 *Namibia*, *supra* note 3, para. 40. Contrast this to the PCIJ's exercise of discretion in *Eastern Carelia* (*Advisory Opinion, Series B, No. 5* (*23 July 1923*)), where Russia's non-participation had made it impossible for the Court to gather all necessary facts, even if the Court noted that some "enquiry as to facts" could take place within advisory proceedings.

75 *Northern Cameroons*, *supra* note 18, 30, in reference to the *Haya de la Torre* dictum.

76 *Fisheries Jurisdiction* (*United Kingdom v. Iceland*), *I.C.J. Reports 1974*, para. 53.

77 Shaw, *supra* note 37, 1742.

78 Andreas Paulus, "Article 66", in Andreas Zimmermann and Christian Tams (eds.), *The Statute of the International Court of Justice* (2019), 1812, 1833: "permit the Court to give advisory opinions fully informed by the members of the international community".

light upon the question" (Article 65(2) ICJ Statute). This places the UNSG in a twofold role: "as representative of the United Nations in cases where it is involved, and as a more neutral representative of the public interest providing the Court with necessary information."[79] While the UNSG at times receives instructions on what to deliver, at other times it is up to their discretion.[80] Their role could be of particular value in questions that relate to a broader public interest rather than institutional questions. However, the UNSG so far has refrained from making substantive arguments on such matters, particularly where Member States are highly politically divided. Thus, in *Nuclear Weapons*, the UNSG simply submitted a dossier of UN resolutions and draft documents, but did not submit any written or oral statement.[81] In practice, their value as a representative of the "international community" has therefore so far remained marginal.

Once the Court receives the request, the Registrar notifies all States which are entitled to appear before the Court of the request (Article 66(1) ICJ Statute, Article 105 RoC) and, "by means of a special and direct communication", notifies States and IOs[82] "likely to be able to furnish information on the question" (Article 66(2) ICJ Statute) of the possibility to submit written or oral statements (Article 105 RoC). Those who have presented such statements are also "permitted to comment on the statements made by other States or organizations" (Article 66(4) ICJ Statute). While the provisions at first glance seem to be restricted to States and "public international organizations" – in line with Article 34(2) ICJ Statute – the Court has demonstrated a certain flexible and pragmatic approach. Hence, in advisory proceedings concerned with self-determination units, the Court has allowed "contributions" (rather than statements) by non-State observers (*Wall* (Palestine)), *Kosovo* (authors of the declaration), which neither qualify as States or IOs. In *International Status of South Africa*, the Court granted upon request permission to a non-governmental organization (NGO) to submit a written statement, albeit without reference to Article 66, and without the organization authorized in the end submitting information.[83] On other occasions, the Court has however rejected

79 *Ibid.*, 1824 (footnotes omitted).
80 Shaw, *supra* note 37, 1736.
81 Compare the Court's case file.
82 This also includes IOs that are not UN specialized agencies.
83 *International Status of South West Africa*, *Advisory Opinion*, *I.C.J. Reports 1950*, 130. On the more forthcoming practice of the PCIJ, see Dinah Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings", 88 *A.J.I.L.* (1994), 611.

such requests.[84] As becomes apparent in the next section, the aspect of participation and access of the public at large was particularly delicate in the *Nuclear Weapons* requests.

4 The Context of a True Public Interest AO

The *Nuclear Weapons* requests and opinions neither fall into the category of opinions on institutional competences, nor was there an underlying dispute. Thus, both proceedings are valuable in the assessment of how true public interest AOs might look in practice, and which challenges might arise in procedural terms. The outcome of the *Nuclear Weapons* advisory proceedings is well known, and has been discussed at length elsewhere. The following therefore does not engage with the substantive aspects of the opinion, but focuses on identifying procedural challenges.

The requests were the result of a multi-year lobbying initiative by NGOs at the domestic and international level throughout the late 1980s/early 1990s (the so-called "World Court Project").[85] They eventually successfully managed to convince the Non-Aligned Movement of their cause, which had in turn only shortly before embraced the thought of international law and the ICJ as a tool of the less powerful.[86] Indeed, the timing of the proceedings at the end of the Cold War, marked by shifting power structures and a push towards community interests,[87] is no coincidence.

The path to a requesting resolution was pursued both within the WHO,[88] which had dealt with nuclear issues since the 1970s, and the GA. Things moved

84 For example, in *Namibia*, requests by individuals and interested groups were rejected by the Registrar because he perceived Article 66 as limitative and not permissive. See Correspondence No. 97 of the case file.

85 See in detail the thesis by Catherine Dewes, "The World Court Project – The Evolution and Impact of an Effective Citizens' Movement" (1998), <http://legacy.disarmsecure.org/Dewes%20PhD%20Thesis.pdf>.

86 *Ibid.*, 168 ff.

87 Throughout the 1990s, the relative harmony in international relations posed a window of opportunity for the push by international organizations towards the strengthening of values in international frameworks. See, e.g., several world conferences on questions relating to the development agenda, the protection of the environment and human rights. See also Jane A. Hofbauer, "Community Interests", in Christina Binder, Manfred Nowak, Jane A. Hofbauer and Philipp Janig (eds.), *Elgar Encyclopedia of Human Rights – Vol. 1* (Elgar, 2022), 310, 311.

88 Going through the WHO was seen as easier since its representatives were felt to be "less easily moved by extraneous political considerations" (*ibid.*, 204), though in the end a parallel process was advocated for.

quicker within the WHO where, following an intense debate and diplomatic battle, the Court was asked to respond to the question: "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?".[89] The request was subject to unprecedented interests by States, with 35 States submitting written statements and 20 submitting oral statements. In addition, before a date for oral proceedings had been set, the GA filed a request on its own,[90] seeking the Court to "urgently" render an opinion on whether "the threat or use of nuclear weapons in any circumstances [is] permitted under international law."[91] In these proceedings, 28 States submitted written statements and 22 submitted oral statements. Both the WHO and the UN – in regards to their respective requests – had been considered as likely to be able to furnish information on the question, but only the WHO made use of the possibility to present an oral statement.[92] Neither filed written submissions, and no other IO participated either. The oral proceedings of both requests took place during the same public sittings (applying Article 47 RoC by analogy), and both opinions were delivered by the Court on the same date (8 July 1996).

Though the widespread participation underscores a certain importance for a large portion of UN Member States,[93] the role of the larger "international

89 WHA46.40 (1993), adopted by 73 voting in favour, 40 against, and 10 abstaining (41 absentees). The resolution had been met with opposition even within the WHO but managed to pass amidst a series of secret ballot voting and the continuous support by NGOs throughout the process. In the end, it took the WHO's legal adviser three months to transmit the request to the Court, indicating that his skepticism on whether the request fell within the "scope of activities" of the WHO had not disappeared. As reported, the WHO's legal adviser had expressed concern that the matter was too complicated for determination and did not fit the functions of the WHO. Dewes, *supra*, note 85, 219–220, 229, 239–240.

90 It had been considered already a year earlier, but ultimately was not pushed through given "the momentum of the progress [in negotiations] being made" (UN Doc. A/C.1/48/SR.30) and disagreement within the Non-Aligned Movement, with members in part being subject to coercion and acts of intimidation (see Dewes, *supra* note 85, 306 ff.). The change has been attributed, among other reasons, to the focus of nuclear weapon States on the fact that the WHO lacked competence. See Laurence Boisson de Chazournes and Philippe Sands, "Introduction", in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999), 5.

91 UNGA Resolution 49/75K (1994), adopted by 78 States voting in favour, 43 against, and 38 abstaining (25 absentees).

92 As the WHO's representative, Mr. Vignes, noted, given that the WHO's members were deeply divided on the issue, the WHO "entend observer en la matière une position de stricte neutralité.".

93 In total, 45 States (and the WHO) participated in the proceedings, among them several small States which had never previously accessed the Court (including, e.g., San Marino,

public/community" remained somewhat diluted in the course of the proceedings. On the one hand, the involved NGOs constituted an invaluable source of information, both in substance (preparing a model memorial that circulated among supporting States and for some constituted the basis for their submissions), but particularly also in procedure. As reported by Dewes, NGOs even offered help submitting the statements to the Court and the International Steering Committee of the World Court Project submitted numerous documents and material to the Registrar as "citizen evidence".[94] One the other hand, despite these efforts, the Court remained critical of their role. Thus, the Registrar notified the public through a letter in the *International Herald Tribune* that the Court had received several *amicus* briefs from NGOs, professional associations and other bodies, but that these were not admitted as part of the court file. They would however be "available to members of the court in their library."[95] Judge Guillaume later discussed in his Separate Opinion whether the fact that the requests originated in an NGO campaign did not obscure who the true authors of the requests were and whether this not might have been a reason to declare them inadmissible.[96] Other members of the Court – aside from Judge Weeramantry[97] – and participants only made minimal references to these documents,[98] or even to the fact that the questions were situated in the broader interest of the international community in achieving a nuclear-free

Samoa, the Marshall Islands and the Solomon Islands). The list also includes a number of developing States, several taking the opportunity to make oral statements. In terms of participation, the *Nuclear Weapons* proceedings have so far only been surpassed by the *Wall* proceedings (45 States and four IOs). In *Kosovo*, 36 Member States and the authors of the declaration participated. In *Chagos*, 31 States and the AU participated. However, taken together, the largest amount of oral statements were made ("only" 15 were made in the *Wall* proceedings versus the abovementioned 20+WHO/22).

94 Dewes, *supra* note 85, 319 ff.

95 Letter available at </www.nytimes.com/1995/11/15/opinion/IHT-court-clarification-letters-to-the-editor.html>. It was published in response to a previous newspaper article in which the Federation of American Scientists had indicated that it had submitted *amicus* submissions to the Court on the pending requests (Eduardo Valencia-Ospina, "Non-Governmental Organizations and the International Court of Justice", in Tullio Treves et al. (eds.), *Civil Society, International Courts and Compliance Bodies* (2005), 227, 231).

96 *Nuclear Weapons*, *supra* note 60, 287–288 (Separate Opinion of Judge Guillaume). In passing, Judge Oda also "noted with particular interest" that NGOs had offered to financially assist the WHO in its initiative (*Nuclear Weapons in Armed Conflict*, *supra* note 13, 93).

97 *Nuclear Weapons*, *supra* note 60, 438, 441–442 (Dissenting Opinion of Judge Weeramantry).

98 See also Shaw, *supra* note 37, 1741, fn. 49, noting that it "appears that these documents, which were at the disposal of the bench, were not easily available to countries appearing before the Court."

world.[99] Among these, particularly the Solomon Islands stands out, emphasizing that the interests of the international community at large would in any event make it appropriate for oral hearings to be held. In its response to the UK's submissions (which had indicated that the NGO lobbying might have had an impact on the request's legitimacy), it also expressed that such efforts "in raising public awareness and contributing to the processes of international law are to be welcomed".[100]

While the GA's competence was generally not disputed,[101] this issue was central in the WHO's request. Several participants raised the concern that the Court would potentially create a precedent of encouraging IO activities *ultra vires*.[102] The Court dealt with the matter in a relatively restrictive manner. Not only did it rely on the limitation of Article 96(2) UN Charter ("legal questions arising within the scope of their activities"), but developed an additional test on whether the question fell within the "technical and functional" scope of the agency's mandate. On this basis, the Court's majority restricted the authority of the WHO by arguing that its Constitution should be interpreted also against the "logic of the overall system contemplated by the Charter" and that the WHO's responsibilities "cannot encroach on the responsibilities of other parts of the United Nations system".[103] Additionally, the Court considered whether the response would have a practical effect on the WHO's mandate and scope of its functions.[104] In the end, the Court found that the request did not fall within the WHO's scope of activities and denied jurisdiction.[105]

Other arguments made by the participants on the lack of the Court's jurisdiction or that it should exercise its discretion and decline to give the requested AO in light of judicial propriety were not decisive for the outcome.

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99 In passing, this was mentioned by Samoa, the Solomon Islands, Mexico, and the Marshall Islands.

100 Solomon Islands response, para. 8.

101 Though some argued that the General Assembly's authority could be limited to issues that were not "totally unrelated to their work", the Court simply stipulated that "it matters little whether this interpretation of Article 96, paragraph 1, is or is not correct; in the present case, the General Assembly has competence in any event to seise the Court" (*Nuclear Weapons*, *supra* note 60, para. 11, referring to Arts. 10, 11 and 13 UN Charter).

102 Russia, Netherlands, Italy, US, France, Germany, UK, Finland, Australia; arguing on the WHO's competence: Mexico, Solomon Islands, Costa Rica, Samoa, Nauru, Malaysia.

103 *Nuclear Weapons in Armed Conflict*, *supra* note 13, para. 26. See, however, the Dissenting Opinion of Judge Weeramantry (at 149–151). See also Dapo Akande, "The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice", 9 *E.J.I.L.* (1998), 437, 444 ff.

104 *Ibid.*, paras. 27–28.

105 *Ibid.*, para. 22.

Aspects such as the abstract or hypothetical nature of the question,[106] political considerations,[107] the relation to wider realms of policy and security doctrines of States,[108] whether an opinion would be useful[109] or have any "practical or contemporary effect",[110] or whether the proceedings would have a harmful effect on ongoing negotiations[111] were all broadly dismissed by the Court.[112] Additionally, the Court emphasized that in issues where political considerations were prominent, it may be particularly necessary to obtain an opinion.[113]

The Court's approach to these points affirms the openness of the advisory procedure for legal questions tied to politically challenging matters, also when formulated in an abstract, exploratory manner. Thus, in the GA request, the Court demonstrated that, even when it came to such a highly disputed issue, it would only exercise its discretion to decline a request in light of "compelling reasons", in its understanding a particularly high threshold. It explained that the "purpose of the advisory function is not to settle – at least directly – disputes between States" and consequently the question may be "abstract or otherwise".[114] This notwithstanding, this approach proved to result in one of the most criticized aspects of the opinion, the well-known second paragraph of paragraph 105 E, in essence a *non liquet*, based on the admission that "in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance

106 Finland, UK, US, Germany.
107 US, France, Germany.
108 Australia.
109 Finland, UK, US.
110 Australia.
111 Finland, Netherlands, UK, US, Germany, Australia.
112 *Nuclear Weapons*, *supra* note 60, paras. 13–16.
113 *Nuclear Weapons in Armed Conflict*, *supra* note 13, paras. 16–17; *Nuclear Weapons*, *supra* note 60, para. 13.
114 *Nuclear Weapons*, *supra* note 60, para. 15. This is generally in line with the Court's preference for abstract questions rather than factual inquiries when it comes to AOS. Judge Azevedo in his Individual Opinion in *Conditions of Admission*, *supra* note 41 addressed in more depth that it was actually "quite fitting for an advisory body to give an answer *in abstracto* which may eventually be applied to several *de facto* situations: *minima circumstantia facti magnam diversitatem juris*" (at 74). To provide "the establishment of a criterion for the future" was indeed one of the purposes of advisory proceedings. Depending on how the request is framed and its further intention, this can therefore prove as a significant advantage when it comes to seeking guidance and clarifications of a legal framework.

of self-defence, in which the very survival of a State would be at stake".[115] The alternative would have been risking its authority being called into question by engaging in a legislative function.[116] Well aware of this danger, the Court expressly rejected that responding to an abstract question would amount to a law-making function, instead stressing that responding in matters where the state of law is particularly unclear, it was part of its "normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons."[117]

When it comes to questions of competence and procedure and how they played out in these public interest AOs, the Court's approach can be summarized as a balance between the old and the new. In terms of participants, the Court remained in line with its approach generally only admitting IOs and not NGOs as participants. However, it did accommodate for the large public interest by informing the public that their statements and documents would at least be made available to judges in the library. Additionally, at the closing of the oral proceedings, the Court's President acknowledged the unprecedented interests shown by the international community.[118] This notwithstanding, several participants were reluctant to have the Court function as a forum for debate on such highly political issues, and sought to limit the Court's willingness, competence and (participatory) openness through different means.[119] This sentiment was shared by some judges[120] and even the WHO.[121] Following a restrictive interpretation of the organization's mandate and functions, the Court in the end dismissed the WHO's request. While this might have seemed warranted at the moment's time in light of the parallel request by the GA, it has overall not been conducive to signalling the Court's openness to requests

115 Particularly critical on this aspect, *Nuclear Weapons*, *supra* note 60, paras. 9, 30 (Dissenting Opinion of Judge Higgins).

116 A suggestion that the Court could "at the request of the Assembly or of the Council, or acting on its own initiative, prepare codes of rules or formulate proposals concerning any point of international law" was dismissed early on by the PCIJ Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee June 16th–July 24th 1920, 549.

117 *Nuclear Weapons*, *supra* note 60, para. 18.

118 "La Cour a été très sensible à l'intérêt peut-être sans précédent dont la communauté internationale a témoigné pour ses travaux et qui s'est traduit par l'éminente participation d'une organisation internationale et de plusieurs dizaines d'Etats aux deux procédures consultatives, qu'il s'agisse de leur phase écrite ou orale."

119 See, e.g., Australia (WHO request), paras. 22–23.

120 See, e.g., Judge Oda's Separate Opinion in *Nuclear Weapons in Armed Conflict*, *supra* note 13, para. 3.

121 The strictly neutral stance of the WHO on interpreting its competence was indeed not helpful.

by specialized agencies relating to broader questions of international law. The political and diplomatic capital necessary to garner support for a request is hard to come by if the project's success is unlikely. In terms of the GA's request, the Court struggled in reaching a meaningful outcome. Unlike in contentious cases, operating closer to private law proceedings based on the burden of proof and the obligation to deliver a decision – a *non liquet* is permissible in advisory proceedings,[122] though arguably unsatisfactory if owed to lack of information rather than of law.

The approach in these proceedings demonstrates that while there are no procedural obstacles to bring public interest AO requests to the Court, such requests are not necessarily successful in achieving the desired outcome. The reasons therefor are manifold, and can be best explored by first viewing this example in light of the context of (non)-successful public interest AO requests (5) and, second, by considering whether some of the identified difficulties might be changed through procedural modifications (6).

5 The Context of Successful and Unsuccessful Public Interest Requests

The "World Court Project" set out with the specific task to request an AO from the Court on the (un)lawfulness of nuclear weapons. The network of NGOs not only provided technical expertise and procedural assistance, but stood as a representation of the pursuit and enforcement of public interests at the global level.[123] Though this role is not uncommon for NGOs at the domestic level, or even in regional human rights systems, choosing the ICJ as their target forum reflects a certain maturity of their cause. Though their influence on the outcome of the request is hard to measure, at a minimum, their wide-spanning network was essential in convincing a sufficient number of States to support the request.

This touches upon two larger questions, i.e. which types of AO requests have been successful? And when do States – whether directly or indirectly –

122 Kolb, *supra* note 16, 744–750, however also noting that this is not necessarily a case of *non liquet* but rather an exercise of the power to not respond to safeguard the judicial integrity of the Court, *inter alia* owed to the lack of clarity given the abstractness of the question/task.

123 On the role of NGOs as public interests agents at the international level, see Karsten Nowrot, "Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law", 6 *Indiana Journal of Global Legal Studies* (1999), 579.

perceive it as promising to approach the Court in public interest matters and what hurdles have so far prevented further public interest requests?

As concerns the first question, the practice of the past seven decades shows that the types of requests have changed. While more recent requests have related to abstract questions of law (such as in the *Nuclear Weapons* cases) or legal issues which arise from existing factual circumstances where States rather than the requesting body are seeking guidance, the early UN period saw a number of requests related to institutional practice and competences.[124] This can be partly explained by considering that with shifting majorities and settled practice, the need for institutional guidance by the Court has become less likely and/or urgent. However, it should not be overlooked that these requests were equally subject to political debate, as especially during the early Cold War years the advisory function was frequently resorted to for the judicial legitimation of political choices achieved amongst ideological rivalries.[125] A general drop in the number of requests has been the result,[126] with States frequently forced to settle on or preferring a diplomatic route rather than seeking judicial guidance.[127]

What has become evident through this practice is that both the GA and SC have from the start been overly political *fora* when it comes to drafting and passing a resolution on an AO request. Despite the earlier claim that IOs serve as representatives of the international community, their autonomy does not express itself fully in their political bodies. Lobbying for the passing of a request

124 Dapo Akande, "Selection of the International Court of Justice as a Forum for Contentious and Advisory Proceedings (Including Jurisdiction)", 7 *J.I.D.S.* (2016), 320, 339; similarly, also later failed requests in light of their overtly political nature. For example, see a US attempt within the ECOSOC on the establishment of the Economic Commission for Western Asia (and its exclusion of Israel), or the Commission on Human Rights' 1981 recommendation to the General Assembly to request an AO on *apartheid* policies and Art. 6 UN Charter.

125 See Michla Pomerance, "Seeking Judicial Legitimation in the Cold War: U.S. Foreign Policy and the World Court, 1948–1962", 4 *Indiana International and Comparative Law Review* (1995), 303, on how initially the US and its allies dominated this practice (through the General Assembly), e.g., approaching the Court on peacekeeping (*Certain Expenses*) or admission practice to the UN (*Conditions of Admission*, *Competence of the General Assembly for Admission*). However, the tides shifted when Cuba and the Soviet Union attempted a similar tactic in the SC on the question of Cuba's suspension from the OAS and the imposed trade embargoes following the 1962 Punta del Este meeting in an effort to curtail "Marxist-Leninist" influence within the inter-American system.

126 Almost half of the Court's AOs were delivered prior to this period.

127 For early examples, see Pomerance, *supra* note 125, 331. Note that such an argument in front of the Court has, however, been dismissed frequently as a ground for exercising discretion to decline delivering an opinion.

in the GA or any other governing assembly is an inherently difficult task, and often builds on several years of previous engagement by States, their representatives and/or civil society. Communications circle within foreign affairs departments of various allies, outlining advantages and disadvantages for requesting an opinion and perhaps obtaining an unfavourable outcome by the Court.[128] Various formulations of drafts are presented (sometimes sponsored by different States), and their different nuances become subject to heated debate. An underlying fear, especially of smaller States, is the threat of more powerful States to block funding (to the institution) or development assistance programs.[129] Thus, oftentimes proposals do not make it to the floor of the voting body, as they fail to obtain sufficient support in advance. Where they have managed to pass in recent years, this has been owed to decades-long engagement and clear political majorities (*Wall*),[130] an extremely narrow question by a sole sponsoring State, fully aware that otherwise necessary majorities could not be reached (*Kosovo*),[131] or were the result of successful litigation strategies pursued in multiple forums and dwindling UK political influence (*Chagos*).[132]

This ties to the second question, i.e. when do States perceive it as promising to approach the Court in public interest matters? Pursuing the protection of public interests through adjudicative means is the result of a balancing of a number of factors, including the potential success rate, the risk of receiving an opinion which does not live up to expectations, and the question whether one can gather the necessary political and diplomatic capital to reach a majority against the pressure of heavily reluctant States.

When it comes to the question of "public interest" issues being brought to the ICJ, it took several decades for the Court to redeem its reputation as a useful judicial forum for the protection of community interests[133] following the unfortunate *South West Africa* saga, where the Court expressly stipulated that *actio popularis* was "not known to international law as it stands at present".[134] Despite its attempt in *Barcelona Traction* to rectify its approach by introducing the notion of *erga omnes* interests, the overall numbers of cases presented

128 *Ibid.*, providing a detailed account on working towards drafting requests from the perspective of US foreign policy.

129 Dewes, *supra* note 85, 228 ff.

130 Michelle Burgis, *Boundaries of Discourse in the International Court of Justice* (2009), 234 ff.

131 James Ker-Lindsay, "Explaining Serbia's Decision to go to the Court", in Marko Milanovic, Michael Wood (eds.), *The Law and Politics of the Kosovo Advisory Opinion* (2015), 9.

132 Thomas Burri and Jamie Trinidad, "Introduction", in Thomas Burri and Jamie Trinidad (eds.), *The International Court of Justice and Decolonisation – New Directions from the Chagos Advisory Opinion* (2021), 1.

133 Cf. Shaw, *supra* note 37, 176.

134 *South West Africa Cases*, *supra* note 2, para. 88.

to the Court dwindled. The few attempts by (individual) States to further public interest protection (*Nuclear Tests*) or intervene in proceedings in protection of an interest of a legal nature (*Continental Shelf* cases) failed to bring any notable shifts in policy which would have signalled a more open approach by the Court. Almost three decades later, and after a lengthy campaign by civil society, it was the one opinion that the Court in the end dismissed for lack of jurisdiction (*Nuclear Weapons in Armed Conflict*) that brought the necessary political momentum for the GA to file a parallel request. However, the Court's strict approach in understanding the functions and scope of the activities of the WHO has so far not encouraged other specialized agencies to draft further public interest requests, fearing a similar fruitless endeavour.[135] Caution against pushing for a decision or an AO is understandable in such a setting, particularly where alternative means of dispute settlement are available to the parties which appear more conducive in achieving public interest protection.[136]

A further difficulty attaches to the question when States in general feel called upon to initiate a true "public interest" matter. While there are no conceptual objections to the fact that States also act beyond their self-interest,[137] there are only a few examples where this has resulted in international litigation.[138] Thus, also recent (failed) attempts at requesting AOs under the pretext of the protection of public interests have largely remained tied to specific State interests rather than truly reflecting the international community's public interest.[139]

135 Kolb (*supra* note 16, 1161) evaluates this more positively and suggests that the lack of requests might also be owed to the fact that "[t]hese bodies are better consolidated than hitherto and have their own legal departments. In the great majority of cases, these are sufficient, and indeed their expertise is often more specialized."

136 Cf. Alan Boyle and Catherine Redgwell, *Birnie, Boyle & Redgwell's International Law and the Environment* (2021), 274–276 (suggesting that this might be the case as regards non-compliance procedures enshrined under MEAs).

137 Samantha Besson, "Community Interests in International Law – Whose Interests Are They and How Should We Best Identify Them?", in Eyal Benvenisti and Georg Nolte (eds.), *Community Interests Across International Law* (2018) 36, 45–47.

138 See also *supra* note 9.

139 For example, following the *Alvarez-Machain* ruling by the US Supreme Court (1992), which found that the government-sponsored abduction of a foreign citizen from a foreign State did not bar US courts from exercising jurisdiction, a resolution was suggested on whether such conduct would amount to a breach of international law, albeit without direct mention of the case (UN Doc. A/47/249/Add.1 (1992)). Though supported by 21 States, the attempt was eventually abandoned out of concern that it nevertheless related to a bilateral dispute between Mexico and the US and did not touch upon matters on the UN's agenda (Rosalyn Higgins, "A Comment on the Current Health of Advisory Opinions", in Vaughan Lowe and Malgosia Fitzmaurice (eds.), *Fifty Years of the International Court*

Likewise, it is not surprising that – similar to the reluctance by States to accept the Court's jurisdiction through optional clause declarations – there is a pronounced tendency especially of politically powerful States to avoid risking a potentially curtailing or disadvantageous outcome from the Court, even if "non-binding".[140]

In comparison, the recent campaign on bringing a request on legal questions linked to climate change seems to mirror the success factors of the World Court Project. Already in 2012, an initiative by several small island States – under the leadership of Palau – was launched to seek an AO on damages from climate change, placing emphasis on the "rule of law" impact of such an opinion and arguing that reaching "consensus on the exact question" to be put to the Court would already constitute an important step in furthering the interests of the entire community.[141] Though unsuccessful in the end, continuous lobbying by several actors of civil society and academia,[142] as well as the momentum of successful national and regional climate litigation cases, has contributed to a strengthened consensus forming that an AO on legal obligations arising in connection with climate change can work in strengthening the framework, and as a means of implementation of obligations. It is therefore not surprising that the issue has resurfaced, with Vanuatu – following a three-year "bottom-up" campaign by law students and NGOs (the "#ICJAO campaign") – in September 2021 officially announcing its intention to garner support for a

of Justice (1996), 567, 579–580). Russia and Belarus – in the aftermath of the 1999 Kosovo intervention by NATO – repeatedly attempted to have a request passed on the use of force by States without prior authorization by the Security Council (UN Doc. A/71/33). Since 2018, African States – in the context of Al-Bashir's ICC arrest warrant – sought to request an opinion on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials (UN Doc. A/73/144). Fears have been expressed that a potential ICJ opinion might undermine the ICC's authority (Astrid Kjedgaard-Pedersen, "Is the Quality of the ICC's Legal Reasoning an Obstacle to Its Ability to Deter International Crimes", 19 *Journal of International Criminal Justice* (2021), 939, 952–953).

140 *Chagos* shows that this fear is not entirely unfounded, given its clear statements on the responsibility of the UK. This was noted with some concern by Judge Gevorgian (*Chagos*, *supra* note 73, para. 5).

141 <www.un.org/press/en/2012/120203_ICJ.doc.htm>. In the end, the necessary majority could not be reached as it was feared that the ongoing climate pre-Paris negotiations might be hampered.

142 Including also the IUCN (see, e.g., its 2016 suggestion asking the General Assembly to file an AO request on the legal status and content of the principle of sustainable development, IUCN WCC-2016-Res-079-EN (2016)).

GA resolution, tabling a draft resolution in early 2023.[143] Also in this instance, a global alliance of more than 1800 civil society organizations formed which have taken on spreading the campaign across more than 130 States and lobbying for government support.[144] Having passed the General Assembly successfully, the request will now face the same difficulties as the *Nuclear Weapons* proceedings, in particular the question who represents the "public" beyond individual State interests.

In light of this, the following considers what changes to the procedural framework – whether explicitly through amendments, adaption of rules or adoption of Practice Directions or implicitly through the Court adapting its judicial policy – might further the use of public interest AOs.

6 Procedural Reforms and Amendments to Strengthen the Use of AOs as Public Interest Litigation

A variety of reform proposals have been made on how to increase the use of AOs. A part of these relate more evidently to making the Court more inviting for "public interest litigation", particularly when it comes to the participation or involvement of a wider circle of participants.

Some of the suggested reforms which are discussed below require treaty amendments (either of the Statute or UN Charter, or possibly both). The core argument advocating in favour thereof usually relates to the fact that there have generally been only a few amendments made to the Statute[145] (and the Statute of its predecessor, for that matter) or the UN Charter,[146] and that recent changes to the structure and substance of international law, particularly since the 1990s, have left the procedural framework in want of adaptations.[147] Of course, amendments to either instrument are immensely difficult and currently appear unlikely.

143 <https://www.vanuatuicj.com/resolution>. On strategic litigation on climate change, see also the enticing contribution by Nataša Nedeski, Tom Sparks and Gleider Hernández, "The World is Burning, Urgently and Irreparably – a Plea for Interim Protection against Climatic Change at the ICJ" (in this Volume).

144 <https://climatenetwork.org/2022/05/05/thousands-of-civil-society-organisations-call-on-countries-to-support-vanuatu-climate-justice-initiative/>.

145 Arts. 69–70 ICJ Statute.

146 Art. 108 UN Charter.

147 See, e.g., Chinkin, *supra* note 25, 55–56.

The Court does, however, have the power to make rules "for carrying out its functions. In particular, it shall lay down rules of procedure"[148] (on the use of Practice Directions to advance its procedural framework, see *infra*). As the Court emphasized in *Nicaragua*, it "was at liberty to adopt 'the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law'."[149] The limits thereto are that the "power to make rules is a subordinate one, intended to supplement and put into operation the Statute. The Court therefore cannot make a valid rule which is in conflict with a provision of the Statute",[150] such as expanding its jurisdiction. However, it has been argued by some judges that in fact the Rules may equip the Court with wider discretionary power by virtue of Article 30 ICJ Statute than the Statute of the Court prescribes.[151] For the purpose of determining when an amendment to its Rules is necessary, the Court established a standing Committee for the Revision of the RoC in 1979 which meets several times a year. Amendments to its Rules are infrequent and subject to an extensive internal review process; but they do occur from time to time, arguably to increase the attractiveness of the Court's procedure.

Thus, before turning to an evaluation of the reform proposals, it should be emphasized that, when it comes to the advisory procedure, the power to issue rules has been marked by considerable flexibility since the beginning. Following some debate on the role and purpose of AOs, it was in the end agreed that, aside from some basic principles, it would be for the Court to regulate the subject in its Rules.[152] The PCIJ Statute therefore did not contain provisions on advisory proceedings.[153] It was only after the Court had already

148 Art. 30 ICJ Statute.

149 *Military and Paramilitary Activities* (*Nicaragua v. United States*), *I.C.J. Reports 1986*, para. 29.

150 Hugh Thirlway, "Article 30", in Andreas Zimmermann and Christian Tams (eds.), *The Statute of the International Court of Justice* (2019), 589, 592.

151 See *Bosnian Genocide* (*Bosnia and Herzegovina v. Yugoslavia* (*Serbia and Montenegro*)), *I.C.J. Reports 1993*, 397 (Separate Opinion of Judge Ajibola). Critical: Thirlway, *supra* note 150, 596.

152 Hammerskjöld (*supra* note 23, 715–716), mentioning the composition of the Court, the form in which questions are to be submitted, the Court's discretion in responding to the request, and the principle of "full publicity".

153 The formal competence to entertain advisory proceedings was deduced from the fact that the Preamble and Art. 1 PCIJ Statute referred to Art. 14 League Covenant, thereby arguably incorporating the jurisdictional basis for both contentious and advisory proceedings (Memorandum by Mr. Moore, 18 February 1922, "The Question of Advisory Opinions", *1922 P.C.I.J.*, *Preparation of the Rules of Court of 30 January*, *Series D, No. 2*, at 385, also indicating that the jurisdictional basis could be deduced from Art. 36 of the Statute ("all matters specially provided for in Treaties and Conventions in force")).

responded to two AOs that it adopted Rules on its advisory competence.[154] As Hudson assessed in 1943, the formalization process – alongside the participatory involvement of interested States and IOs and the overall public nature of the proceedings – led to the strengthening of the nature of advisory jurisdiction as part of the judicial function,[155] resulting in a successful evaluation of the PCIJ's advisory competence.[156] Articles 65–68 ICJ Statute were thus adopted with merely minor changes in comparison to Articles 65–68 of the (revised) PCIJ Statute.[157] Against this background, the majority of guidance and clarification on these provisions has in fact therefore occurred through the Court's practice,[158] whether through the introduction of (minor) amendments to the Rules, the flexible interpretation of questions of admissibility and/or judicial propriety, but also the handling of information by participants and other actors.

This practice shows that the Court does not operate with a particular rigidity when it comes to advisory proceedings, though the shifting judicial policy of the bench results in some inconsistencies. As shown above (Sections 3 and 4), the current procedural framework does not pose any considerable obstacles to public interest AOs. That said, there are a number of steps that can be taken which would make AOs more conducive to public interest litigation. These relate particularly to strengthening the role of "international community representation" through the opening of AO proceedings to further actors. The aim thereof is not only to depoliticize the requesting process, but also to provide the Court (and the public at large) with as much essential information as possible. This includes a critical reflection on whether allowing for a more

154 Arts. 71–74 1922 Rules. The 1929 Revision Protocol formally introduced Arts. 65–68 into the Statute. However, the revised Protocol did not enter into force until 1936. Thereafter, no further AOs were delivered.

155 Manley Hudson, *The Permanent Court of International Justice 1920–1942* (1943), 510–511. See also *Eastern Carelia*, *supra* note 74, 29.

156 Between 1922 and 1940, the PCIJ issued 27 AOs (compared to only 31 judgments), with the majority (19) of these relating to existing disputes rather than abstract legal questions. Most requests were submitted through the Council, even though oftentimes on behalf of other IOs, such as the Danube River Commission, the Mixed Commissions for the Exchange of Greek and Turkish Populations, or the ILO. See Hudson, *supra* note 155, 488 ff.

157 The main difference – albeit largely semantic – related to Art. 65 ICJ Statute. Also Art. 82 RoC was redrafted for the 1946 version of Rules (Cot and Wittich, *supra* note 39, 1848). However, despite the competence being based on largely similar provisions, it has been suggested that the advisory function of the ICJ must be viewed from a slightly different angle than the PCIJ's advisory competence. This is particularly owed to the ICJ's status as the "principal judicial organ of the United Nations" (Art. 92), with the Court thereby assuming a "constitutional" role (see Kolb, *supra* note 16, 1030).

158 Cf. Kolb, *supra* note 16, 1033.

direct role of NGOs in advisory proceedings might have a negative impact on the fair administration of justice by "opening the floodgates".[159]

6.1 *Expanding the Circle of Requesting Bodies*

In general, the most common proposal relating to any potential reform of advisory proceedings suggests expanding the circle of requesting bodies. Depending on who would be included by such an extension, this indeed might increase the likelihood of relating public interest requests.

Prior to the adoption by both the PCIJ and ICJ there was some discussion on who should be entitled to approach the Court with a request, with some advocating for an extension to States ("acting in concert") or other IOs such as the ILO.[160] However, in the end it was agreed that the competence should be limited to UN organs and its specialized agencies. Nevertheless, suggestions have repeatedly surfaced to expand the circle to include States, the UNSG (rather: the Secretariat[161]),[162] (other) IOs and bodies, and even national courts.[163] There are several arguments in favour and against with regard to each of these

159 The fear of "opening the floodgates" goes back to the Registrar's response to Professor Reisman's request on participating as an *amicus* in *Namibia* (Correspondence, at 638–639). Cf. Astrid Wiik, *Amicus Curiae before International Courts and Tribunals* (2018), 71.

160 For the PCIJ, see Hudson, *supra* note 155, 486; for the ICJ, see Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, 39 *A.J.I.L.* (1945), 1 (see, e.g., paras. 68–70). Also at the United Nations Committee of Jurists, some suggested to enlarge the advisory competence of the new court. For example, representatives of Venezuela, the UK and Belgium proposed that the route should be opened also to public IOs and States amongst themselves (*Documents of the United Nations Conference on International Organization San Francisco*, Vol. XIV (United Nations Committee of Jurists, 1945), Jurist 14, 319, 447). However, this was rejected for fear that it might discourage States "from accepting the Court's contentious jurisdiction" (d'Argent, *supra* note 56, 273). Additionally, some State representatives felt that "granting to individual States the right to apply directly to the Court for an advisory opinion" might overload the Court with individual applications (e.g., Soviet Union (*Documents of the United Nations Conference on International Organization San Francisco*, Vol. XIV (United Nations Committee of Jurists, 1945), Jurist 45, 181)).

161 Hans Kelsen, *The Law of the United Nations* (1950), 546.

162 See, e.g., Stephen Schwebel, "Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice", 78 *A.J.I.L.* (1984), 869. Recently see Kolb, *supra* note 16, 1049 ff.

163 Arguably, this would increase the uniformity of the interpretation of international law, similarly to the idea of a preliminary ruling as can be asked for by the national courts of EU Member States from the CJEU. Suggestions, however, often condition this expansion on the establishment of a screening body (by the General Assembly), see in detail Shabtai Rosenne, "Preliminary Rulings by the International Court of Justice at the Instance of National Courts: A Reply", 29 *Virginia Journal of International Law* (1989), 401.

groups, but when it comes to "public interest" opinions, the UNSG and (other) IOs and bodies seem most promising.

The UNSG qualifies as one of the organs that may be authorized by the GA under Article 96(2) UN Charter, and it has requested such authorization on at least three occasions.[164] Yet, the GA has so far refused granting authorization, not willing to equip one person with such potentially far-reaching authority, and risking undercutting the political control by Member States over requests. This fear seems unfounded, since the UNSG also has the power to "bring to the attention of the SC any matter which in his opinion may threaten the peace and security" (Article 99 UN Charter), which has so far not been used excessively or without caution.[165] However, given the far-reaching scope of activities and functions of the UNSG (Article 98 UN Charter) – at its broadest potentially even being "coextensive with all the organisation's activities"[166] – it cannot be ruled out that the UNSG would "override" failed attempts in seeking an AO in the GA or complement and expand the scope of a request with a parallel submission.[167] Such fears could, at least partially, be put to rest by limiting the authority *ratione materiae*[168] to issues which do not fall within the primary functions of the GA and/or SC. In any event, it seems that the Court's interpretation of "scope of activities" in the WHO's request might have also alleviated such fears, though the GA's reluctance has not been diminished.

The GA could also authorize further bodies already established that play an important role in the protection of public interests (such as UNEP)[169] or resort to its power to establish subsidiary organs "as it deems necessary for the performance of its functions" (Article 22) and then authorize these organs. This suggestion of "outsourcing" the authority within the framework and possibilities of the Charter in order to "depoliticize" the procedure would not be an entirely

164 The first request was made in connection with the establishment of the Human Rights Committee, based on the argument that there should be a possibility of the UN Secretary-General to request AOs on its behalf. More recent requests were made, particularly after the end of the Cold War by, e.g., Boutros Boutros-Ghali, *An Agenda for Peace* (1992), para. 38 and Kofi Annan, *Prevention of Armed Conflict* (2001), para. 50.

165 Schwebel, *supra* note 162, 878.

166 Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (2004), 64, providing an overview of the debate.

167 Kolb, *supra* note 16, 1050.

168 *Ibid.*, 1045.

169 Boyle and Redgwell, *supra* note 136, 266–267. UNEP seems to have tentatively inquired at one point (1991), see Shaw, *supra* note 37, 334. See also CTBTO (Art. VI). There was some debate during the drafting of the UNFCCC whether to include such a competence for either the Conference of Parties or an ad hoc panel of its members. See Boisson de Chazournes, *supra* note 36, 112–113.

novel approach by the GA. It has done so on two occasions (the inactive Interim Committee of the GA and the now discontinued Committee on Applications for the Review of Administrative Tribunal Judgments),[170] and the Court has noted that it does not pose an issue if the GA creates "an organ designed to provide machinery for initiating the review by the Court".[171] The manner of creating subsidiary organs is quite flexible,[172] allowing for both political and expert bodies. A body such as a High Commissioner could be bound to engage in an annual reporting process to the GA and Secretariat, to receive feedback on suggested initiatives and requests, but could also serve as an important access point for civil society actors. Such positions are not uncommon at the domestic level, often operating in a similar fashion to ombudspersons, but have also become more common at the international level,[173] at times even equipped with powers of enquiry.[174] Nevertheless, one must keep in mind that such endeavours remain dependent on the political will of Member States – at least at one moment in time.[175] They would also require a lengthy process defining

170 In the 1970s, Jessup suggested for the General Assembly to establish a permanent Commission of Enquiry (under Art. 22 UN Charter), which might serve as an expert body tasked with identifying legal questions in need of clarification which could be sent to the Court without having to go through an at times politically divided General Assembly. As an alternative, he argued that this task might be designated to the International Law Commission. See Philip C. Jessup, "To Form a More Perfect United Nations", 9 *Columbia Journal of Transnational Law* (1970), 177, 186–187.

171 *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, para. 17.

172 Several hundred subsidiary organs and autonomous bodies have been established by the General Assembly, Security Council and the Economic and Social Council (ECOSOC) over the past years (e.g. UNICEF, UNRWA, UNEP, UNCTAD, UNITAR and UNCED). Cf. Shaw, *supra* note 37, 334.

173 At the Rio+20 conference, there were (in the end unsuccessful) suggestions to install a UN High Commissioner for Future Generations. See Catherine Pearce, "Ombudspersons for Future Generations: A Proposal for Rio+20", 6 *Perspectives* (2012), 1.

174 See, e.g., in the context of international financial institutions (such as the World Bank Inspection Panel).

175 In the 1990s, a series of factors contributed to the strengthening of such projects. The end of the Cold War allowed for the "international community" to bring a number of international rule of law projects to an end, ranging from the instalment of a UN High Commissioner for Human Rights, a series of multilateral environmental treaties, or the establishment of the International Criminal Court. On the general reluctance by States, see Shaw, *supra* note 37, 335–336, focusing on the debate as to whether the Commission on Human Rights could have equipped the Human Rights Committee with the possibility to request an opinion (UN Doc. E/1681), to which the UN Secretary-General answered in the negative given that it would not be a specialized agency or organ of the UN.

what might fall within the mandate of the designated High Commissioner and mechanisms to avoid abuse.[176]

Where the expansion of the requesting power to other organizations or treaty bodies such as the International Whaling Commission, the EU or AU is concerned,[177] the overwhelming majority of scholars seem to agree that a Charter amendment would be necessary. Article 96 UN Charter is quite clear in this regard, and as the Court observed in *Nuclear Weapons in Armed Conflict*,[178] it also does not allow the GA to expand the competence by "delegating" its power to other non-listed subjects (e.g., States or regional organizations) or expanding the authority of designated organs and specialized agencies beyond their scope of activity.[179] Yet, Article 65 ICJ Statute is arguably broader in language, stipulating that the Court "may give an advisory opinion on any legal question at the request of whatever body [French: 'organe ou institution'] may be authorized by or in accordance with the Charter of the United Nations to make such a request." The IAEA – authorized by GA Resolution 1146 (XII) (1957) –, e.g., is not a specialized agency in the sense of Article 57 UN Charter since it has not been brought into a formal relationship via the ECOSOC (Article 63), but is classified as a related organization.[180] Still, it is listed on the ICJ's website as an authorized body. While the IAEA has not requested an AO yet, there seems little doubt in the literature that the authorization is valid.[181] The Court itself

176 While it is unlikely that such an institution would abuse its powers, and the Court in any event has discretion to dismiss requests that threaten to undermine its judicial integrity, one might also consider adopting the approach used by regional human rights bodies that are regularly confronted with a high caseload, and struggle to distribute resources adequately. The European Court of Human Rights (ECtHR), for example, for this purpose undertakes a preliminary assessment of the admissibility of the request through a panel of five judges, whereas the opinion is delivered by the Grand Chamber (Art. 2, Protocol 16).

177 For example, in 2004, the Court's President Shi noted at the Sixth Committee that access to the Court's advisory procedure should be extended through the General Assembly or the Security Council which could "by means of appropriate resolutions, make requests for advisory opinions on behalf of those inter-governmental organizations. This proposition could be especially useful for the regional organizations whose important role in the maintenance of international peace and security is recognized by the United Nations Charter" (A/C.6/59/SR.21 (2004)).

178 *Nuclear Weapons in Armed Conflict*, *supra* note 13, para. 30.

179 See Kolb, *supra* note 16, 1046, emphasizing that "Article 96, paragraph 2 of the Charter is, for the General Assembly, an imperative provision of *jus cogens*".

180 However, it in fact has a closer relationship with the General Assembly (Shaw, *supra* note 37, 347). Initially, some suggestions had pushed for channelling requests through the General Assembly.

181 This despite some initial skepticism by the UN Secretary-General and at the IAEA's Statute Conference (Shaw, *supra* note 37, 347).

has also not made an explicit reference to the issue, but has observed that the "agency requesting the opinion must be duly authorized, under the Charter".[182] Gross has observed that the meaning of Article 65 ICJ Statute would be dependent on the meaning of "in accordance with the Charter of the United Nations", and that depending thereupon, this could even apply to "regional or functional organizations".[183] Others have been more cautious and have concluded that, given the special circumstances of the IAEA's establishment, the IAEA could be considered as an UN organ and the granting of authorization "offends neither the letter nor the spirit of the Charter or the Statute".[184] In any event, when it comes to interpreting the Charter, the Court has emphasized that "each organ must, in the first place at least, determine its own jurisdiction",[185] and it would be for the Court "to satisfy itself that the conditions governing its own competence to give the opinion requested are met."[186]

The precise flexibility on this issue is therefore still open and it does not seem entirely out of the scope of possibilities to grant certain "regional arrangements or agencies" in the sense of Article 52 UN Charter a special role in this regard. At a minimum, this would apply to a number of treaty organs established under the auspices of the UN.[187] This would certainly be the biggest innovation launched to further public interest AOs, as smaller or less politicized bodies are more likely to reach consensus on matters that are not within the self-interests of its members. That said, it might raise the question of whether such AOs can pertain to issues that exceed the scope of such smaller body by also touching upon legal questions relevant to non-members.[188] Parts of this concern will be alleviated if widespread participation – also by non-members – is ensured.

182 *Nuclear Weapons in Armed Conflict*, *supra* note 13, para. 10.

183 Leo Gross, "The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order", 65 *A.J.I.L.* (1971), 253, 277.

184 Shaw, *supra* note 37, 347.

185 *Certain Expenses*, *supra* note 32, 168.

186 *Nuclear Weapons in Armed Conflict*, *supra* note 13, para. 29.

187 Shaw, *supra* note 37, 335.

188 See also the recent discussion raised by McGarry and Chávez Aco in relation to the pending ITLOS AO proceedings on climate change, arguing that since AOs are given to the organ requesting it, this would present a challenge to ITLOS' competence. Brian McGarry and Francis Chávez Aco, "The Competence of the International Tribunal for the Law of the Sea in its New Advisory Proceedings on Climate Change" (*EJIL: Talk!*, 16 December 2022), <https://www.ejiltalk.org/the-competence-of-the-international-tribunal-for-the-law-of-the-sea-in-its-new-advisory-proceedings-on-climate-change/>.

6.2 *Increasing Participation*

The likelihood of public interest requests might also be furthered by increasing participation in advisory proceedings, both in terms of subjects (i.e. also non-State actors), but also by means of ease. The broadening of participants in advisory proceedings indeed also constitutes an objective of the Court itself. In practical terms, this is owed to the Court's general approach to fact-finding which is usually party-driven.[189] However, when it comes to advisory proceedings, the Court must hope for participants to "furnish information" necessary for it to be able to exercise its judicial function.[190] Arguably, in public interest AOs this seems to be even more pressing,[191] given that so far the practice of the UNSG has been inconsistent on whether to submit statements or only documents.[192] Moreover, when it came to the *Nuclear Weapons* cases, both the WHO's legal adviser and the UNSG remained neutral, understandably in light of the opposing views among their Member States.[193] In the end, in lack of certain facts and arguments, the Court, e.g., had to restrain itself to a *non liquet* formula, speaking of nuclear weapons "generally" being prohibited.[194]

As noted above (Section 3.4), there have been a few instances where the Court has deviated from its rules or interpreted them in such a manner as to allow for the participation of other actors. This seems to be in accordance with the object of Article 66 ICJ Statute. Even though there has been criticism that such a liberal interpretation is not explicitly foreseen in the procedural framework, it can be "justified as an extension of Article 66, para. 2 by analogy to fulfil

189 James Gerard Devaney, *The Law and Practice of Fact-Finding before the International Court of Justice* (2016), highlighting the difficulties the Court encounters through its reactive approach, particularly when it comes to factual material and documents.

190 Difficulties might arise in cases where the State particularly concerned by the Opinion fails to appear, such as, e.g., Israel in the *Wall* proceedings or South Africa in the *Namibia* proceedings. Judge Buergenthal, for example, noted in his Declaration appended to the *Wall* opinion that the Court "did not have before it the requisite factual bases for its sweeping findings" (para. 1).

191 For example, it might be hard for the Court to gather sufficient information on matters related to climate change and its effects without the involvement of the IPCC.

192 John Dugard, "Advisory Opinions and the Secretary-General with Special Reference to the 2004 Advisory Opinion on the Wall", in Marcelo Kohen and Laurence Boisson de Chazournes (eds.), *International Law and the Quest for its Implementation* (2010), 403, 413 ff.

193 There have been suggestions to introduce something like an Advocate General, similar to the CJEU, which could overcome this challenge. Paulus, *supra* note 78, 1833.

194 Cf. *Nuclear Weapons*, *supra* note 60, para. 30 (Dissenting Opinion of Judge Higgins).

the principal aim of this article: the Court's ability to obtain information."[195] Additionally, Article 66's formulation – making reference to "international organizations" rather than "public international organizations" – arguably allows for the Court to adapt its policy.[196] This conclusion is also not contradicted by Practice Direction XII that applies to statements and documents by international NGOs submitted *on their own initiative.* In contrast, the Court might nevertheless *invite* such participation under Article 66.[197] Such a reading of the Statute and Rules would also allow the Court to control the amount and length of submissions for its own consideration, avoiding potential overburdening. Finally, even though it might be rightfully questioned whether NGOs in fact increase the legitimacy of proceedings,[198] traditional concerns raised with regard to contentious cases (interference with party autonomy, additional costs for parties, delay of proceedings) do not carry the same weight with regard to AOs. If selected wisely by the Court, their fact-finding expertise and specialized legal information can provide essential additional insight into the subject matter (which should also become part of the official case file, as seen below).[199]

As regards the ease of access, the primary aim of the Court should be generally to foster greater participation in terms of public interest representation. Even if the Court might not be willing to accept the participation of international NGOs, Article 66 ICJ Statute does not yet reflect the increased role and importance IOs have come to play in international relations. The Court's practice, thankfully, has become more liberal over the years, and it has accepted submissions by organizations that did not first receive a formal request to submit them.[200] Nevertheless, the Court's formal requests to IOs have remained

195 Paulus, *supra* note 78, 1821, speaking of a *lacuna* since the drafters did not have self-determination units in mind, and it should be allowed, if not mandated, in light of the principle of fair administration of justice.

196 *Ibid.* It has been suggested that the phrasing is owed to the difficulties in drawing a firm line between "public" and "private" IOs, as the example of the ILO and its tripartite structure demonstrates, thus intentionally broader than public IOs. See Shelton, *supra* note 83, 621–622. A similar example would be the ICUN which has been allowed by ITLOS to participate in advisory proceedings given that it consists of governmental and non-governmental member associations.

197 Art. 105 Rules.

198 Luisa Vierucci, "NGOs before International Courts and Tribunals", in Pierre-Marie Dupuy and Luisa Vierucci (eds.), *NGOs in international Law – Efficiency in Flexibility* (Elgar, 2008), 155, 163, arguing that introducing criteria such as restricting access to those NGOs that have consultative status with an international body reduces such concern.

199 Wiik, *supra* note 159, 45 ff., speaking of their potential of reopening "the marketplace of ideas before the court".

200 Shaw, *supra* note 37, 1737, with reference to the EU's statement submitted in the *Wall* proceedings, which had not been requested but still accepted.

few, usually only amounting to one or two per case.[201] Formalizing such an amendment would not seem to raise significant political objections and might constitute an important signal to the international community of the openness of the Court to widen the circle of participants.

6.3 *Publicity and* (*Procedural*) *Transparency*

Finally, when it comes to public interest litigation, an important aspect relates to publicity and the question of (procedural) transparency, i.e. "availability of information about the proceedings".[202] Transparency and publicity in AOs have a special significance given that opinions are non-binding and display their full relevance through the authority their findings evoke.[203] One way to overcome the abovementioned reluctance of the Court to admit non-State actors as formal participants might therefore focus on how to improve the handling of documents and how to make them more accessible for both participants and the public at large. This relates particularly to two aspects.

First, Practice Direction XII foresees that documents submitted by NGOs are treated like publications and are "placed in a designated location in the Peace Palace" (paragraph 3) for the participants of the proceedings to be able to consult. They do not become part of the Court's case file, and the public does not have direct access to these documents through the Court[204] (though of course NGOs are not bound by the same confidentiality as regards written submissions as parties/participants are). Additionally, since the 1990s, the Court has stopped publishing correspondence as part of the case file, with only a few exceptions, i.e. where it is "essential for the understanding of the decisions taken by the Court."[205] However, it is only through its earlier correspondence that we are aware of requests by individuals or NGOs and the handling of those requests by the Registrar. Therefore, it is now only in isolated instances where it becomes public knowledge that further information/documents have been submitted to the Court. In comparison, both the Seabed Disputes Chamber and the ITLOS Tribunal – operating with procedural rules very similar to those

201 It has also omitted important organizations. For example, in *Nuclear Weapons*, the Court did not feel it necessary to invite the IAEA.

202 Wiik, *supra* note 159, 63.

203 Cf. Andreas Paulus, "Article 67", in Andreas Zimmermann and Christian Tams (eds.), *The Statute of the International Court of Justice* (2019), 1835, 1839.

204 Speculating that this might have been simply for reasons of costs, see Kolb, *supra* note 16, 1026.

205 UNGA, "Report of the International Court of Justice" (2005), UN Doc. A/60/4, para. 242; that such information is not available to the public has also been confirmed by the Court's information department (e-mail correspondence on file with the author).

of the ICJ – have followed a more transparent approach.[206] Even though they did not formally qualify the *amicus* submissions by NGOs as formal submissions by participants to the proceedings,[207] they posted them to the website under the case docket in a section titled "Other Statements and Further Information".[208] These documents are now freely accessible to the public.

Second, based on Article 106 RoC, it is common practice for the Court to only publish the written statements and relevant documents to the website on the date of the opening of the oral proceedings. This is line with the general approach by the Court to work towards avoiding cases (and written submissions) becoming subject to "public, perhaps even to polemical, discussion before the hearing".[209] However, it also makes it difficult for the public to follow the proceedings, since only formal participants will have earlier access to the documents, i.e. Article 105 RoC stipulates that submitted written statements to the Court "shall be communicated by the Registrar to any States and organizations which have submitted such statements". Article 105 was only introduced in 1978, limiting the previous practice of wider circulation among all States and organizations invited to participate. It serves to offer participants an opportunity to "comment on the statements made" (Article 66(4) ICJ Statute).

Finally, unlike in contentious cases, there are no provisions explicitly providing for the hearings to be held in public (Article 46 ICJ Statute, Article 59 RoC) and the Court may altogether decide that no oral hearings will be held.[210] This seems unlikely in cases which attach to a larger public interest,[211] though an express provision on this might be welcomed. Similarly, there is no express provision for the publication of the minutes of the hearing in advisory proceedings by the Court (as foreseen in Article 71 RoC for contentious cases).

206 *Activities in the Area* (*supra* note 27) and *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (SRFC) (*Request for Advisory Opinion submitted to the Tribunal*) (2015).

207 They were however allowed to make oral statements. See Wiik, *supra* note 159, 102.

208 <www.itlos.org/index.php?id=109&L=0%25255CoOpensinternallinkincurrentwindow#c587>; <www.itlos.org/en/main/cases/list-of-cases/case-no-21/>.

209 See letter by the Registrar in *Fisheries* (*UK v. Norway*), Correspondence, at 629.

210 *Application for Review of Judgment No.* 158, *supra* note 171, para. 38.

211 For example, in the *Wall* proceedings, the Court paid respect to the large interest the case had raised, and offered live streaming of the oral proceedings (however, the website does not seem to offer any recordings of the sessions). Participants were only informed with a few days' notice, to prevent any attempt to tarnish the proceedings by having the representatives directing their submissions to the audience as a form of propaganda rather than to the Court (Cf. Shaw, *supra* note 37, 1746). This practice has been maintained where suitable. In *Kosovo*, audio recordings and pictures were made available. In *Chagos*, there were videos of the oral hearings.

Even though the Court has in practice so far always published the oral statements made, there is no indication whether they are always in fact complete.

7 Conclusion

The recent increase in public interest litigation at the international level raises a number of questions, among which the search for the proper forum stands out first and foremost. In theory, AOs seem to be an ideal match for accommodating the "international community" at large, by offering access also to non-State actors (in the case of the ICJ, certain bodies of the UN may request an AO, and other IOs may participate). AOs enable an adjudicative approach to questions of international public interest, do not require a specific legal interest, and are also open for abstract or hypothetical questions thus serving as potential guidance in matters in which means of prevention (particularly in the context of environmental matters) play a particular role. Moreover, they constitute a forum for the multilateral enforcement of international public interests, overcoming the procedural pitfalls attached to the largely still purely bilaterally conceptualized contentious proceedings. Hence, the relevance of AOs far exceeds the status of a "participation trophy" for the contributing entities.

However, when it comes to the Court's role in the protection of public interests, the apparent suitability of the advisory procedure for such endeavours has so far proved disappointing in practice, particularly in terms of numbers. Requesting an AO is subject to a number of political obstacles and the Court's exercise of its advisory function is viewed cautiously, particularly by powerful States that are not willing to risk an authoritative – albeit non-binding – statement condemning their practice and policy. This might also be owed to the perception of AOs at times being used for judicial "white-washing", by aiming at "solidify[ing] claims and gain[ing] political advantage by disqualifying opposing views".[212] In the *Nuclear Weapons* opinions, procedural limitations, such as the lack of standing of the WHO to request the opinion or the lack of access to the proceedings by NGOs, hampered the success. Hence, the limits of public interest AOs might also be found in the quality of participation. Thus, "an opinion given on a general question of law, without reference to specific facts, may be useless when it comes to the resolution of specific factual issues."[213]

212 d'Argent, *supra* note 56, 275.

213 Kenneth J. Keith, *The Extent of the Advisory Jurisdiction of the International Court of Justice* (1971), 21.

With this in mind, reforms that foster the role of international community representation should be considered. While these are partially dependent on the political will of UN Member States (e.g., expanding the circle of requesting bodies to depoliticize the process), in addition the Court itself has the means to increase its role in light of the marked flexibility of the advisory procedure. Hence, it would be a welcome development if the Court adapted a more forthcoming approach in terms of participation of a wider range of non-State actors, including NGOs. This can be achieved by granting more generous access to proceedings, more openly requesting information from expert bodies and organizations, and generally striving to ensure more transparency of the proceedings (e.g., by making submitted information and documents publicly available). While none of these aspects on their own – or even taken together – seem to push the boundaries of the Court too far to exceed its reputation as a "cautiously progressive"[214] body, the Court has in fact in several aspects – circulation of written statements in advance of the opening of proceedings, publishing of correspondence – over the years even become less transparent, failing to lead the way on such important issues for other international bodies. If the Court therefore wishes to remain relevant for the most pressing challenges of the twenty-first century, it must also use the means available to it to accommodate the changing composition and structure of the international community.

Acknowledgement

An earlier version of this paper was presented at the ESIL International Courts and Tribunals Interest Group Workshop held during the 2021 ESIL Annual Conference in Stockholm. I would like to thank the participants as well as Philipp Janig and Donald Riznik for their valuable feedback. I am also especially grateful for the excellent comments received by Cecily Rose and the anonymous reviewers. Any remaining errors and omissions are my own. I would like to acknowledge financial support for the open access publication by Universität der Bundeswehr München.

214 As suggested by Callum Musto and Antonios Tzanakopoulos, "The ICJ and 'Progressive Causes'", in Achilles Skordas and Lisa Mardikian (eds.), *Research Handbook on the International Court of Justice* (Elgar forthcoming), draft available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3379040>.