SPEECH BY H.E. JUDGE SHI JIUYONG,

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The advisory function of the International Court of Justice

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Mr. Chairman, distinguished delegates, Ladies and Gentlemen,

It is for me a privilege and an honour to address your Committee for the second time as President of the International Court of Justice. I sincerely appreciate your kind invitation in this regard.

The 2003-2004 annual Report of the Court to the General Assembly demonstrates that the principal judicial organ of the United Nations has enjoyed yet another year of great activity, with 25 cases at the start of the review period and 20 as of 31 July 2004. The Court held five sets of hearings relating to no less than 12 cases (the hearings in all eight cases concerning the *Legality of Use of Force* having been dealt with simultaneously), rendered three final judgments and delivered one advisory opinion. Currently, the Court has 21 cases listed on its docket, originating from across the globe and involving a wide range of issues. The Court is delighted to see the ongoing confidence that States place in it and will endeavour to continue discharging its duties with the utmost care.

Mr. Chairman,

The topic which I have chosen to address today takes me away from the thriving contentious side of the Court's work; I would like instead to draw your attention to its generally less known but nonetheless extremely important advisory function. Previous Presidents of the Court in speaking before your Committee have commented on the underutilization of the ICJ advisory procedure and its potential for expansion to a wider spectrum of organs and agencies. At the same time, you have all recently had an opportunity to witness the importance attributed to the Court's opinions, as the front pages of newspapers all over the world covered the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. I believe that the advisory function of the Court is an extremely valuable tool for the United Nations bodies and that its role in this regard deserves to be highlighted once again.

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I shall begin with a history of the advisory procedure and outline some of its main characteristics.

The advisory function of the Court finds its origins in Article 14 of the Covenant of the League of Nations concerning the establishment of the Permanent Court of International Justice. The Permanent Court was authorized to give advisory opinions on a discretionary basis on "any dispute or question referred to it by the Council or the Assembly". One of the primary objectives

of this provision was to offer assistance to the Council of the League in carrying out its functions. Indeed, it was not uncommon for the Council, either on its own initiative or at the request of States and intergovernmental bodies, to refer legal questions to the Permanent Court. The subsequent advisory opinions greatly facilitated the work of the Council by offering a solid legal basis for the final settlement of international disputes.

Although these opinions were not binding in nature or *res judicata*, they were invariably given authoritative status by the organs and States concerned. In this way, the advisory procedure allowed the Permanent Court to provide, with the goodwill of the participants, an effective alternative method to achieve, albeit indirectly, the settlement of international disputes and the resolution of legal questions, beyond the boundaries of the traditional contentious proceedings of a court of law.

Despite initial concerns that the advisory function might be incompatible with the role of the judicial institution — either by appearing legally ineffectual or by affecting the consensual nature of the Court — by 1927, the PCIJ recognized that it had derived significant prestige from the manner in which it had performed its advisory function (*P.C.I.J., Series E, No. 4*, p. 76). Although the questions put in the requests for advisory opinions usually addressed discrete issues, the Permanent Court, through the delivery of 27 advisory opinions in less than two decades, made an exemplary contribution to the development of international law in the period between the two world wars. Its renowned dicta covered the interpretation and application of the Paris Peace Treaties, tensions regarding German minorities, the status of Danzig and ILO requests concerning working conditions for women.

With the creation of the United Nations and the International Court of Justice as its principal judicial organ, the advisory competence was not only maintained, but also widened in scope. According to Article 96, paragraph 1, of the Charter of the United Nations, the General Assembly and the Security Council may request an advisory opinion from the Court on any legal question. While the Security Council has used its prerogative only once, in the *Namibia* case, nearly one third of all the requests for advisory opinions have emanated from the General Assembly.

In addition, the General Assembly may, under Article 96, paragraph 2, of the Charter, authorize other organs of the United Nations and specialized agencies to request advisory opinions "on legal questions arising within the scope of their activities"; currently there are 20 such bodies. Over the years the International Court of Justice has delivered nine advisory opinions at the request of specialized agencies: three for the Committee on Applications for Review of Administrative Tribunal Judgments, two for ECOSOC, two for the WHO, one for Unesco and one for IMCO. On one occasion, in the Advisory Opinion concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (I.C.J. Reports 1996 (I))*, the Court decided that it lacked jurisdiction to reply to a request submitted by the WHO because the request did not relate to a question within the scope of the activities of that Organization as required by Article 96, paragraph 2, of the Charter.

According to Article 68 of its Statute, the Court shall, in the exercise of its advisory function, be guided by the provisions of the Statute which apply in contentious cases, to the extent to which it recognizes them to be applicable. When dealing with requests for advisory opinions, both the PCIJ and the current Court have adopted standard (although simplified) judicial procedures for both the written and/or oral presentations of the positions of the relevant participants, the internal deliberations of the judges and the rendering of a collegial decision.

Article 65 of the Statute provides that the International Court of Justice "*may* give an advisory opinion" (emphasis added), and this has always been understood to confer discretion upon the Court whether to give the opinion requested. The International Court, like its predecessor, has however always considered that there must be compelling reasons for it to exercise its discretion not to render an advisory opinion. In particular, the Court, as a principal organ of the United

Nations, considers that it is under a duty to co-operate with other organs and to contribute to the work of the Organization.

Concerns about the propriety of the Court's exercise of its advisory function have tended to arise when the subject-matter of the request has been connected in some way with an actual dispute between States, or, as Article 102 of the Rules of Court specifies, with "a legal question actually pending between two or more States". While contentious proceedings destined for the settlement of legal disputes between States always require the consent of the parties, such consent is not set out by Article 96 of the Charter as a condition for advisory jurisdiction. However, the Court has always held that it is obliged, even when giving advisory opinions, to respect the essential rules guiding its activities as a court of justice. Thus in its Advisory Opinion in the *Western Sahara* case, the Court stated that "[i]n certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character" and added that "[a]n instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent" (*I.C.J. Reports 1975*, p. 25, para. 33).

Such a situation has rarely arisen; this Court's predecessor only once took the view that it "could not reply to a question put to it" in a request for an opinion submitted by the Council,

> "having regard to the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the State parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way *(Status of Eastern Carelia, P.C.I.J., Advisory Opinion, 1923, Series B, No. 5)*" (*Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I)*, pp. 235-236).

However, the present Court has never declined to give its opinion simply because there has been some connection between a dispute involving States and the subject of the request. In a number of cases, the Court has construed the question before it as relating to the exercise of the functions of the requesting United Nations organ rather than to any ongoing dispute. Thus, in its most recent Advisory Opinion, the Court decided that pronouncing on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* would not have the effect of circumventing the principle of consent to judicial settlement. It reached this conclusion on the basis that the question put by the General Assembly was located in a much broader frame of reference than that of the bilateral dispute, and that this question was of particularly acute concern to the United Nations (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 50).

When considering its jurisdiction, the Court is also subject to Article 96 of the Charter which requires that the question put to it be of a legal nature. The fact that such a question arises in a political context has not been regarded as sufficient to deprive the Court of its jurisdiction. As long ago as 1948, in the case of *Conditions of Admission of a State to Membership in the United Nations* (the first request for an advisory opinion submitted to the ICJ) the Court refused to attribute a purely political character to a request which, framed in abstract terms, invited it "to undertake an essentially judicial task by entrusting it with the interpretation of a treaty provision". In its famous dictum in the *Western Sahara* case, it held that questions framed in terms of law and raising problems of international law are by their nature susceptible of a reply based on law and appear to be questions of a legal character (*Western Sahara, I.C.J. Reports 1975*, p. 10). Furthermore, the Court has, to this day, never found that political arguments surrounding a legal question put to it, constituted a compelling reason for it to decline to exercise its advisory jurisdiction. In the *WHO-Egypt* case, the Court remarked that "in situations in which political considerations are prominent it [might] be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter

under debate . . ." (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, I.C.J. Reports 1980*, p. 87).

As I mentioned earlier, another essential characteristic of advisory opinions is their non-binding nature; even the requesting body is not obliged to accept the conclusions of the Court. As already indicated, however, the Council of the League of Nations has always favourably accepted the pronouncements of the Court; and so have also the organs and agencies of the United Nations. Moreover, States and other international entities are not prevented from agreeing between themselves that the opinion will be binding on them. Indeed, there are a number of treaties between States and international organizations which stipulate that, in the event of a dispute, the organization will request an advisory opinion of the Court, which the two parties agree will have a "decisive" or "binding" effect on them. The Advisory Opinion in the case concerning the *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (*I.C.J. Reports 1999*) was issued in response to a request based on an agreement of this kind (namely, the Convention on the Privileges and Immunities of the United Nations, Art. VIII, Sect. 30). In that Opinion, the Court distinguished, however,

> "between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion of the Court . . . These particular effects, extraneous to the Charter and the Statute which regulate the functioning of the Court, are derived from separate agreements." (*Ibid.,* para. 25.)

Now that I have outlined the history and main characteristics of the advisory function, I should like to pose the following question: Why should recourse to the advisory function of the Court be encouraged, and how might it be developed to achieve its potential?

Mr. Chairman,

The advisory procedure provides the Court with a very real way of participating and contributing to the overall objectives of the United Nations. In addition to offering legal guidance to the requesting bodies, it can play a role in international dispute resolution and prevention, and clarifies and develops international law.

As I have already mentioned, from its inception, the advisory procedure of the Permanent Court was conceived as a means of providing the Council of the League of Nations with legal guidance in order to facilitate the process of finding a solution to actual international disputes. The current Court can play a similar role for the United Nations. Thus, having lately asserted that the construction of the wall by Israel, in the Occupied Palestinian Territory, including in and around East Jerusalem, as well as its associated régime, are contrary to international law, the Court found among other things that "the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to end [this] illegal situation . . . taking due account of the present Advisory Opinion".

With reference to the contribution the advisory procedure can make towards resolving existing disputes, it is worth recalling that in the past there have been instances in which States have found it more acceptable for an advisory opinion to be requested than for contentious proceedings to be instituted. For example, in the Advisory Opinion on the *European Commission of the Danube*, given in 1927 by the Permanent Court (*P.C.I.J., 1927, Series B*, *No. 14*), settlement was achieved by this means only after Romania had rejected the option of seeking adjudication via the contentious procedure, but had agreed to an advisory opinion being requested as a compromise.

The advisory procedure of the Court can also play an "indirect" part in preventing disputes and conflicts from developing, by clarifying the legal parameters within which a problem may be resolved — whether between the United Nations and its Member States or between States *inter se*.

In the past, the advisory function has proved useful in providing advice in the context of abstract problems of lawfulness, raised in the day-to-day activities of the various organs of the United Nations. The case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (*I.C.J. Reports 1951*) dealt not only with an organizational issue and the depositary functions of the Secretary-General, but also with what was a general problem of treaty law, namely the question of the legal effect of reservations to a multilateral treaty, and of the objections made by other parties. As you know, the International Law Commission built on this precedent to devise the solution now enshrined in Articles 20 and 21 of the Vienna Convention on the Law of Treaties. In its Advisory Opinion of 1971 on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (*I.C.J. Reports 1971*), the Court interpreted Article 27 of the Charter, and considered a voluntary abstention by a permanent Member of the Security Council did not preclude the adoption of a resolution, despite the terms of that Article.

In the context of the development of international law, advisory opinions can further provide the Court with the opportunity to determine the current status of particular principles and rules of international law and thereby to contribute to a more cohesive and law-abiding international community. In its Advisory Opinion on the *Western Sahara* the Court confirmed, for instance, that a "cardinal condition of a valid 'occupation'" as a legal "means of peaceably acquiring sovereignty over territory otherwise than by cession or succession . . . was . . . that the territory should be a *terra nullius* — a territory belonging to no-one — at the time of the act alleged to constitute 'occupation'" (*I.C.J. Reports 1975*, p. 39, para. 79). The Court found that State practice at the end of the nineteenth century already indicated "that territories inhabited by tribes or people having a social and political organization were not regarded as *terrae nullius*". Reiterating the importance of the principle of self-determination of peoples as determined by the Charter and General Assembly resolutions 1514 (XV), 1541 (XV) and 2625 (XXV), the Court recognized its direct and particular relevance for non-self-governing territories and its status as a right *erga omnes*. Another example is the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. There, the Court considered whether customary international law provided a basis for the prohibition of the threat or use of nuclear weapons. In its Opinion, the Court noted that members of the international community were profoundly divided on the matter and did not therefore consider itself able to find that there was such an *opinio juris*. The Court did however stress the applicability of the principles and rules of humanitarian law to a situation involving the possible threat or use of nuclear weapons. At the end of its reasoning, the Court recognized that it could not conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake. The Court further found that there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

The Court's opinions have also been particularly useful in establishing and settling points of the law of international organizations, particularly since entities other than States cannot have recourse to the contentious jurisdiction of the Court. For example, in the case concerning *Reparation for Injuries Suffered in the Service of the United Nations (I.C.J. Reports 1949)*, the Court stated that in its opinion the United Nations had been created as an entity possessing objective international personality and not merely personality recognized by its Members alone. This Opinion paved the way for the clarification of important aspects of the international legal personality of intergovernmental organizations. Other examples include the case concerning *Judgments of the Administrative Tribunal of the ILO upon Complaints Made by Unesco (I.C.J. Reports 1956)*, which addressed the question of the binding effect of the judgments of the ILO Administrative Tribunal on Unesco, and the case concerning *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization* (*I.C.J. Reports 1960)*, which preceded the reconstitution of the Maritime Safety Committee of IMCO (now the IMO).

In view of the many potential uses of the advisory procedure, it is perhaps surprising that in 58 years the current Court has only been asked to give advisory opinions on 24 occasions; this is comparatively far less frequently than the PCIJ was requested to advise during its 17-year existence. There is a feeling in some quarters that many more international problems could usefully be addressed in this way. Over the years a number of ideas, not all necessarily viable, have been put forward regarding the possible development of the Court's advisory function to enable it to achieve its potential. In the spirit of opening up the debate on this important topic, but without wishing in any way to prejudge the question, I should like to recall some of these options for you.

Thought might be given to broadening the field of application of the Court's advisory jurisdiction *ratione personae*. It is worth noting that inter-governmental organizations in general have gained prominence in international life. In response to the importance and the complexity of the functions, which many of these organizations perform, it has been proposed that they should be authorized to request opinions directly. It has however been suggested that steps in such a direction might raise certain legal issues in relation to the interpretation of the Charter. In order to avoid these difficulties, access to the Court's advisory procedure might be given to a wider group of inter-governmental organizations, including those outside the United Nations family, through the General Assembly or the Security Council. These two latter organs — which may ask for opinions on "any legal question" — could, by means of appropriate resolutions, make requests for advisory opinions on behalf of those intergovernmental 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.

Another suggestion which has been canvassed is to empower the Secretary-General on his own initiative to request advisory opinions. The Secretariat, represented by the Secretary-General, is to date the only principal organ of the United Nations not authorized to request an advisory opinion of the Court on any legal question related to its activity in the service of the Organization. Currently, the Secretary-General can only place a question on the agenda of an organ and suggest that it become the object of a request for an advisory opinion. In fact, on a number of occasions it was the Secretary-General who took the initiative in the General Assembly in order to formulate the requests. Already in 1990, in his annual report on the work of the Organization, Secretary-General Boutros Boutros-Ghali made a recommendation that the General Assembly authorize the Secretary-General and other United Nations organs to take advantage of the advisory competence of the Court, and that other United Nations organs that already enjoy such authorization resort to the Court more frequently for advisory opinions (doc. A/45/1, Part III, p. 7). Reiterating this proposition in his Report on Prevention of Armed Conflict submitted to the General Assembly and the Security Council in 2001, Secretary-General Kofi Annan expressed his belief that the extension of the authority to the Secretary-General would greatly add to the means of peaceful solutions of international crisis situations (doc. A/55/985-S/2001/574, para. 50).

Other perhaps less "mainstream" suggestions which have been made include the idea of authorizing national supreme courts as well as international courts and tribunals to request advisory opinions on certain difficult or disputed questions of international law so as to allow for a uniform interpretation of the rules and principles of international law raised by those questions.

These ideas have found varying support in international legal circles and it is not my intention to claim that any of them represent a definitive way to reinvigorate the advisory procedure of the Court. Rather I should like to draw attention to them in order to stimulate debate among policy makers, including the distinguished delegates whom I have the honour to address today. My hope is that by keeping an open mind to the possibilities available to us, theoretical proposals can lead to practical solutions and a strengthening of the Court's advisory function.

Mr. Chairman,

Recourse to the advisory procedure of the Court offers clear advantages: just as with its judgments, the advisory opinions of the Court allow it to develop its jurisprudence and to contribute to the progress of international law. Furthermore, the "judicial" approach to this non-binding procedure makes it possible for the Court to offer an authoritative legal opinion, which nonetheless allows for flexibility in its implementation by the participants. Thanks to these unique characteristics, the Court's advisory procedure has the potential to play a key role in the smooth functioning of world organizations, and provides a particularly suitable means for the Court to defuse tension and ward off conflicts by determination of the law.

In conclusion, it is the Court's view that its advisory function should become better known by all so that it can be better utilized and play a greater role in the creation of a coherent international legal order.

Thank you, Mr. Chairman.

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