

Evaluating the extent to which international courts can maintain their judicial character in advisory proceedings.

It is necessary to distinguish between judicial procedure or function and judicial character. In allowing for abstract questions to be entertained by the Court as part of its advisory judicial function, the Court's pronouncement can only be viewed, at best, as akin to *Obiter Dicta*. It is suggested that the judicial character of the Court, however, is characterised by the Court's engagement in argument, which when tempered with the divergent views of even ad hoc judges, strikes a fine balance between the two conflicting principles of sovereignty and harmonisation.

History

The conflicting textual translation of Article 14 of the Covenant of the League of Nations led to a divergence of views. Judge Moore took the view that the non-binding nature of advisory opinions and the lack of duty to discharge the function of advisory jurisdiction was "inconsistent with and potentially destructive of [the Court's] judicial character".¹ On the contrary, the Court's position in the *Peace Treaties case*² was that its discretion to decline to give an advisory opinion is characteristic of its judicial character.³ Judge Moore, being American, was influenced by the adversarial US Supreme Court practice and fear that advising on the constitutionality of pre-enactment legislation could shape the political condition of the country.⁴

¹ Pomerance M, "The advisory role of the International Court of Justice and its 'judicial' character: past and future prisms" in A.S. Muller, D. Raic and J.M. Thuranszky *The International Court of Justice, its future role after fifty years* (Leiden Journal of International Law) 275.

² See 2 AD 394; <<http://www.icj-cij.org>>

³ Pomerance (n 1) 297

⁴ Laskin B, "The institutional character of the judge" (1972) 7 Isr. L. Rev 330.

International law

The constitutive instruments of the Inter-American Court of Human Rights, the African Court of Human and Peoples' Rights, The Law of Sea Tribunal and the European Court of Justice enable these judicial organs to render advisory opinions in limited circumstances.⁵

The authority of the International Court of Justice to render advisory opinions is entrenched in Article 96(1) of the UN Charter and Article 65(1) of the ICJ Statute on the basis that it should participate in the activities of the United Nations as its principal judicial organ unless there are "compelling reasons".⁶ Such reasons include where the reply has the effect of obliging a state to the judicial settlement of its dispute without its consent.⁷ This is supported by the view taken by the Court in the *Eastern Carelia Case*.⁸

Legal standing

Article 38(1)(d) of the ICJ statute label advisory opinions as "subsidiary source of law".⁹ They have also been described as being of the same high judicial quality as judgments by virtue of their reasoning by a convincing majority.¹⁰ Oellers-Frahm notes that advisory opinions not only constitute precedent given that they will be relied on by the Court in subsequent proceedings¹¹ but also carry persuasive authority that can, by inducing state practice, justify state action and create customary law.¹² With the

⁵ Oellers-Frahm K, "Lawmaking through advisory opinions?" (2011) 12 German Law Journal 1033, 1035-1038

⁶ Bianchi A, "Dismantling the wall: The ICJ's advisory opinion and its likely impact on International law" (2004) 47 German Yearbook of International Law 343

⁷ Keith K, "The advisory jurisdiction of the International Court of Justice: some comparative reflections" (1996) 17 Australian Yearbook of International Law 39

⁸ PCIJ Rep, Series B No 5; 2 AD 394

⁹ Oellers-Frahm (n 5) FN55

¹⁰ Oellers-Frahm (n 5) 1050

¹¹ Oellers-Frahm (n 5) 1051

¹² Oellers-Frahm (n 5) 1051, 1053

exception of the *South Africa and Namibia Opinion*¹³ and the *Wall Opinion*¹⁴ no state or organisation has acted contrary to its opinion.¹⁵

Assimilating the advisory process and the contentious and the insistence of the equality of the parties¹⁶ in advisory proceedings before the ICJ and the Inter-American Court of Human Rights (IACtHR), all parties are informed of the request and invited to furnish written statements and make oral arguments as per Article 66 of the ICJ Statute and Article 62 of the Rules of Procedure of the IACtHR.¹⁷

Under Article 69 of the UN Charter, both the Security Council and the General Assembly have the right to ask for an Advisory Opinion on any legal question. Three conditions are stipulated in Article 96(2) of the UN Charter and Article 65(1) of the ICJ Statute to found its advisory jurisdiction: the authority to request an opinion on a legal question arising within the scope of the activities of the requesting agency.¹⁸

Cases

In the *Legality of the threat or use of Nuclear Weapons Opinion*¹⁹, for example, the ICJ considered that the question was relevant to the activities of the General Assembly in international relations and the disarmament process and the progressive development of international law.²⁰ This Opinion and the *Wall Opinion* have been criticised as politically controversial and failing to enable the UN to do its work

¹³ [1971] ICJ Rep, 16

¹⁴ [2004] ICJ Rep, 3

¹⁵ Oellers-Frahm (n 5) 1047

¹⁶ Keith (n 7) 48

¹⁷ Oellers-Frahm (n 5) 1049

¹⁸ Aust A, "Advisory Opinions" (2010) 1 Journal of International Dispute Settlement 132

¹⁹ [1996] ICJ Rep 226

²⁰ Aust (n18) 136

better.²¹ It is suggested that this implies a desire for a solution of the problem rather than a solution to the problem.

A similar criticism could be made of the *Namibia Opinion* which, although only placed moral obligation on the Union of South Africa to place the territory under the Trusteeship system, circumvented the absurdity of forcibly compelling the UN to approve the annexation of Namibia because their inhabitants had lost the right to petition the defunct League of Nations. It placed an obligation on South Africa to petition the UN.²²

Objections

One of the criticisms of Lenefsky is that advisory opinions give argumentative ammunition to the requesting body²³ although no analysis of any cases are given. In asserting that opinions should be directed to the requesting body, the *Namibia Opinion* is used as an example of the failure to achieve a solution.²⁴ It is suggested that advisory opinions can be used as a tool to seek a reasoned solution to a problem.

Alternative suggestions to advisory opinions, such as extra judicial books, speeches, and interviews²⁵ carry less weight than a judicial pronouncement. Furthermore, Judge Elaraby was criticised despite having privately expressed his view that the Israeli occupation was illegal.²⁶

Another weak objection to advisory opinions has been that of bias in subsequent proceedings and the difficulty in convincing one who has already formed an opinion.²⁷

²¹ Aust (n 18) 134

²² Lenefsky D, "Advisory Opinions as a problem solving process" (1966) 11 Vill. L. Rev. 537

²³ Lenefsky (n 22) 544

²⁴ Lenefsky (n 22) 544

²⁵ "Advisory opinions and the influence of the Supreme Court over American policymaking" (2011) 124 (8) Harvard Law Review 2064, 2067, 2068

²⁶ Pomerance M, "A Court of 'UN Law'" (2005) Israel Law Review Nos. 1-2 136

²⁷ Emery L, "Advisory Opinions from Justices" (1908-1909) 2 Me. L. Rev. 1, 2

Heavily criticised is the *Wall Advisory Opinion*, in particular the Court's finding that states were under an obligation not to recognise the illegal situation and ensure compliance by Israel with International Humanitarian Law (the "Ensure respect obligation").²⁸ Scobbie notes the observation of Palwankar that the UN is used to round political support of community of states to ensure respect for International Humanitarian Law.²⁹ The exaggerated implication is that the Court is complicit in political manoeuvrings by virtue of its mandate to participate in the activities of the UN.

Wall Advisory Opinion

Aust notes that in the *Advisory Opinion in Peace Treaties* and the *Western Sahara Opinion*³⁰ the Court held that for an advisory opinion to be given "in conditions compatible with its judicial character" the ICJ must have before it sufficient evidence and information.³¹

In the *Wall Opinion*, Israel made no representations nor did it provide its consent and in proceeding, it is suggested that the Court avoided an absurdity as in *the Namibia Opinion*. Also, analogous to common law civil proceedings, the Court can have regard to the pleadings, in the absence of a party. Here, the Court considered the report of the Secretary General, reports of the UN Special Rapporteurs, the Israeli written statement and Israeli documents in the public domain.³² Additionally, the Court followed the same principles of equity and procedure adopted in contentious proceedings. At best, in the alternative, the Court's advisory jurisdiction can be treated as *Obiter*.

Pomerance purports that the ICJ "judicially reinforc[ed] the General Assembly deligitimation of the steps taken by Israel to protect its citizens" and that any representations it would have made could have been treated as acquiescing the Court's competence and propriety.³³ The advisory jurisdiction of

²⁸ Bianchi (n 6) 6

²⁹ Scobbie I, "Smoke, mirrors and killer whales: the International Court's Opinion on the Israeli Barrier Wall" (2004) 5 (9) German Law Journal 1109

³⁰ [1975] ICJ Rep 28

³¹ Aust (n 18) 143

³² Pomerance (n26) 145

³³ Pomerance (n26) 163

the ICJ allows for representations to be made and Israel could have done so without prejudicing its position.

Equally, his argument that the opinion could impede a negotiated solution to the Israeli/Palestinian conflict³⁴ is misguided as building a wall is not illustrative of any such intention. The Court, as an old creature that has lay silent witness to historic milestones such as the fall of the Berlin Wall, is the only independent mechanism that can authoritatively ensure that humanity does not regress. What would it have said of the Court if it did not opine on the wall?

More challenging arguments to counter are that in recognising Palestine as having a right of self determination, the Court not only imposed consequent obligations on Israel of an erga omnes nature³⁵ but the “Just War” doctrine also affected the principles of Jus ad bellum and Jus in bello.³⁶ The non-binding doctrine in answer to this is weak.³⁷

Indicated in part by the *Wall Opinion* are several issues peculiar to advisory opinions.

(a) Consent

The Court stated in the *Western Sahara Opinion* that the lack of consent of an interested state “may render the giving of an advisory opinion incompatible with the court’s judicial character”³⁸ Oellers-Frahm notes that state “consent constitute[s] the democratic and legitimising basis of international law”.³⁹ Even the *Lotus Decision*⁴⁰ of the PCIJ held that “the rules of law binding upon states emanate from their own free will” which connotes a consensual character of international law.⁴¹

³⁴ Pomerance (n26) 164

³⁵ Pomerance (n26) 157

³⁶ Pomerance (n26) 156

³⁷ Topf M, “State Supreme Court Advisory Opinions as Illegitimate Judicial Review”(2001) M.S.U. – D.C.L. 117-126

³⁸ Pomerance (n 1) 305

³⁹ Oellers-Frahm (n5) 1054

⁴⁰ SS Lotus, 1927 PCIJ Series A, No. 10

⁴¹ Payandeh M, “The concept of International law in the jurisprudence of H.L.A. Hart (2011) 21(4) EJIL 971

The position of the ICJ however is that it has inherent jurisdiction and competence by virtue of the Charter and its Statute and consent is not necessary.⁴² The *Opinion concerning Peace Treaties with Bulgaria, Hungary and Romania*⁴³ held that consent of states in advisory proceedings is not required because the reply has no binding force.⁴⁴ Consent will only be considered in “exceptional cases”⁴⁵ where lack of consent renders the requesting organ incompetent to deal with the matter or the non co-operation of the disputant state prevents the court from acting judicially.⁴⁶

The credibility of the Court is not assisted by the weak “non binding doctrine” especially if credence is to be given to the argument that opinions have the effect of developing customary law.

(b) Incremental development of law

Nevertheless, that they do and this raises a different issue of judicial law making⁴⁷ which can be reconciled with the Court’s power to rule *Obiter* in establishing new legal principles. The subsequent application of opinions as precedent have also been demonstrated by the use of previous opinions on legality of secession, consent of former sovereign, self defence, recognition of new states, minority rights and human rights in the case of secession in dealing with the Former Yugoslavia and subsequently Kosovo.⁴⁸

The malleability afforded by the “non binding doctrine” does mean that the Court, even if reversing its position due to “practice and acquiescence” and “contemporary interpretation”⁴⁹, is still influencing incremental legal development.

⁴² Lecture Ian Scobbie, SOAS 15.3.16

⁴³ [1950] ICJ Rep 71

⁴⁴ Hambro E, “The authority of the advisory opinions of the International Court of Justice” (1954) 3 International and Comparative Law Quarterly 2, 12

⁴⁵ Hambro (n 44) 13

⁴⁶ Keith (n 7) 43

⁴⁷ Oellers-Frahm (n 5) 1040

⁴⁸ Oellers-Frahm (n 5) 1045

⁴⁹ Dahlquist R, “Advisory opinions, extrajudicial activity and judicial advocacy: a historical perspective” (1983-1984) 14 Sw. U. L. Rev 52-54

(c) Law making

That the *Wall Opinion* has been criticised for law making by recognising Palestine's right of self determination, in the same vein it has been criticised for "closing the door to any argument that self defence can be claimed against non state actors"⁵⁰ which clearly would be making law. On the contrary, Judge Kooijman expressed doubt that the "Ensure respect obligation" imposed by the Court was a statement of positive law.⁵¹

(d) Political v legal

The drafting history of the League Covenant suggests that the advisory jurisdiction was intended to bring "the court's expertise to...legal questions connected with political disputes which were on the agenda of the League's political organs".⁵² Legal issues cannot be treated in a politically neutral context.⁵³

The guarded *Opinion on the threat or use of Nuclear Weapons* in favour of their use in self defence has been criticised as demonstrating the Court's weakness in advising on contentious issues.⁵⁴ The Court's involvement is debatable given, for example, that it required sensitive political negotiation and withdrawal of US missiles from Turkey to secure removal of the same from Cuba in 1962.⁵⁵ The suggestion that the UN can consider opinions of the ICJ on legal questions from a political point of view⁵⁶ has been criticised as allowing political organs to act as a Court of Appeal.⁵⁷ The fact is that with

⁵⁰ Bianchi (n6) 40

⁵¹ Scobbie (n29) 1118

⁵² Pomerance (n 1) 272

⁵³ Bianchi (n 6) 4

⁵⁴ Oellers-Frahm (n 5) 1042

⁵⁵ Sandler M, *The Letters of John F. Kennedy* (Bloomsbury 2013)

⁵⁶ Hambro (n44) 18

⁵⁷ Hambro (n44) 22

the exception of the *South Africa and Namibia Opinion* and the *Wall Opinion* no state or organisation has acted contrary to the ICJ's opinion.⁵⁸

However, the Court's position was made clear in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Opinion*⁵⁹ that the purpose of the advisory opinion is to "furnish to the requesting organs the elements of law necessary for them in their [own] action" and that "the General Assembly has the right to decide for itself on the usefulness of the opinion in light of its own needs".⁶⁰

(e) Abstract questions

With regard to the type of question referred, contrary to the recommendations of the Informal Inter Allied Committee on the Future of the PCIJ in 1943,⁶¹ the ICJ in the *Admissions Opinion*⁶² held that it can "give an opinion on any legal question abstract or otherwise"⁶³ and this principle was followed in the *Opinion on the legality of Nuclear Weapons*.⁶⁴

However, in the WHO-Egypt case⁶⁵ the Court stated that "if [it] is to remain faithful to the requirement of its judicial character in the exercise of its advisory jurisdiction it must ascertain what are the legal questions really in issue in questions formulated in a request".⁶⁶ That the rephrasing of questions is really a judicial exercise is questionable. However, reconciling that latitude with the concept of *Obiter dicta* is easier to justify.

⁵⁸ Oellers-Frahm (n 5) 1047

⁵⁹ [1951] ICJ Rep, 15

⁶⁰ Aust (n 18) 144, 145

⁶¹ Pomerance (n1) 286

⁶² Conditions of Admission of a State to Membership of the United Nations [1948] ICJ Rep 51

⁶³ Aust (n 18) 138

⁶⁴ Aust (n 18) 138

⁶⁵ [1980] ICJ Rep 73

⁶⁶ Keith (n7) 49

Oellers Frahm notes that the “majority of advisory requests to the ICJ [between 1945 -2010 concerned] current legal questions that were at stake also in contentious disputes or Security Council resolutions.”⁶⁷

Moreover, in the same way that the Court cannot choose the contentious matter before it, “there is no departure from judicial standards in an application of law to concrete questions in which adjudication does not proceed to final judgment”.⁶⁸

Having assessed the cases above, it is clear that the advisory jurisdiction is compatible with judicial *procedure and function* if considered as *Obiter* in that it construes and applies the law to disputes concerning its meaning following representations and argument not always as to factual but to abstract circumstance to which the Court can attach its reasoning.⁶⁹

Advisory opinions are consistent with the Court’s judicial *character* in terms of achieving the desired effect of developing the law. While the “character of the dispute may affect the Court through its power to appoint judges ad hoc”⁷⁰ Frug notes that we tailor our argument to nurture and reflect our own sense of self and society and views argument as character.⁷¹ An advisory opinion engages in argument and the divergent views are converged to bring cohesion to a pluralistic world.

Manley Hudson stated that: “I find it impossible to know how the world is going to continue successfully the many agencies of co-operation that have now been established unless we have it possible to settle the legal questions bound to arise in the course of that co-operation in some

⁶⁷ Oellers-Frahm (n 5) 1035

⁶⁸ Hudson M, “Advisory Opinions, Contributions of the PCIJ to the development of International law” (1930) 24 Am. Soc’y Int’l L. Proc. 66

⁶⁹ Rhodes J, “Advisory Opinions” (1912-1913) 6 Me. L. Rev. 28, Lecture Ian Scobbie, SOAS 15.3.16

⁷⁰ Keith (n 7) 47

⁷¹ Frug, J, “Argument as character” (1987-1988) 40 Stan. L. Rev. 905

authoritative manner”.⁷² Hudson notes that a larger contribution by the Court to peace is made through its advisory opinions than through its judgments.⁷³

⁷² Hudson (n 68) 67

⁷³ Hudson (n 68) 67

Bibliography

Books

Sandler M, *The Letters of John F. Kennedy* (Bloomsbury 2013)

Chapters in Books

Pomerance M, "The advisory role of the International Court of Justice and its 'judicial' character: past and future prisms" in A.S. Muller, D. Raic and J.M. Thuranszky *The International Court of Justice, its future role after fifty years* (Leiden Journal of International Law)

Journal Articles

"Advisory Opinions" (1908) James Bradley Thayer Legal Essays 42

"Advisory opinions and the influence of the Supreme Court over American policymaking" (2011) 124 (8) Harvard Law Review 2064

Aust A, "Advisory Opinions" (2010) 1 Journal of International Dispute Settlement 123

Bianchi A, "Dismantling the wall: The ICJ's advisory opinion and its likely impact on International law" (2004) 47 German Yearbook of International Law 343

Dahlquist R, "Advisory opinions, extrajudicial activity and judicial advocacy: a historical perspective" (1983-1984) 14 Sw. U. L. Rev 45

"Decisions and advisory opinions of International Tribunals" (1980) UN Jurid. Y.B. 215

Emery L, "Advisory Opinions from Justices" (1908-1909) 2 Me. L. Rev. 1

Frug, J, "Argument as character" (1987-1988) 40 Stan. L. Rev. 869

Hambro E, "The authority of the advisory opinions of the International Court of Justice" (1954) 3 International and Comparative Law Quarterly 2

Hudson M, "Advisory Opinions, Contributions of the PCIJ to the development of International law" (1930) 24 Am. Soc'y Int'l L. Proc. 63

Keith K, "The advisory jurisdiction of the International Court of Justice: some comparative reflections" (1996) 17 Australian Yearbook of International Law 39

Kuhn A, "Advisory opinions and the Hague Court" (1927) Proceedings of the American Branch of the Law Association 17

Laskin B, "The institutional character of the judge" (1972) 7 Isr. L. Rev. 329

Lenefsky D, "Advisory Opinions as a problem solving process" (1966) 11 Vill. L. Rev. 525

Oellers-Frahm K, "Lawmaking through advisory opinions?" (2011) 12 German Law Journal 1033

Payandeh M, "The concept of International law in the jurisprudence of H.L.A. Hart (2011) 21(4) EJIL 967

Pomerance M, "A Court of 'UN Law'" (2005) Israel Law Review Nos. 1-2 134

Rhodes J, "Advisory Opinions" (1912-1913) 6 Me. L. Rev. 28

Richardson J, "Declaratory Judgments and Advisory Opinions as Judicial Legislation" (1951-1953) 22 Tenn. L. Rev. 354

Scobbie I, "Smoke, mirrors and killer whales: the International Court's Opinion on the Israeli Barrier Wall" (2004) 5 (9) German Law Journal 1109

Topf M, "State Supreme Court Advisory Opinions as Illegitimate Judicial Review" (2001) M.S.U. – D.C.L. 101

Wallace P, "Sovereign Immunity made easy: Curbing litigation with advisory opinions" (1972-1973) 3 Cal. W. Int'l L.J. 354