

## Analysis of the Function of Advisory Jurisdiction

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### Abstract

Two types of jurisdiction usually exist in international justice, namely, contentious jurisdiction and advisory jurisdiction. Advisory jurisdiction is not as common as contentious jurisdiction, but it is also one of the most critical judicial functions in the international community, which had been established primarily to make up for the fact that during the time of the Permanent Court of International Justice, only States may be the subject of litigation. The International Court of Justice deals with disputes between international organisations and member States by issuing advisory opinions. While advisory opinion itself is not legally binding, it can have a positive effect on international law, the international justice system, and even the international community as a whole. This article analyses the function of this jurisdiction through advisory jurisdiction cases over the years, followed by the 2018 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 as a specific example of the function of advisory jurisdiction.

### Keywords

Advisory Jurisdiction, Function, International Court of Justice.

### 1. Introduction

Advisory jurisdiction is one of the key competencies of contemporary international judicial bodies, both for international courts and tribunals. This mechanism plays a significant role in the development of international law as well as the resolution of international legal issues. Advisory jurisdiction is a legal proceeding to provide non-binding legal opinions on legal questions to international organizations and states. The absence of a procedure for international organizations to resolve legal disputes and questions served as the initial impetus for the establishment of the advisory jurisdiction. This jurisdiction was first adopted by the Permanent Court of International Justice (PCIJ). Article 14 of the Covenant of the League of Nations (1919) and Arts. 65 to 68 of the Statute of the Permanent Court of International Justice specifically provides for the advisory authority of the PCIJ. The court did not reject providing any advisory opinions for the requests and published 27 advisory opinions in total between 1922 and 1946, [1] except for "Eastern Carelia". [2] Another case in which the PICJ also did not give an advisory opinion was that of "former Saarland officials," because the request was not brought before the court. [3] The International Court of Justice (ICJ), as the successor to the PCIJ, inherited its judicial expertise in the resolution of international disputes. It is the principal judicial organ of the United Nations (UN) and one of the most crucial judicial bodies on the international stage. There is no doubt that the ICJ also established advisory jurisdiction. The advisory jurisdiction of the ICJ is clearly set out in Article 96 of the UN Charter, Articles 65 to 68 of Chapter IV of the Statute of the International Court of Justice, and Rules of Court. In contrast to the PICJ, the ICJ expanded the bodies that could request an opinion and replaced "any dispute or question" with "legal question." 29 advisory requests have been brought before the ICJ until 1st of February, 2023, and almost all of them have concluded.

Other international and regional tribunals and courts, in addition to these two international judicial entities mentioned above under the United Nations system, are also equipped with this authority. Namely, the International Tribunal for the Law of the Sea (ITLOS), the African Court on Human Rights and People's Rights (AfCtHR), the European Court of Human Rights (ECtHR), and the Inter-American Court of Human Rights (IACtHR). The ITLOS, as a specialised international tribunal, sets the advisory proceeding out in Article 191 of the Convention on the Law of the Sea, Annex 6 Statute of the International Tribunal for the Law of the Sea, and Arts. 130 to 138 of the Rules of the Tribunal, and received three advisory requests and two of them were provided with an advisory opinion since the establishment. International courts and tribunals are not unrestricted in their exercise of the crucial advisory process. It is limited for the subject of eligible to request an advisory opinion, *ratione personae*, and the scope of the advisory matters, *ratione materiae*. Taking the ICJ as an example, the Art. 96 of the UN Charter:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

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

Unlike the ICJ, the Specialized International Tribunal and regional ones are constrained by the Convention's goal and purpose, and the advisory matters up for discussion fall under the purview of the pertinent international convention. As a result, the advisory opinions become focused and expert. When certain nations or international organizations deal with similar matters, the opinions rendered by the court might offer more convincing legal advice or legal guidance since they are precise in terms of specialized regime concerns.

As seen above, advisory jurisdiction is a widespread practice in the international community and an essential component of the mechanisms of international judicial bodies. This essay, therefore, focuses on the functional aspects of advisory jurisdiction with reference to the corresponding case law. Moreover, it will refer to international advisory jurisdiction cases from the last five years in order to justify the function of the advisory jurisdiction.

## 2. The Function of Advisory Jurisdiction

The number of international organizations has multiplied in this new period of the development of the international community, and their significance as key players on the global stage and in the international legal system has grown.[4] However, until the introduction of adversarial jurisdiction, which provided a chance to settle the legal disputes and questions of international organizations, there were no remedies to the legal issues proposed by international organizations.

Advisory jurisdiction is not only of great significance for international organizations, but the mechanism also has numerous functional roles. It is indispensable in international law. The advisory jurisdiction of an international judicial body differs from its contentious jurisdiction, in which advisory one is intended to provide authoritative opinions to relevant legal questions, clarifying the international law, rather than directly resolving disputes.[5] The absence of a state as the subject that is eligible to request an advisory opinion and the advisory question's scope being restricted to legal matters, whether or not the advisory case will actually resolve a state dispute, will weaken the political intention for resolution, which will advance the development of international law by promoting the legal and peaceful settlement of global disputes.

## 2.1. The function of Clarification and Guidance of Advisory Jurisdiction

As before hinted, one of the fundamental functions is to furnish authoritative and impartial legal opinions. The vagueness and uncertainty are embedded in international law, raising disputes at times.[6] In certain situations, an advisory opinion from an international court or tribunal authority may furnish interpretation and clarification of the pertinent issues and contribute to eliminating ambiguity and uncertainty about international law. Thereby, it can guide states and international organizations on legal matters, availing states and international organizations to realize their legal obligations and rights under international law, and sequentially exert them in making informed decisions in their conduct of international relations.[7]

In the advisory opinions of 1949 Reparation for Injuries Suffered in the Service of the United Nations, the ICJ explained the international personality and capacity of international organizations in claiming reparation in the situation without expressly stipulating under the Charter of the United Nations, which also partly facilitated confirming the legitimate position of international organizations at the international community.[8] And it has greatly contributed to the independence of the UN as an institution.

In its 1951 advisory opinion on Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, the Court gave an important interpretation of the question of reservations to conventions and provided guidance on it. It establishes the criteria for taking into account the purpose, character and provisions of the treaty in the formulation of a reservation when the convention does not contain a reservation article, and the court in the advisory opinion on "Legality of the Threat or Use of Nuclear Weapons" further clarification of the object and purpose of the reservation and of the objection to the reservation, so as to guide States in their reasonable and expected conduct in relation to the reservation.[9] Meanwhile, the court also makes it clear that "one state could not be bound by a reservation to which it had not consented, but the state has made a reservation can be a party to the convention if some were accepting the reservation." Before that, there was a divergence between the two regimes for the valid formulation of reservation, the League of Nations and the Pan-American Union, the former adopted the "unanimity rule" which considers permission from all contracting parties to a treaty as a necessity, while the latter with the validity of formulating a reservation is only for the states who accept it but be not in force for those states who object it.[10] The ICJ takes the way of the Pan-American Union but with a little adjustment. The advisory opinion, in this case, provides crucial guidance on the legal status and consequences of reservations to convention and multilateral treaties and clarifies the implications of objections by other parties to such reservations and the statement is stipulated in Articles 20 and 21 of the Vienna Convention on the Law of Treaties, stabilizing the formulation of a reservation. The Seabed Disputes Chamber, in its 2011 advisory opinion on Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, provided specific answers on the legal duties and obligations of State sponsors,[11] the scope and manner of compensation to be paid by State sponsors in the event of a risk, and among others. "This opinion was broadly welcomed throughout the international community."

These cases serve as a good illustration of the crucial contribution that advisory jurisdiction makes to the understanding of international law and the development of international legal practice.

## 2.2. The Function of Promoting the Development of International Law

The clarification per se will promote the development of international law, as it makes international law clearer and more instructive for international members. It also provides the international community with another way to resort to legal methods rather than forcing or other means of coercion. Meanwhile, advisory jurisdiction is more adaptable and applicable, in contrast to contentious jurisdiction in which consent is a prerequisite. Consent-based

jurisdiction might be a hindrance for an international judicial organ to deal with the dispute or legal matter and frustrates many potential arrangements that would benefit the international society as a whole.[12] Because not all states are willing to bring their disputes to the international authorities, attributing to political and sovereignty considerations etc. Yet, “even though it may possibly affect the propriety of furnishing an opinion,”[13] the consent of the relevant state is not necessary in the case of advisory jurisdiction. Moreover, its targeting is a legal issue concerned by the overall international community, despite the fact it may also come with the settlement of a dispute between states concerning sometimes, but the primary purpose for requesting an advisory opinion is to seek authoritative legal explanations for the sake of the international system. As Christine D Gray argues, advisory jurisdiction has unique advantages in the interpretation of international law and the settlement of international legal issues, which are reflected in the flexibility of the advisory function, specifically: the initiation of a case depends on the applicant organ; the consent of the States involved in the dispute is not required for the issuance of an advisory opinion; and although advisory jurisdiction is directed at legal issues, it does not preclude the effect of settling disputes between States.

Advisory jurisdiction strengthens the legal attribute of international law. Due to the lack of binding, the international courts or tribunals have to take pains to write and provide opinions persuasively.[14] At the same time, “it will not terminate any possibility of tackling this matter in debate but rather encourage productive and principled legal and jurisprudence debate over the fundamental issues at state.”[15] “Advisory opinions may carry significant legal weight and undeniably reverberate the overall international society.” It functions as a vehicle for the development of international law.[16]

### 2.3. The Function of Promoting Participation and Unifying International Law

Nowadays, the fragmentation of international law in the international system has become more distinguishable, driven by complicated concerns such as the proliferation of international institutions and specializations, the formation of legal regimes, and the horizontal nature of international law. In the legal system, as Rob Harris mentioned, “the reality of an international legal order characterized by multiple international tribunals with overlapping jurisdiction is also a factor of international fragmentation and inconsistency.”

Advisory jurisdiction substantially facilitates international members' involvement as contrasted with contentious jurisdiction in which “[o]nly states may be parties in cases before the Court,” permitting the participation of pertinent international organizations. In 2013 on the jurisdiction opinion submitted by the sub-regional fisheries commission, “the Tribunal identified no less than 48 international organizations which it thought could contribute valuable information.” Meanwhile, while providing the jurisdiction opinions, the international courts or tribunals will reference all legal sources pertinent to the opinion. It is also true for regional judicial organs, such as the Inter-American Court, in which “whatever the primary goal of such a treaty, whether it be bilateral or multilateral, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto, with regard to any provision dealing with the protection of human rights set forth in an international treaty applicable in the American States.” This approach of *ratione materiae* will also create the effect echoing the ICJ's case law, which can also be found in the case of the ITLOS in its Opinion of 2015. Advisory jurisdiction makes it feasible for a greater diversity of actors and stakeholders to engage in the legal mechanism, taking various perspectives into account, filling the gap in the international legal system, and minimizing the adverse consequence caused by fragmentation. Apart from that, ICJ is, particularly, capable of defining the role of other international organizations for both the fragmentation and itself per se. It is demonstrated in the ICJ advisory opinion Legality of the use by a State of nuclear weapons in armed conflict, defining the scope and functions of the World Health Organization.

### 3. The Advisory Case of “Chagos”

The opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 is profound and far-reaching in lately international community. The case caught the interest of all international players, and it was listed among the “top ten developments in international law in 2017.”[17] It involves a number of intricate issues that are significant to global civilization, such as decolonization, self-determination, and state consent to a dispute. To varying degrees, this reflects the important role of advisory jurisdiction in the international arena and the critical functions it has.

The function of clarification and guidance is embodied in this opinion. First of all, the opinion clarifies the principle of self-determination and confirms its vital status as customary law in the modern international community, which is “*an obligation erga omnes*”, and ought to be the obligation for every state to fulfil. As well as it elucidates the scope of the self-determination concerned, “the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory”, and the nature of self-determination, which is generated from the genuine and unrestricted expression of the relevant citizens. It also stated that the right of self-determination does not belong to individuals but the “integrity of national benefit”.[18] Second, the opinion recalls the efficacies of General Assembly resolutions to the international actors. “General Assembly resolutions, even if they are not binding, may sometimes have normative value.” The resolution is crucial in defining and regulating the behavior of international actors and is the key basis for assessing whether their actions are unlawful. Last but not least, the opinion upholds the legality and nationality of the General Assembly in governing decolonization. “The General Assembly has played a crucial role in the work of the United Nations on decolonization, in particular, since the adoption of resolution 1514 (XV).” It might be considered an evidenced legal basis for further action by the General Assembly, “furnishing to the requesting organs the elements of law necessary for them in their actions.”[19] Simultaneously, it makes the abstract legal issue clear for any government wishing to avoid being held in violation of international legal obligations, as well as reflects the authoritative tendencies of international legal bodies for decolonization and self-determination. The role of this opinion in the development of international law and system. There is no denying that elaborating on the above-mentioned legal issues and human rights issues by ICJ advances the field of international law and benefits the international community. The explanations for these highly debated matters, decolonization, self-determination and the validity of the General Assembly resolutions, contribute to a better understanding of the purposes and the scope of these international law applications. Additionally, it will be beneficial for the international community to reach a consensus and serve as a guide for future international judicial practice, thus improving the harmonization and advancement of international law.

It is reflected in this opinion that the consent of the State to a dispute is not required for requesting an advisory jurisdiction. Some parties have argued that “to render an advisory opinion would contravene the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.” But, The Court, however, held that in the present case the Court considers that the General Assembly, as an active promoter of decolonization, has expressed its strong concern about the dispute between Mauritius and Great Britain, and that its request for an advisory opinion from the Court is not a request for the Court to resolve the bilateral sovereignty dispute between Great Britain and Mauritius, but only to better address the decolonization issues involved in the dispute. Giving an advisory opinion by the Court on the legal issues involved does not amount to a binding settlement of the bilateral dispute per se and does not circumvent the “consent of the party’s principle” referred to in the parties’ concerns. The Court did not have “compelling reasons” for refusing to give an advisory opinion in this case. Therefore, the state stated that they could do so.[20] It



is different from the case of “Eastern Carelia”. This reflects the flexibility and applicability of advisory jurisdiction. In the case of contentious jurisdiction, the consent of the relevant State would be required, which, in the light of the British attitude in this case, would certainly prevent international judicial organs from interpreting important legal issues of general interest to international subjects, thus failing to provide the international community with clearer and predictable legal norms and standards that enhance the applicability and predictability of international law.

It is exemplified in this case that the function of facilitating the participation of international members in international affairs and unifying the international system. Eight judges delivered their statements, of which two gave a combined declaration, four gave separate opinions, and one presented a dissenting opinion at the conclusion of the proceedings. A total of 31 states have provided written statements. The African Union organization was permitted to submit written statements. The advisory opinion gathers and refers to events in several international domains while referencing pertinent legal precedents and rulings. The majority of the justices in the opinions analyzed the Chagos human rights concerns from several perspectives, and Judge Cançado highlighted the Human Rights Committee's significant contribution to the opinion.

Due to the fragmented and decentralized nature of international law, there may be conflicts or inconsistencies between legal rules and international practices in different fields. Advisory opinions can provide references for the different specialized regimes by explaining and elaborating the principles and rules of international law, thereby promoting the unification and coordination of international law. It is demonstrated in the ITOLS on the dispute between Mauritius and Maldives case.[21] ITOLS considered that although the ICJ stated in the Chagos advisory opinion that it would not address the sovereignty dispute between Britain and Mauritius, it can be inferred from the advisory opinion's conclusion that Mauritius has sovereignty over the Chagos Archipelago and that the secession of Chagos from Mauritius in 1968 violated the principle of peoples' right to self-determination and that Mauritius' continued occupation of Chagos was an internationally wrongful act. Advisory opinions are not legally binding as the judgment of contentious proceedings, but it is equipped with the same authoritative validity in clarifying international law and testifying the legality of members' international behaviors.

#### 4. Conclusion

According to the analysis above, advisory jurisdiction is a crucial legal tool for resolving legal ambiguities in international law, guiding international subjects in exercising their rights and fulfilling their obligations in a reasonable manner, and minimizing international conflicts and the issue of international fragmentation. Notwithstanding the non-binding effect of advisory opinions, they are considered to carry significant persuasive authority and are often given serious consideration by states, international organizations, and legal scholars in their interpretation and application of international law. Furthermore, it has procedural due process, reasonable restrictions on the advisory jurisdiction, subjective restrictions and restrictions on the legal nature of the request can effectively prevent abuse of the procedure and increase its professionalism and reasonableness. It contributes to states, international organizations, and other international entities with a new idea for resolving complex legal issues in a fair and efficient approach, not strictly through the usual contentious jurisdiction or negotiation, but a flexible, persuasive, and authoritative legal method, advisory jurisdiction.

#### References

- [1] Aust, A., 2010. Advisory opinions. *Journal of International Dispute Settlement*, 1(1). P. 129..

- [2] PCIJ, 27 April, 1923, Status of Eastern Carelia, Advisory Proceedings, PCIJ Series B. No 5. P. 27. PCIJ, 27 April, 1923, Status of Eastern Carelia, Advisory Proceedings, PCIJ Series B. No 5. P. 27.
- [3] Kenneth, K., 2018. Advisory Proceedings: International Court of Justice (ICJ), para 15. Kenneth, K., 2018. Advisory Proceedings: International Court of Justice (ICJ), para 15.
- [4] Archer, C., 2014. International organizations. Routledge. P. 114.
- [5] Gunn, J., 2022. Advisory Opinions of the International Court of Justice: Uncovering Their Legal Status. In New Zealand Yearbook of International Law. Brill Nijhoff. P. 86.
- [6] Ammann, O., 2020. The Need for Interpretative Methods in International Law. In Domestic Courts and the Interpretation of International Law. Brill Nijhoff. P. 178.
- [7] Ruys, T. and Soete, A., 2016. "Creeping" advisory jurisdiction of international courts and tribunals? The case of the International Tribunal for the Law of the Sea. Leiden Journal of International Law, 29(1). P. 155
- [8] Ku, C., 2018. International Court of Justice. P 198.
- [9] ICJ Request for Advisory Opinion, 8 of July 1996, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion. Pp. 235-250.
- [10] Fitzmaurice, M. and Agnes, R., 2021, Derogations and Reservations in International Law. Oxford University Press, Introduction.
- [11] Request for Advisory Opinion Submitted to the Seabed Disputes Chamber, 2011, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion, ITLOS Request for Advisory Opinion 2011. Paras 99-120, 188-205.
- [12] Guzman, A., 2011. The consent problem in international law. P. 16.
- [13] Gray, C.D., 1990. Judicial remedies in international law. Oxford University Press. P. 116.
- [14] Lachs, M., 1983. Some Reflections on the Contribution of the International Court of Justice to the Development of International Law. Syracuse J. Int'l L. & Com., 10, p. 250.
- [15] Lang, A., 2013. The role of the International Court of Justice in a context of fragmentation. International & Comparative Law Quarterly, 62(4). P 812.
- [16] Hernández, G., 2014. The International Court of Justice and the judicial function. Oxford University Press. P. 78.
- [17] Merel, A., 2018, Top ten developments in international law in 2017.
- [18] Papanicolopulu, I. and Burri, T., 2020. Human Rights and the Chagos Advisory Opinion. Decolonization and the International Court of Justice: New Directions from the Chagos Advisory Opinion, Thomas Burri and Jamie Trinidad (eds), CUP. P. 195.
- [19] ICJ Request for Advisory Opinion, 9 of July 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion. Para. 162.
- [20] ICJ Report, 2019, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Summary of the Advisory Opinion, <https://www.icj-cij.org/en/case/169/summaries>
- [21] Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives) Preliminary Objections, 28 of January 2021, Judgment, ITLOS Case No. 28.