

ROLE OF INTERNATIONAL COURT OF JUSTICE AND ITS LEGALLY BINDING ADVISORY OPINIONS IN DEALING WITH ARMED CONFLICTS

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ABSTRACT

Advisory opinion is an alternative resolution of conflict in the international court of justice (hereinafter ICJ). The opinion is commonly requested in armed conflict issue; It consists of an advice by interpreting the international principles based on the concept of the “Jus ad bellum” and “Jus in bello”. Nevertheless, the ICJ statute does not determine conspicuously the legal binding of the opinion. This research ostensibly sought to highlight the legal force of the opinion. Hence, what is exactly the value of ICJ’s opinion in armed conflict? This question demands evidently a doctrinal approach and analysis of cases. This study mainly pointed out the conditions for requesting the advisory opinion, and the analogy of its legal binding effect. Certainly, this resolution might have legal effect but it depends on the circumstances. As a result, it might be crucial for resolving the contemporary armed conflict over the world.

Keywords: ICJ, Advisory opinion and armed conflict

A. Introduction

States are the fundamental subject of international disputes that lead to armed conflict.¹ Historically, the armed conflict has been proactively the trend of the third world since the first world war that had occasioned several human deaths and destruction of infrastructures. As a result, the international community has established the jurisdiction within the creation of United Nations (hereinafter UN), in order to settle judicial issues among State members;² and this system of jurisdiction attracted myriad countries neither members nor non-members, apply and recognize the ICJ proceedings to resolve universally the conflict. The objective of the framework is absolutely to get rid of the war which escalates to massive destruction of materials and humans, precisely to protect human being and preserve the

1 Anne Dienelt and Imdah Ullah, Law of armed conflict, Chapter 14

2 Hubbard, C., A Critique of the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons : The Nuclear Weapons Case, Edith Cowan University, 8 July 1996. https://ro.ecu.edu.au/theses_hons/685

welfare of the future generations.³

The UN ascribes full power to ICJ to resolve all international conflicts inter alia armed conflict among states whether members or not, through impartial resolution with accord to the process of jurisdiction required by the parties. Before the court, the disputing parties have choice of resolution whether contentious or advisory opinion. Talking specifically about the advisory opinion, the disputing parties have to proceed through the request of the UN organs or the Specialized Agencies in accordance with the criterion determined by the statute of the court. The statute underlines clearly the competences and legal questions which has to be fulfilled while requesting the opinion, otherwise the request would be rejected.⁴ For the armed conflict issue, the court would accept for the cases related only to armed issues, such as the misuse of nuclear weapons and threats to civilian during the war time.⁵ Armed conflict exists whenever the conflicting States recourse to the use of army force to resolve the dispute;⁶ however, none of the international conventions have defined it ostensibly, they stipulate the circumstance embedded as an armed conflict neither a clear definition.⁷ The Armed conflict might be classified into two categories, international and non-international but commonly it relates to war through the utilization of arms and military.⁸

In addition, the advisory opinion is apparently known as an advice to guide disputing parties in the ambit of interpreting the international rules, neither like the judgement through which the court takes solely decision on the matter.⁹ However, neither the UN charter nor the ICJ statute provide the legal effect of the opinion; It risks the court to lose its legitimacy while disputing parties do not comply with the opinion.¹⁰ This system implies a contradictory into the perspectives of lawyers; because some of them perceive that all decisions rendered by the ICJ have legal binding, whereas some stick on the idea that the statute is literally lack of provision which determining legal binding of the opinion unless the parties consent to be bound. Actually, it is a matter of compliance with the obligation under the international law rather than compulsory decision. So far, the ICJ has rendered no lesser than 20 cases through advisory opinions; most of the issues concern the sovereignty related to armed conflicts, for example the first advisory opinion for the independence of Namibia from South

3 United Nations Human rights office of the high commissioner "International Legal Protection of human rights in armed conflict" New York and Geneva, 2011.

4 Jesse Cameron Glickenhau, "Potential ICJ Advisory opinion: Duties to prevent transboundary harm from GHG Emissions",

5 Amit Kumar Meena, advisory jurisdiction of the ICJ, the WHO case: implication for specialized Agencies, 4th year National law school of India University Bangalore, India

6 See prosecutor v. Dusko Todic, case No. IT-94-1-A, decision on the defense motion for the interlocutory Appel on jurisdiction, 2 October 1995, para 70.

7 See for example article 2 of the Geneva convention

8 Anne Dienelt and Imdah Ullah, "Chapter 14, Law of armed conflict"

9 Terasa F. Mayer and Jelka Mayer-Singer, keep the wheels spinning: the contribution of Advisory Opinions of the international court of justice to the development of international law.

10 Jesse Cameron Glickenhau, "Potential ICJ Advisory opinion: Duties to prevent transboundary harm from GHG Emissions",

Africa in 1956.¹¹

The present research is set limitedly to evoke the role of the court and the effect of the opinion in the resolution of armed conflict; meanwhile it seeks to make clear the legal effect of the decision through advisory proceedings. It aimed to enhance the value of the advisory opinion proceedings to disputing parties, because it is become a pseudo resolution for the interest of the developed countries. Thus, the silent of the international law-makers on the obscurity of the international principles disvalues the UN objectives, and would exasperate the weakness of the UN organs in facing the current trend of the world where the powerful States disobey the application of the international law.¹² Furtherly, the research seeks to point out improvement of the international rules on its legal force, unless such principle remains regressively meaningless.

So far, it remains controversial to affirm that the advisory opinion has or no legal effect to disputing parties; whereas, all decision rendered by the court shall wear legal binding effect no matter contentious or opinion. In order to make clear the main objective of the study, it comes in mind, does the advisory opinion contain legal effect which is supposed to binding the disputing parties? Is it necessary to request an advisory opinion if it would not have a legal binding effect?

Subsequently, this research talked in the first part, the conditions for requesting the opinion of the court with its roles; the statute makes clearly that only legal question is a reason for demanding the opinion, and the requesting party must be competent on the issue. For an armed conflict, it is expressed hereinafter the threats to civilians and misuse of nuclear weapons. And the second part of the study apparently analyzed and criticized the legal force of the advisory opinion based on its characteristics determined by the statute and the possible way of concretizing the legal effect of the decision.

B. Research Method

This research was conducted through a doctrinal approach in which the author exhibited the importance of analyzing the previous cases of the ICJ concerning advisory opinions since 1945 and critical analysis of the force of advisory opinion as a legal binding decision.¹³ All Data utilized in this research are primary and secondary sources, which were collected from online official website of the UN,¹⁴ journal, books and articles and cases.

11 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ Rep 16

12 Unfinished war between Israel and Palestine, and Russia with Ukraine...etc. These trends showing that the UN organs have no longer power to rule out the international community.

13 Philip Langbroek, Kees van den Bos, Marc Simon Thomas, Michael Milo, Wibo van Rossum, "methodology of legal research: Challenges and opportunities, Utrecht Law review, Vol.13, Issue 3, 2017 <http://doi.org/10.18352/ulr.411>

14 <https://www.un.org/en/>

In doing so, the collection of primary data was deemed vital as it contained the main point of the critical analysis such as the collection of following international statute, charter, convention, cases filed before the court, and personal observation over the current trend of international law in facing the resolution of ubiquity armed conflict between some countries cross the world. In addition, other relevant data related to resolution of armed conflict were analyzed in the objective to assert the effectiveness of the proceedings of the court through an advisory opinion and its legal effect.¹⁵

On the other hand, analysis of secondary data was also helpful in this research, likewise the analysis of other authors' perspectives on the mechanism of the advisory opinion, which some empirical data defined that all decision rendered by the court through judgement or advisory opinion contain legal binding effect; whereas some authors said that only judgement has legal binding force to the requesting parties.¹⁶ So through this latter, there is a controversial part that evokes the sensitivity of the statute of the court; because the legal force of the opinion is interpreted differently.

C. Discussion

1. Advisory Opinion in the resolution of armed conflict

In the view of the statute of the ICJ, the jurisdiction can be requested through its internal bodies inter-alia General Assembly and security council, and as well the other specialized agencies such as WHO and environmental protections institutions, for legal questions raised and in the war time for unlawful use of nuclear Weapons and threat to civilians.¹⁷ The jurisdiction has only competence on these grounds in the armed conflict, it does not rule out the punishment of individuals or any other that is beyond the UN charter. The advisory procedure is open to five United Nations organs and 15 UN specialized agencies. Before acceding to a request, the ICJ has to decide that it has jurisdiction and, if it has so, whether it should exercise its discretion to give an Advisory Opinion. A part from Armed conflict, myriad international issues are submitted to the UN bodies¹⁸ for requesting the advisory opinion likewise the entrance of Israel i the occupied Palestinian Territory. "*Public sitting held on Thursday 22 February 2024, at 3 p.m., at the Peace Palace, President Salam presiding, on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for advisory opinion submitted by the General Assembly of the United Nations)*"

15 On 8 July 1996 the International Court of Justice delivered its Advisory Opinion, General List No. 95, Legality of the threat or use of nuclear weapons.

16 A John Wiley and Sons, "Legal research" University of Slaford, February 2007

17 <https://www.icj-cij.org/advisory-jurisdiction>

18 <https://www.icj-cij.org/case/186>

a. Requesting parties and Legal Question

The States have right to request for advisory opinion of the court through the compromise deposited to the General Assembly of the United Nations or through the Specialized Agencies but respectively for legal questions related to the international law,¹⁹ Under the article 96 of the United Nation Charter, the court has competence to give its opinion on legal questions.²⁰ It is underlined also in article 65 of the ICJ statute that the court shall give an advisory opinion to the legal questions at the request of the UN body and agency which are authorized in accordance with the UN Charter.²¹ Meanwhile, the legal question must be written while requesting the court, and importantly which opinion is requested and accompanied by all documents highlights the question.²²

The UN organs and specialized bodies have competence to request the jurisdiction for its advisory opinion but depends on the case; meanwhile the court is not like the domestic jurisdiction, because its proceeding refers on the bodies or the specialized agency request for the jurisdiction. The court may refuse the request while the requesting parties demand an advice or interpretation for a legal question which does not belong to its competence.²³ For example: In 1993, the Director-General of the WHO filed a request for the legality of the use of nuclear weapons to the registry of the court for the breach of its obligations by the States, the use of nuclear weapons during the war time. The court denied this request since the WHO has no competence to ask for the legality of the use of nuclear weapons, while its competence remains on the legal question related to health or threat to health. The question of legality of the use of weapons corresponds to competence of the UN organs.

A request filed in the Registry on 6 January 1995 by the General Assembly of the UN for the following legal question “is the threat or use of nuclear weapons in any circumstance permitted under international law?”²⁴ The court has acquiesced this request and rendered its opinion on the issue that legality and illegality of the use of armed conflict belongs to the relevant law of armed conflict, as well the proportionality of the attack in armed conflicts indefinite since the army may use nuclear weapons for self-defense.

It comes to mind that the acceptance and refusal of the request depends not only the legal question but as well who are qualified to file request before the court. While the court perceives the legal question targeted by the parties does not fulfill the criterion or the legal

19 Heribert Golsong “The role and the functioning of the international Court of Justice”, <http://www.zaoerve.de>

20 Hubbard, C. (1997). A Critique of the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of nuclear weapons, 8 July 1996: The Nuclear Weapons Case. Edith Cowan University. https://ro.ecu.edu.au/theses_hons/685

21 See Article 65 of the Statute International Court of Justice

22 Ibid para.2

23 See WHO request for legality of the use of the nuclear weapons <https://www.icj-cij.org/case/93>

24 In 1995, General Assembly requested for Advisory Opinion on “ Is the threat or use of nuclear Weapons in any circumstance permitted under international law?”

questions is beyond their competences, the court may refuse the request. It accepts only while the request fulfills the criterion for demand of the jurisdiction on the issue. Mind in this part, all form of international political issues shall not be confined as a grounds or legal questions of requesting the court for an advisory opinion.²⁵

b. Unlawful war: Threats and the use of Nuclear Weapons

The use of nuclear weapon is generally conducted during the armed conflict, this practice is accorded in the international community,²⁶ yet under the respect of applicable laws such as international law governing states in the use of army (*jus ad bellum*) and international law applicable in armed conflict (*jus in bello*).²⁷ The existing problem on the determination of unlawful use of force, in fact, there is no clear international norms provide the types of arms forbidden, it is just a matter of conventional rules; however the International Humanitarian Law determines the extent to which the lawful use of the weapons.²⁸ Further, there is always a high risk of threatening the international humanitarian law regardless the strict use of the international rules on armed conflict. However, the IHL and the other international norms have their concepts of legality of the use of force during armed conflict; meanwhile the use of nuclear weapon is conceptualized as legal when it is used on the territory of state where occurs the attack for a self-defense reason. More precisely, the concept of “*Jus ad Bellum*” allows the use of threats or nuclear weapon for a self-defense.

Thus the court bases on the said concept to manage its advisory opinion while the use of nuclear weapons and threat are illegal in the view of international law.²⁹ Looking at the opinion of the court on the issue “legality of Nuclear weapons Advisory Opinion 1996, paragraph 13”, declared that while there is no customary or conventional international law that allows or prohibits the States using the nuclear weapons, the threat or use of nuclear weapons would generally be contrary to the principles of the international humanitarian law. But in the self-defense circumstance, the jurisprudence has not yet considered whether the use of nuclear weapons would be lawful or unlawful.³⁰ Notwithstanding, it is difficult to determine the self-defense circumstance in some case, likewise the case filed by RDC for

25 Amit Kumar Meena, “advisory jurisdiction of the ICJ, the WHO case: implication for specialized Agencies” 4th year National law school of India University Bangalore, India

26 William Bothby, “Weapons and the law of armed conflict», oxford University press, 2009. Pp.464

27 Charles Garraway CBE, nuclear weapon under International Law: Overview, International law and policy institute, October 2014, <https://www.geneva-academy.ch/joomlatools-files/docman-files/Nuclear%20Weapons%20Under%20International%20Law.pdf>

28 See, *Ibid.*

29 Christopher Hubbard B.A, A critique of the advisory opinion of the international court of justice on the legality of the threat or use of nuclear weapons, 8 July 196, the nuclear weapon case

30 Myrto Stavridi, The advisory function of the international court of justice: Are States resorting to advisory proceedings as a “soft” litigation strategy? *journal of public and international law affairs*, April, 22, 2024. The Advisory Function of the International Court of Justice: Are States Resorting to Advisory Proceedings as a “Soft” Litigation Strategy?

its armed conflict with Uganda that the use of force has targeted by Uganda was unlawful,³¹ the Uganda army entered in the territory of the Congo with the consent that is an act prohibited by the UN charter in its article 2.³² Meanwhile, all form of irregular use of the force to the territory of the other State constitutes violation of the international norms in the armed conflict which was stressed by the ICJ jurisdiction in the said case.³³

The threats and excessive use of nuclear weapons to civilians during the armed conflict is measured by the provisions of the human rights and international humanitarian principle;³⁴ by all means the states are always bound by its obligation under these rules in the spite of the armed conflict. In addition, it is also required to observe arbitrary deprivation like the maneuver targeted by Israel on construction of the barrier in the occupied territories without regarding the content of the fundamental rights determined by the international covenant on Civil and Political Rights (liberty on movement article 12 and arbitrary deprivation).³⁵ In the other hand, unlawful acts to war inter-alia act of aggression and genocide victimizing criminally civilians are framed under the principles of the Roma statute.³⁶

To sum up, in the armed conflict resolution through advisory opinion, the parties are required to fulfill the conditions determined by the statute which says that the request for the opinion shall lay down on the legal questions, and importantly the requesting must be competent, otherwise the procedure would be vain. There were not a smaller number of requests, which were lack of legal question and competence conditions, rejected by the court.

2. The effect of the advisory opinion

The legal effect of the opinion of the court is relatively recognized, but it depends on the bodies or the specialized agencies under which conditions the opinion was requested to the concerned parties. These organs can deal with the parties to accept legal force of the advisory opinion rendered on the issue.

a. Characteristics of the advisory opinion

The UN bodies or the specialized agency can request the advisory opinion by submitting the questions before the court which is in form of written request containing the exact question with document enlightens the issues. Once the registrar of the court has received the request, it shall notify all the states concerned to present before the court, and notice

31 Armed activities on the territory of the RDC, <https://www.icj-cij.org/case/116>

32 See article 02 of the UN charter

33 The irregular use of force violates myriad international rules such as humanitarian law and the principle of human rights, therefore it is logical either the UN organs underlined rigorously the circumstance of using the force against other state during the war.

34 Claus Cref, International court of Justice and armed conflicts, 23 August 2023

35 See article 6 and 12 of the International Covenant on Civil and Political Rights

36 See Roma Statute

them to prepare for the information on the question with time limit to hear at the public sitting.³⁷ The state and the organization have presented its oral or written statements, both shall comment the statement of other state; and moreover, the decision of the court shall be in open court with the regard respectively the provisions of the Statute.³⁸

Despite the advisory opinion has neither the UN charter nor the Statute of the ICJ legal support on the opinion;³⁹ It remains on its natural character which is a legal advice to interpret the principle of international law in the international community. It is perceived as more influential than judgement because it interprets the international rules for general information rather than for only the concerned states.⁴⁰ In light of this, the dispute concerning the delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean, submitted to Special Chamber of the International Tribunal for the Law of the Sea, which Mauritius claimed the boundary resolution under the advisory opinion contributed by ICJ, which is interpreted progressively has a legal effect. Maldives did not recognize the interpretation of the ICJ opinion as legal binding, it asserted that the decision wears authoritative but not legal impact to the parties.⁴¹ As a result, some States do not consider the opinion as a legal decision since it perceived as simple advice or interpretation of the international law.

b. Effect of the agreement of Consent

Systematically the opinion shall not have legal effect to parties since it is considered as simple advice to present issues, therefore the parties shall not be legally affected by the decision rendered, the requesting parties remain free to decide what effect they should give for the opinion;⁴² however it is commonly occurred the certain circumstances which the opinion has legal binding force to parties.

Firstly, it may contain legal effect in the case there is any clauses consented by the requesting parties, provide for a legal binding of decision to the concerned states.⁴³ Additionally, it is also possible the existence of the “special agreement” between the parties to accept the opinion as a decisive; meanwhile the parties consent the legal effect

37 See article 66 of the ICJ statute

38 See article 68 of the ICJ statute

39 Bacot, *Réflexions sur les clauses qui rendent obligatoires les avis consultatifs de la C.P.J.I. et de la C.I.J.*, 84 *Revue Générale de Droit International Public* 1027 (1980).

40 Mahasen M. Aljaghoub, *The Advisory Function of the International Court of Justice, 1946-2005*, https://www.google.cd/books/edition/The_Advisory_Function_of_the_International_Court_of_Justice/-zUWKIPigjYC?hl=fr&gbpv=1&dq=Advisory+opinion+in+the+international+court+of+Justice&printsec=frontcov

41 Fabien Simon Eichberger, *The legal effect of ICJ Advisory Opinions Redefined? The Mauritius/Maldives Delimitation case-Judgement on preliminary objections*, *Melbourne Journal of International Law* 1, 17. 22 February 2021

42 <https://www.icj-cij.org/advisory-jurisdiction>

43 Anthony Aust, *Journal of International Dispute Settlement*, Volume 1, Issue 1, February 2010, Pages 123–151, <https://doi.org/10.1093/jnlids/idp005>

of decision.⁴⁴ As a result, the court cannot go beyond this consent, its decision binds the parties in virtue of the existing agreement of consent or instrument.

Secondly, some international organization recognize the advisory opinion wear the legal binding effect; this broadly concerns the matter of interpretation or the constituent of the treaty associated with ICJ statute.⁴⁵ If a dispute arises between one of the specialized agencies and a member, a request shall be made for an Advisory Opinion on any legal question involved, and this would be done in accordance with article 96 of the UN Charter and article 65 of the Statute of the ICJ, and the relevant provisions of the agreements concluded between the United Nations and the specialized agency concerned. The parties to the dispute accept the Advisory Opinion as decisive.

Thirdly, some states accept the binding force of the advisory opinion; because they may have treaties contain provisions under which the requesting parties shall bound by the decision rendered by the court.⁴⁶ For example, United States evoked compromise clauses of several treaties as the basis for the ICJ `s jurisdiction when it brought a successful case against Iran for the holding of the US hostages.⁴⁷ Those States who have treaties attributing the legal effect of the advisory opinion rendered by the court in the case of requesting the opinion, thus the conflicting States have legal engagement to enforce the decision.⁴⁸

Although these circumstances affirm that the opinion of the court covers legal effect, but it remains ambiguous because it has not expressly legal back up from the ICJ statute itself. Consequently, it remains vulnerable in the event that the parties refuse to accept the enforcement.

D. Conclusion and Suggestion

To conclude with, the doctrinal approach showed up that the opinion is commonly requested to resolve an armed conflict issue, because it is an authoritative jurisdiction which broadly elaborates the principles of international, rather than contentious methods. Requesting the opinion of the court is different from other common jurisdiction, it is available only for certain UN organs and specialized agencies, and in the armed conflict, it is requested for legal questions to threats and unlawful war affecting civilians.

The advisory opinion is definitely contrary to the contentious resolution, because the decision has no significant force. It depends particularly to the UN bodies or the specialized agencies to attribute the value of the opinion.⁴⁹ Nevertheless, in armed conflict resolution,

44 Christian Dominice, "Chapter 5 request of the advisory opinion, Brill, P.91-92, 01 Jan 2022

45 See Ibid.

46 Joan E. Donoghue, The role of the World Court today, 108th Sibley lecture School of Law University of Georgia, Athens, on April 3, 2012

47 United States diplomatic and Consular Staffs in Teheran (US vs Iran), 1980 ICJ, 3.24, available at <http://www.icj.org/docket/files/64/6291.pdf>

48 Heribert Golsong, The role and the functioning of the international Court of Justice, <http://www.zaoerve.de>

49 <https://www.icj-cij.org/advisory-jurisdiction>

the opinion plays vital role in the international community since it has a preventive characteristic to avoid convulsion and interpret misunderstanding within the international law. For example, the perspective of Judge Higgins concerning the impediment of Israel on the territory of Palestine, affirmed desperately that the advisory opinion might be expected to contain detailed analysis; it might be an opportunity to elaborate and develop international law.⁵⁰

Taking into account the contemporary trend of resolution of the armed conflict that the request for the opinion plays mammoth roles in settling issues; as a result, the enhancement of its value and legal effect should be elaborated and developed. All States, organizations and superposed jurisdictions should adopt an instrument to attribute the legal effect of the advisory opinion, such as the settlement of the boundary disputes between Maldives and Mauritius, through the Special chamber confirmed the Mauritius stated that advisory opinion has legal effect on the parties.⁵¹ A part from armed conflict issues, the recognition of the legal effect of the opinion should prevail in the resolution of other international issues. Meanwhile, before requesting the opinion of the court, the concerned parties should handle an instrument illustrating the consent of the decision, unless the advisory proceeding will remain vain and exhaustive.

50 Iain Scobie, "Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* for the Responsibility of the UN for Palestine" *European Journal of International Law*, Volume 16, Issue 5, November 2005, Pages 941-961,

51 Fabien Simon Eichberger, The legal effect of ICJ Advisory Opinions Redefined? The Mauritius/Maldives Delimitation case-Judgement on preliminary objections, *Melbourne Journal of International Law* 1, 17. 22 February 2021

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Curriculum Vitae

JUVELIN Rezara, PhD in Law graduated from SWUPL, and currently works as an Assistant Professor at the department of Law, domain of Social Science of the university of Toliara. His doctoral research concerned “effective implementation of foreign Investment legal protection in Madagascar”, and he also published some articles Legal Aspects and Policies for Indonesian SMES after The Omnibus Law-Challenges in The Regional Free Trade and Developing Economic Bond of Indonesia-Madagascar Based on Bilateral Investment Treaty.