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Do General Assembly and Security Council Undermine the Efficacy of ICJ?

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ABSTRACT

The relationship between International Court of Justice and United Nations can clearly be analysed from the perspective of United Nations Charter and the way it demarcates the capacities of the various principal UN organs and regularize the practise of their simultaneous powers. However, the Court is responsible for playing a dual, fluctuating role. As per Article 92 of the Charter, It is the only and main judicial organ in the United Nations and moreover, it also enjoys the position of an independent body with adjudicative function, and according to Article 38 of its Statute, performs the duty of applying international law to various disputes among the states as are filed before it. On focusing the primary functions performed by the other major organs of UN we observe that either directly as in the case of the General Assembly and Security Council which directly elects the members of ICJ or indirectly as in with the other organs like the Economic and Social Council which on several occasions themselves become dependent on the advice given by ICJ on concerned matters.

United Nations' primary objective is to maintain peace and security to the member nations which on a larger extent is fulfilled by the International Court of Justice. Keeping the same view, the paper will magnify in researching the role of ICJ along with the study of contemporary case laws brought before ICJ, while primarily focusing on the interrelation and the impact of the working of ICJ on the other major organs of the United Nations.

I. INTRODUCTION

As pointed out by late Dr. Nagendra Singh, who was one of the judges and also served as President of the International Court of Justice, “Two basic pillars are necessary for the establishment of public order: the existence of a proper law and the machinery for enforcing it, including the sanctions behind the law. In the International State sphere, order can be maintained if there is no existence of a well-codified International law and an effective agency to enforce it.” In the view of Nagendra Singh, the establishment of the rule of law in

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the world is necessary because it is only through this that peace and public order can be established in the international field.²

The credit of beginning the system of settling international disputes through judicial decisions goes to the permanent court of International Justice which was established under the League of Nations. ICJ was the successor of this Permanent court of International Justice and got established in 1945 by the UN Charter. The principle constitutional document constituting and governing the court is the Statute of the International Court of Justice which is quite alike to that of its predecessor.

It consists of a panel of 15 judges which are elected by the General Assembly and Security Council for the tenure of nine-year and indirectly possess a greater influence on the functioning of the ICJ. It is situated at the Peace Palace in The Hague, Netherlands.

This paper will highlight the relationship between the three major organs: ICJ, General Assembly and Security Council and will also magnify the impacts of the conflicts amongst them at the international level.

II. OBJECTIVE

In a broader aspect, the International Court of Justice was set up in order to ensure peace and security to the member nations and become a platform to solve the disputes of the states at international level. In addition to this, ICJ has two primary functions:

- (1) To settle disputes brought by the member states at international level.
- (2) To give legal advice to any organ of the UN on request.

While deciding the cases, the court applies international law as per Article 38 of the ICJ Statute, which details out that in arriving at its decisions the court shall apply international conventions, international custom and *the "general principles of law recognized by civilized nations."* Article 59 makes it clear that the common law notion of precedent or *stare decisis* is not applicable to the decisions of the Court. And it is noteworthy that the court's decision binds only the parties to that particular controversy. However, under 38(1) (d), the court may consider its own previous decisions.

If the parties agree, they may also grant the court the liberty to decide the case *ex aequo et bono* ("in justice and fairness"), which grants the ICJ with the freedom to make an equitable decision based on what is fair under the circumstances. But it is astonishing to note that, this

² 21st edition Dr. S.K. Kapoor, International Law & Human Rights 577

provision has never been used in the court's history. So far, the International Court of Justice has dealt with about 130 cases.³

Apart from maintaining peace and security of the member nations, the General Assembly deals with the functions of administration like the election of member states and members of other organs etc. and the Security Council is responsible for investigating disputes and recommending appropriate measures for the same respectively.

So, we can clearly infer the interrelation between these three and their overlapping nature on each other's functions and powers. Thus, it might be more interesting to explore the concepts deeply.

III. WHETHER THE ADVISORY FUNCTION OF ICJ HAS THE BINDING FORCE?

The ICJ has the power to give advisory opinions on legal questions referred to it by any of duly authorized United Nations organs and agencies.⁴

An advisory opinion is legal advice provided to the United Nations or a specialized agency by the International Court of Justice, in accordance with Article 96 of the UN Charter.

- The General Assembly and the Security Council may request advisory opinions on "any legal matter"
- Other organs and the specialized agencies may request advisory opinions on "legal questions arising within the scope of their activities"

Chapter IV, Articles 65-68⁵ of the Statute of the ICJ and Part IV, Articles 102-109 of the Rules of Court concern advisory opinions.

- **Article 65:**

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.

2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

³ International Court of Justice (visited on 10/03/19 at 19:38)
https://en.wikipedia.org/wiki/International_Court_of_Justice

⁴ UN Charter Art. 96

⁵ ICJ Statute Arts. 65-68

- **Article 66:**

1. The Registrar shall forthwith give notice of the request for an advisory opinion to all states entitled to appear before the Court.

2. The Registrar shall also, by means of a special and direct communication, notify any state entitled to appear before the Court or international organization considered by the Court, or, should it not be sitting, by the President, as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

3. Should any such state entitled to appear before the Court have failed to receive the special communication referred to in paragraph 2 of this Article, such state may express a desire to submit a written statement or to be heard; and the Court will decide.

4. States and organizations having presented written or oral statements or both shall be permitted to comment on the statements made by other states or organizations in the form, to the extent, and within the time limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to states and organizations having submitted similar statements.

- **Article 67:**

The Court shall deliver its advisory opinions in open court, notice having been given to the Secretary-General and to the representatives of Members of the United Nations, of other states and of international organizations immediately concerned.

- **Article 68:**

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

As of 2017, there have been 28 requests for advisory proceedings.

- 17 by the General Assembly
- 1 by the Security Council
- 2 by the Economic and Social Council
- 3 by the Committee for Review of Administrative Tribunal Judgments

- 1 by UNESCO, 2 by WHO, 1 by IMO, 1 by IFAD

In general, advisory opinions are not binding, but may inform the development of international law. According to the ICJ website, advisory opinions:

"carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and have peace-keeping virtues. Advisory opinions also, in their way, contribute to the elucidation and development of international law and thereby to the strengthening of peaceful relations between States."

All of the principal organs of the United Nations (with the exception of the Secretary-General representing the UN Secretariat), the 16 UN Specialized Agencies and the Interim Committee of the General Assembly may submit requests for advisory opinions. These are the only organizations having "standing" in advisory proceedings before the Court. The UN Security Council and General Assembly have the authority to request advisory opinions on any legal question, while the other organizations may request advisory opinions only on legal questions arising within the scope of their activities.⁶

The Court will first have to determine that it has jurisdiction, under the UN Charter and the ICJ Statute, to reply to the General Assembly's request. The Court confirmed in connection with the Assembly's most recent request for advisory opinion that the Assembly has broad competence to engage the Court.⁷

One possible ground for refusal to entertain the Assembly's request would be a finding by the Court that this request calls for a factual investigation that cannot be undertaken without the consent and cooperation of both Israel and the Palestinian Authority. The Court's predecessor once declined to give an advisory opinion on the ground that the necessary investigation in the case at hand required the consent and participation of the two states involved in the dispute that had given rise to the request for an advisory opinion (Finland and Russia, which at the time of the request was not a member state of the League of Nations, the organization requesting the advisory opinion).⁸ In his explanation after the vote on Resolution, the representative of the United Kingdom commented that his country had abstained on the vote requesting an advisory opinion "because it was inappropriate to take such action without the consent of both parties."⁹

⁶ UN Charter Art. 96(2)

⁷ Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Reports, p. 226, paras. 11-12, Advisory Opinion of July 8, 1996.

⁸ Status of Eastern Carelia, Permanent Court of International Justice, Advisory Opinion, 1923 P.C.I.J. Series B, No. 5.

⁹ General Assembly Press Release GA/10216, at 9 (Dec. 8, 2003).

The Court next must satisfy itself that the Assembly's request relates to a legal question within the meaning of the ICJ Statute and the UN Charter. In this connection, the Court has previously pointed out that the political nature of any motives inspiring the request, the political implications of any advisory opinion, and any political aspects of the legal question are irrelevant to the establishment of its jurisdiction to give an opinion.¹⁰

Even after it has established that it has competence to issue an advisory opinion, the Court must still consider whether it should exercise its inherent discretionary power not to give an opinion.¹¹ According to the Court's consistent case law, only "compelling reasons" can lead it to refuse a request for an advisory opinion.¹² The fact that a question put to the Court did not relate to a specific dispute, or was couched in abstract terms, has not been found to be a compelling reason to decline to give the opinion requested. In assessing its power of appreciation, the Court also has confirmed the exclusive right of the General Assembly to determine the usefulness of an opinion in the light of its own needs. Specifically, the Court has refused to consider the origin or political history of a request, or the distribution of votes underlying the adopted resolution.¹³ After deliberations are held by the full Court (consisting of 15 members from different nations) immediately following the closing of any hearing, the advisory opinion is then delivered at a public sitting of the Court. The deliberative phase alone usually takes several months.

Under the UN Charter and the ICJ Statute, advisory opinions rendered by the Court are non-binding.¹⁴ This non-binding character does not mean that advisory opinions are without legal effect, because the legal reasoning embodied in them reflects the Court's authoritative views on important issues of international law and in arriving at them, the Court follows essentially the same rules and procedures that govern its binding judgments delivered in contentious cases submitted to it by sovereign states. An advisory opinion derives its status and authority from the fact that it is the official pronouncement of the principal judicial organ of the United Nations. Despite having no binding force, the Court's advisory opinions nevertheless carry great legal weight and moral authority. They are often an instrument of preventive diplomacy and help to keep the peace. In their own way, advisory opinions also contribute to the clarification and development of international law and thereby to the strengthening of

¹⁰ Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Reports, p. 226, at para. 13

¹¹ Art. 65(1) of the ICJ Statute

¹² Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. Reports, p. 226, para. 16, Advisory Opinion of July 8, 1996

¹³ *Id*

¹⁴ Charles N. Brower & Pieter H.F. Bekker, Understanding "Binding" Advisory Opinions of the International Court of Justice, in: *Liber Amicorum Judge Shigeru Oda* (N. Ando, E. McWhinney & R. Wolfrum eds., 2002)

peaceful relations between States.

IV. PROBLEM OF THE ENFORCEMENT OF THE JUDGEMENTS OF THE INTERNATIONAL COURT OF JUSTICE

Article 94 (2) sanctifies up on the Security Council the power to enforce the judgments of the International Court of Justice and seeks to establish harmony between these two organs of the UN.

Art. 94 (1) of the Charter reads as “Each member of the United Nations undertakes to comply with the decision of the international Court of Justice in any case to which it is a party” while Art. 94 (2) lays down that ‘If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.’ It is also very tragic and unfortunate to note that the ICJ Statute which governs and dictates the complete behaviour of the Court and State parties also do not contain any provision for the enforcement of its own judgment which actually should bear a mandatory clause and a condition precedent for any States before they approach the World Court. In this context, it was suggested a number of times earlier that Art. 60 of the ICJ Statute must be amended to include the remedy in the form of ‘Declaration of non-Compliance’. One must pay close attention to the word ‘may’ placed under Art. 92(2) by virtue of which, discretion is conferred on Security Council to enforce or not to enforce the judgments of the Court.¹⁵

However, the use of Article 94(2) since its inception are still rare and utilized only on three occasions: this Article was used by the UK, in 1951, with respect to the *Anglo-Iranian Oil Company case*; by Nicaragua, in 1986, in the case against the United States and by Bosnia-Herzegovina, in 1993, in the case against the Federal Republic of Yugoslavia.¹⁶

The Anglo-Iranian Oil Company case.¹⁷ Similarly the case of Military and Paramilitary Activities in and against Nicaragua was a typical case of ‘*litispence*’. With respect to the ICJ’s order, the Security Council exercised its discretion and decided to adjourn the Council’s meeting on the issue until the final judgment from ICJ handed down. Similarly the case of Military and Paramilitary Activities in and against *Nicaragua*¹⁸, also highlights the use of

¹⁵ Tanzi Antilla, ‘Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations’ 6 *EJIL* (1995) 539-572

¹⁶ *Bosnia and Herzegovina V. Serbia and Montenegro* [2007] ICJ 2

¹⁷ *United Kingdom V. Iran* [1952] ICJ 2

¹⁸ *The Republic of Nicaragua V. The United States of America* (1986) ICJ 1

Art. 94(2) and ineffectiveness of the ICJ's judgments and inability of the Security Council to deal with the situation. In this case, ICJ delivered the Judgment against USA and Nicaragua asked the Security Council to enforce the judgment as early as possible. Put to the vote, the draft resolution was not deemed to be adopted by the President of the Council due to the negative vote of the United States of America, a permanent Member of the Council.

V. CONCLUSION

In this context, the jurists and international authors are posed with yet another important question i.e. *Can the judgments of ICJ be politically reviewed?*

The answer to this question would probably be in negative because both the UN Charter and ICJ Statute contain no provisions to that effect. However, one can argue that the decisions of the World Court can indeed be reviewed by other organs of the UN in many other indirect and informal ways. By resorting to Art. 24 (2), the judgments of ICJ may be reviewed keeping in mind various considerations like politics, economic relations with countries in favour of which the judgment has been delivered and other aspects which may be of contemporary value. It must always be projected that while dealing with each case, both Security Council and ICJ must be cautious. Moreover, in the application of Art. 92(2), the principle of 'Self-restraint' must be followed by the Security Council. In enforcing the judgments of the World Court, the Security Council must give full effect to the judgment in order to ensure effectiveness and abidingness of the international law in general. Political and other consideration must fade away and the veto power in cases where the World Court's decisions are involved must rarely be used. The incidents like Nicaragua must strictly be avoided. The best way feasible in this regard is to amend the relevant provisions of the UN Charter and also the provisions of ICJ Statute specifically to include the power to issue 'declaration of Non- Compliance'.
