

Advisory Opinion from the International Court of Justice 101



There are many reasons why we believe in the potential of the campaign for an Advisory Opinion by the International Court of Justice. On one hand some legal and climate change experts have discouraged us from pursuing this campaign, as they believe there might be more effective legal and political avenues to pursue. But on the flip side, there are also experts who firmly believe that an Advisory Opinion can serve as a powerful catalyzer for greater ambitious climate action .But what exactly is an Advisory Opinion? You might have never heard about Advisory Opinions, or maybe you are our strongest critic. And for you, exactly for you we have compiled an ‘Advisory Opinion 101’ on this page.

1. What is an Advisory Opinion?

Watch this video by Leiden University to find out: [2.3 Advisory Opinions of the International Court of Justice](#)

2. What does the UN say?

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 "legal questions arising within the scope of their activities".

Source: www.un.org

3. How can an Advisory Opinion be obtained?

Pursuant to Article 96 of the Charter of the United Nations and Article 65(1) of the Statute of the International Court of Justice, UN organs (General Assembly, Security Council etc.) and UN specialised agencies (Food and Agriculture Organization, UN International Children's Emergency Fund, World Health Organization etc.) are eligible to request an advisory opinion from the ICJ. The UN General Assembly and the Security Council may request an advisory opinion in respect of “any legal question” while other UN organs and agencies may request an advisory opinion on “legal questions arising within their scope of activities”. States cannot request an advisory opinion from the ICJ directly.

4. What does an Advisory Opinion do?

Unlike judgments of the ICJ in contentious proceedings, advisory opinions are not binding at law. Nonetheless, due to the status of the ICJ as the highest court in the world they “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 peaceful relations between states.”¹

- 5. Purpose of Advisory Opinions more general:**“In the *Nuclear Weapons* advisory opinion, the Court stated that the “purpose of the advisory function is not to settle – at least directly – disputes between States, but to offer **legal advice** to the organs and institutions requesting the opinion.”² “³

6. What do the legal experts say?

Daniel Bodansky⁴ finds Advisory Opinions generally a beneficial tool (and in some cases preferable to international adjudication) in the international law tool box for several reasons:

- a. ‘Advisory opinion[s] would have a more general effect, since judgements in contentious cases only bind the parties to the dispute’
- b. ‘All states could have their voices heard, in contrast to contentious cases, which are limited to the parties to the dispute and states permitted to intervene.’
- c. ‘An advisory opinion on the general rules of international law relating to climate change would not require the Court to make specific determinations of standing or causation’ [This is usually an obstacle for litigation on cross-boundary harm cases.]
- d. ‘An advisory opinion could address issues at a relatively high level of generality, leaving the specifics to be worked out through negotiations’
- e. And ‘an advisory opinion would allow the I.C.J to perform its most important role [...] to clarify and elaborate the relevant norms of general international law.’

7. How does the International Court of Justice arrive at their conclusion?

Article 38 of the ICJ Statute outlines the sources of international law that the judges consider when drafting an AO. They are namely: treaty law, customary international law, general principles of international law, past decisions, and academic writings.⁵

That means,

¹ International Court of Justice: <https://www.icj-cij.org/en/advisory-jurisdiction>

² Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 11 (July 8), at 15.

³ p12/103 yale report on palau - file:///Users/juleschnakenberg/Downloads/SSRN-id2309943%20(1).pdf

⁴ Bodansky D, ‘The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflection’ (2017) 49 Ariz St LJ 689.

⁵ United Nations, Statute of the International Court of Justice, 18 April 1946, available at: <https://www.refworld.org/docid/3deb4b9c0.html> [accessed 1 December 2020] Article 38.

- (a) That the court will look at other existing agreements, such as the ‘Convention on the Rights of the Child’ for example, to decide what existing international obligations state have to respect, protect and fulfill⁶ the human rights of their citizens.
- (b) That the court will consider whether certain ways of behaving have become customary in international law and diplomacy. This means that the judges will examine whether states have consistently acted in a certain way, for a long period of time out of a sense that they ‘have to’ (i.e. it is considered like a quasi-legal obligation). An example for this is the granting of immunity for visiting heads of states⁷. “**Custom** may be evidenced by numerous material sources, such as, among others, diplomatic correspondence, policy statements, press releases, official legal advisers’ opinions, military manuals, state legislation, judicial decisions by national and **international** courts, resolutions of the UN General Assembly”⁸
- (c) That the Court will also consider general principles of international law: “(i.e. general principles of fairness and justice which are applied universally in legal systems around the world). Examples of these general principles of law are laches, good faith, res judicata, and the impartiality of judges. International tribunals rely on these principles when they cannot find authority in other sources of international law.”⁹
- (d) That the Court will look at past decisions made in other cases either in front of the International Court of Justice, or in front of other international tribunals (such as the International Tribunals for the Law of the Seas) and courts. They might also consider very authoritative judgements from national courts, such as the Dutch Supreme Court.
- (e) That the Court might also consider academic publications by authoritative writers. This is a rather vague source of law, as it is not specified when someone

⁶ UNEP and Sabin Center for Climate Change Law (Columbia Law School), ‘Climate Change And Human Rights’ (United Nations Environment Programme 2015) accessed 24 November 2020, 8.

⁷ Cornell Law School, ‘Customary International Law’ (*Legal Information Institute*) <https://www.law.cornell.edu/wex/customary_international_law#:~:text=Customary%20international%20law%20results%20from,for%20visiting%20heads%20of%20state> accessed 08 January 2021.

⁸ Andre da Rocha Ferreira, Cristeli Carvalho, Fernanda Graeff Machry, Pedro Barreto Vianna Rigon, ‘Formation and Evidence of Customary International Law’ (UFRGS Model United Nations Journal, 2013) <<https://www.ufrgs.br/ufrgsmun/2013/wp-content/uploads/2013/10/Formation-and-Evidence-of-Customary-International-Law.pdf>> accessed 08 January 2021, 188.

⁹ Duke University School of Law, ‘International Legal Research Tutorial’ <https://law.duke.edu/ilrt/cust_law_10.htm#:~:text=Examples%20of%20these%20general%20principles,other%20sources%20of%20international%20law> accessed 08 January 2021.

would be considered an authoritative writer. It is unlikely that the Court will make a decision purely based on academic publications by legal scholars. However, if there are bounteous sources amplifying for example the existence of certain international obligations of states regarding human rights and climate change, it would be very difficult for the court to make a judgement contradictory to this.

All Advisory Opinions issued by the **International Court of Justice:** (in descending chronological order)

Source: <https://www.icj-cij.org/en/decisions/advisory-opinion/1946/2020/desc>

Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 [2019]

Judgement No.2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development [2012]

Accordance with International law of the unilateral declaration of independence in respect of Kosovo [2010]

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004]

Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights [1999]

Legality of the Use by a State of Nuclear Weapons in Armed Conflict [1966]

Legality of the Threat or use of Nuclear Weapons [1966]

Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations [1989]

Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 [1988]

Application for Review of Judgement No.333 of the United Nations Administrative Tribunal [1987]

Application for Review of Judgement No.273 of the United Nations Administrative Tribunal [1982]

Interpretation of the Agreement of 25 March 1951 between WHO and Egypt [1980]

Western Sahara [1975]

Application for Review of Judgment No.158 of the United Nations Administrative Tribunal [1973]

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) [1971]

Certain Expenses of the United Nations (Article 17, paragraph 2, of the charter) [1962]

Constitution of the Maritime Safety Committee of the Inter-Governmental maritime Consultative Organization [1960]

Judgements of the Administrative Tribunal of the ILO upon Complaints Made against Unesco [1956]

Admissibility of Hearings of petitioners by the Committee on South West Africa [1956]

Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa [1955]

Effect of Awards of Compensation Made by the United Nations Administrative Tribunal [1954]

Reservations to the Convention on the Prevention and Punishment of the crime of Genocide [1951]

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (second phase) [1950]

International Status of South West Africa [1950]

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (first phase) [1950]

Competence of the General Assembly for the Admission of a State of the United Nations [1950]

Reparation for Injuries Suffered in the Service of the United Nations [1949]

Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) [1948]