

Research on the Advisory Jurisdiction of the International Court of Justice

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Abstract

The International Court of Justice (ICJ) is a sovereign intergovernmental judicial body of the United Nations for the settlement of international disputes, and the jurisdiction of the ICJ, as one of the main means for the ICJ to exercise criminal jurisdiction, includes both contentious and advisory jurisdiction. Among them, the advisory jurisdiction of the International Court of Justice is far less effective and influential than the contentious jurisdiction, but as a supplement to the contentious jurisdiction, it still has an important influence on the settlement of international disputes in the international field. In order to solve disputes in the international community and give full play to the role of international law, we need to continuously explore the realistic path to improve the advisory jurisdiction system of the ICJ. With our country, we can also promote the guarantee and realization of the advisory jurisdiction of the ICJ and promote the peaceful settlement of international disputes by increasing the degree of participation in the exercise of jurisdiction of the ICJ and playing the responsibility of superpowers.

Keywords: international courts, international disputes, jurisdiction, advisory jurisdiction

1. Introduction

Before the International Court of Justice (ICJ) came into existence, the main ways for sovereign states to settle international disputes ranged from the initial settlement by force through war to the later advocacy of peaceful means of resolving conflicts between states, such as negotiation, mediation, conciliation and arbitration. After the establishment of the International Court of Justice (ICJ), international disputes were resolved by ruling on cases brought by states to the ICJ, providing legal advice, etc. The exercise of litigation and

advisory jurisdiction by the ICJ is a breakthrough by the United Nations in the settlement of international disputes by peaceful means, and has played an irreplaceable role in the establishment of a fair, just, stable and unified international order.

2. Overview of the Jurisdiction of the International Court of Justice

2.1 Overview of Jurisdiction

The International Court of Justice has jurisdiction over disputes between sovereign states. The word "jurisdiction" is derived from the Latin pronunciation "jusdicere". Its essence

means an authority to promulgate laws and declare legal status and to make publicity of rights and obligations. At this level, jurisdiction is actually the entire process of litigation, including the court's trial activities. In contrast, Black's Law Dictionary states that jurisdiction is the general right of the state to exercise administration over all persons and things within its territory, the geographical area where courts and judicial officials hear cases, make decisions on their competence, and exercise administrative and judicial power. This explanation explains the scope of the power of jurisdiction more comprehensively.

As far as the jurisdiction of the ICJ in the sense of international law is concerned, jurisdiction only implies the ability and competence of the ICJ to hear international disputes and is a prerequisite for the ICJ to exercise its adjudicative function and ultimately to render an adjudicative result. From the Permanent Court of International Justice to the International Court of Justice and a large number of permanent and temporary international judicial institutions, the term "jurisdiction" is inseparable from the International Court of Justice. The core focus of the dispute over jurisdiction is also the question of attribution of jurisdiction. Therefore, a definition of jurisdiction is necessary.

2.2 The Emergence of the Jurisdiction of the International Court of Justice

The jurisdiction of the ICJ arises mainly from two ways, one is the voluntary cession of sovereign states, and the other is the competence granted by the UN Security Council. Since the ICJ is founded on the voluntary basis of sovereign states, it neither exists as a supranational body of rights above sovereign states, nor can it be a judicial body above sovereign states; its authority derives directly from the provisions of the UN Charter and the Statute of the ICJ.

The basis of jurisdiction is based on the principle of state consent, which determines that the ICJ cannot have compulsory jurisdiction. The main way in which jurisdiction can be acquired is only through voluntary cession by sovereign states. That is, sovereign states submit their disputes to the ICJ and make a commitment to be bound by the outcome of its decisions. Thus, the authoritative status of the ICJ's jurisdiction is constantly challenged by sovereign states. When some sovereign states want to use the ICJ to settle their disputes, they readily accept and use the judicial resources of the ICJ. However, when

they do not want to submit certain disputes to the ICJ for the purpose of safeguarding some of their interests, they will challenge the jurisdiction of the Court by different means and in various ways. In order to prevent the jurisdiction of the International Court of Justice over the disputed cases. Such incidents are not only detrimental to the settlement of international disputes but also weaken the judicial authority of the ICJ to a certain extent. For example, in 1973, Australia and New Zealand sued France, asking the Court to adjudicate and declare that the aerial nuclear weapons testing activities in the South Pacific region violated the provisions of existing international law on nuclear weapons, etc., and wanted France to be judged to stop its insane behavior and not to conduct similar nuclear tests again. France's behavior was once considered contemptuous of the International Court of Justice, as it did not appear before the Court or submit any pleadings from the beginning.

There are also positive aspects in the process of establishing the jurisdiction of the International Court of Justice. Such as the establishment, improvement and development of the jurisdiction of other international judicial institutions to provide a certain sense of reference experience for the establishment of the jurisdiction of the International Court of Justice system in the future to lay the foundation for the International Court of Justice to accumulate practical experience for the International Court of Justice, the International Criminal Court and other international judicial institutions in the establishment of jurisdiction introduced complementary provisions, etc..

Therefore, we still need to analyze the role of the ICJ in the whole process of international dispute settlement in a dialectical manner. In the complex international relations, the International Court of Justice (ICJ) should study the controversial issues of its jurisdiction, identify the focus of disputes, and formulate relevant measures for their resolution, so as to guarantee the authoritative status of the ICJ in international dispute settlement.

3. Advisory Jurisdiction of the International Court of Justice

3.1 Overview of Consulting Jurisdiction

The advisory jurisdiction of the International Court of Justice (ICJ) refers to an authoritative opinion for information given by the ICJ, as a judicial organ of the United Nations, in response to a non-contentious request from relevant international organizations and institutions, after a comprehensive analysis of the relevant

legal questions submitted to the Court. It is another important way for the International Court of Justice to realize its jurisdiction. According to the Charter of the United Nations, only specific authorized organs, specialized agencies and other bodies of the United Nations are entitled to refer to the International Court of Justice for an advisory opinion on questions of law within the jurisdiction of the Court in the performance of its functions. States, on the other hand, cannot request an advisory opinion from the ICJ as the subject of a request, nor can they prevent the ICJ from issuing an advisory opinion on a dispute they have raised. Nor is anyone, including the Secretary-General of the United Nations, entitled to request an advisory opinion from the ICJ. Advisory jurisdiction, unlike contentious jurisdiction, has no statutory enforcement procedures for the exercise of its powers, nor does it have statutory consequences for non-performance, and unlike contentious jurisdiction, lacks a legal basis in the strict sense. This is not to say, however, that advisory jurisdiction is not compulsory and binding; on the contrary, its role cannot be underestimated. Advisory jurisdiction provides sovereign states with a non-litigious, more efficient and simpler solution to international disputes. Because of this feature of the advisory opinion, international organizations are more proactive in seeking advisory opinions from the ICJ to prevent dispute resolution, and sovereign states are more willing to refer disputes to the ICJ for resolution.

For example, the United Nations Convention on the Law of the Sea and the Statute of the International Tribunal for the Law of the Sea adopt the same provisions for the advisory chamber on seabed disputes by reference to the advisory jurisdiction. Article 138, paragraphs 1 and 2, of the 1997 Rules of the International Tribunal for the Law of the Sea, on the other hand, provide for the advisory functions of the Tribunal: i) If an international agreement relating to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for an advisory opinion, the Executive Tribunal may give an advisory opinion on a legal question. ii) A request for an advisory opinion shall be communicated to the Tribunal through any entity authorized to do so or to prosecute the request before the Tribunal in accordance with the agreement.

3.2 International Law Basis for the International

Court of Justice's Exercise of Advisory Jurisdiction

It goes without saying that the International Court of Justice, as a judicial organ of the United Nations, exercises its advisory jurisdiction and the final legal document rendered is the ICJ advisory opinion, which deals with matters limited to legal issues and is highly specialized. The power of the ICJ to exercise its advisory jurisdiction derives from the provisions of the UN Charter and the Statute of the ICJ. Article 96 of the UN Charter provides for the right of the UN General Assembly, the Security Council and other authorized organs to apply to the ICJ for an advisory opinion of a professional nature on certain legal questions when they are in doubt or in dispute. The scope of application by the UN General Assembly and the Security Council is "any" legal question, while other subjects are limited to legal questions within the scope of their work, and the ICJ decides whether to accept the application of the relevant subject after discussion; Article 65(1) of the Statute of the ICJ further emphasizes the subject of application on the basis of the former provision Legitimacy. These two provisions are the source of the effect of the advisory jurisdiction of the ICJ, and their scope of application covers all legal questions in respect of which an application has been filed. To date, the scope of litigation and advisory cases before the ICJ has been very broad, including various legal issues such as territorial sovereignty, boundaries, maritime, jurisdiction, diplomatic relations, legal status of aliens, succession of States, treaties, State responsibility, international organizations, etc. Although the ICJ advisory opinion lacks the binding force of a judgment rendered at trial, and is merely a legal document of the "advice and guidance" type, in the actual exercise of its power, its status is equivalent to that of soft law, indicating the direction of international law in the determination of relevant legal issues.

3.3 Practice of the International Court of Justice in the Exercise of Advisory Jurisdiction

It is undeniable that the legal results obtained in the exercise of its advisory jurisdiction constitute the vast majority of the work achieved by the International Court of Justice, whose advisory opinion of 1949 on the question of the right of claim of the United Nations is considered to be an important statement of the subjectivity of international law for international organizations. The 1951 advisory opinion on reservations to the Genocide Convention, which became the basis

for articles 20 and 21 of the Vienna Convention on the Law of Treaties 20 and 21 of the Vienna Convention on the Law of Treaties. The 1975 advisory opinion on the legal status of Western Sahara had a considerable impact on establishing the status of the principle of national autonomy in international law.

The previous Permanent Court of International Justice issued 27 advisory opinions in the international community in the more than 20 years between its establishment and termination, and the ICJ has entertained just over 20 requests for advisory opinions since its establishment. The advisory jurisdiction of the ICJ facilitates the prevention and resolution of international disputes of sovereign states, while providing authoritative interpretation for other international organizations. It provides a new way and means of legal remedy for each sovereign state, has a positive impact on the establishment of the international rule of law system in China and the development of the international rule of law in the international community, and has promoted the establishment of a globalized rule of law system. It has contributed to the peaceful settlement of international disputes and the stability of the international community.

4. International Court of Justice Advisory Jurisdiction in the Process of Practice Exposed the System Deficiencies

4.1 Limited Scope of Subject Matter of Advisory Jurisdiction

In the international community, the limited number of United Nations bodies entitled to submit requests for advisory opinions to the ICJ has largely constrained the effective exercise of advisory jurisdiction, for example, only 22 specific organs of the ICJ have advisory standing today, and less than one-third of them exercise their rights. In the 70 years since the establishment of the ICJ, the number of advisory cases received by the ICJ is only equal to the number of cases received by the Permanent Court of International Justice, which has existed for 24 years, and the limitations of the ICJ on the issue of advisory jurisdiction today have seriously limited the development of the ICJ. Moreover, unlike the compulsory force guarantee of contentious jurisdiction, the advisory opinion of the ICJ has only a reference value and is not legally binding, and this limitation also leads to the inability of the ICJ's

advisory jurisdiction to be universally applicable to the international community.

4.2 Insufficient Exercise of the Right of the Subject of Power to Apply for an Advisory Opinion

Under the UN Charter, the UN has received only a handful of requests for advisory cases in the more than 70 years since its establishment. These have mainly involved territorial disputes, use of force, decolonization, diplomatic relations, nationality, political asylum, and economic rights. Although the number of advisory cases is broad, the number is small. The reason for this is that the authorities who have applied for the right to request an advisory opinion are worried that the outcome of the advisory opinion made by the International Court of Justice will be unfavorable to the interests of their own country due to political, economic, and geopolitical considerations, and will eventually lead to damage to their rights and "lift a stone and smash their own feet". Thus, they are more cautious in exercising their right to request advisory jurisdiction and are reluctant to exercise their right to request an advisory opinion from the International Court of Justice, thus avoiding the abuse of their right to request an advisory opinion, which will lead to their own interests not being protected. This is in fact a passive avoidance approach. For the above reasons of protecting their own rights and interests, subjects with the right to request an advisory opinion tend to be more cautious in exercising their rights.

4.3 Weak Binding Power of the Advice

The essence of advisory jurisdiction is to make up for the lack of effectiveness of litigation jurisdiction, and its binding power is lower than that of litigation jurisdiction. Since the nature of the ICJ is such that its contentious jurisdiction is not compulsory, its advisory jurisdictional opinions are of course not legally binding, and each body requesting an advisory opinion decides for itself what measures to take to resolve an international dispute. The advisory opinion of the ICJ does not directly affect the parties to the dispute. Although the legislation does not explicitly provide for the legally binding nature of advisory jurisdiction, it is clear through the practice of the ICJ in specific cases that ICJ advisory jurisdiction opinions are not binding in the practical sense. This has largely formalized the advisory jurisdiction of the ICJ. Relying solely on the self-consciousness of

sovereign states is not an effective, fair, reasonable and just solution to international disputes. This has led to the ineffective implementation of the jurisdiction of the International Court of Justice, affecting the judicial authority of the International Court of Justice, which is not conducive to the development of international law and the peace and stability of the international community.

5. Suggestions for Improving the Feasibility of the Advisory Jurisdiction of the International Court of Justice

5.1 Appropriately Expand the Scope of Consulting Subjects

The subjects that can apply for an advisory opinion from the ICJ are so far qualified by only 22 specific organs worldwide. Among them, except for certain specialized agencies, most of the global and regional international organizations do not have the right to apply for advisory opinions of the ICJ. By expanding the scope of subjects entitled to apply for advisory jurisdiction of the ICJ, it is conducive to increasing the source of cases for advisory jurisdiction of the ICJ, ensuring the effective exercise of the ICJ's advisory jurisdiction, further expanding the influence of the ICJ's jurisdiction, and promoting the active exercise of its rights by the competent institutions. However, the scope of the subjects of the advisory jurisdiction of the ICJ cannot be expanded arbitrarily, otherwise it may lead to the abuse of jurisdiction and become a tool for certain countries to seek their own unjustified interests.

Therefore, when expanding the scope of the subject matter of advisory jurisdiction, the principle of consent of the parties should be applied, and the advisory jurisdiction should not override the consent of the states, which is the last line for the parties to submit the relevant international disputes to the International Court of Justice for settlement. In addition, it is also possible to proactively resort to the International Court of Justice to seek advisory opinions to effectively prevent and resolve international disputes that may arise or have arisen. It is also possible to grant other international organizations, such as regional international organizations, the right to request an advisory opinion from the ICJ, as recommended by the International Law Association in 1956. However, it is prudent to expand the scope of the relevant subjects only within a limited scope, otherwise

the phenomenon of abuse of the advisory jurisdiction of the ICJ will occur, and then the authority of the ICJ will be greatly reduced, and its international status in the settlement of international disputes will be challenged.

5.2 Appropriately Expand the Scope of Consulting Subjects

Making full use of and utilizing the advisory jurisdiction requires improving the efficiency of the operation of the ICJ's advisory jurisdiction mechanism. Making full use of advisory jurisdiction does not mean only the expansion of advisory jurisdiction. It should also improve the efficiency of the ICJ in providing advisory opinions. While a robust expansion of advisory jurisdiction is a natural way to make full use of advisory jurisdiction and is a worthwhile endeavor for the current international community, improving the efficiency of the existing advisory mechanism is the first priority for making full use of advisory jurisdiction at this time. In addition, the ICJ should first examine whether the issue raised by the subject of the request for advisory jurisdiction is within the scope of the ICJ's jurisdiction and whether it is a legal issue.

Here, we should make it clear that the issues on which the ICJ issues advisory opinions must be legal issues. This requirement not only improves the efficiency of the ICJ in providing advisory opinions, but also prevents the relevant countries from using the ICJ's power to bring issues with strong political sensitivity to the ICJ for advisory opinions, which would greatly reduce the ICJ's authority and at the same time weaken the ICJ's ability to handle relevant cases efficiently. To prohibit the legalization of political issues and to improve the efficiency of the ICJ's jurisdictional mechanism, it is also possible to institutionalize the advisory jurisdiction, institutionalize the custom of state participation, and independently provide for specific procedural rules for the application of the advisory, and further explore whether the advisory procedure can be applied to the litigation process to analyze and provide feasible opinions on the disputes provided by the dispute body organizations in a timely and effective manner. Simplify the consultation procedure to facilitate the active participation of each requesting subject in the jurisdictional activities.

5.3 Clarify the Scope of Legal Issues

In practice, the International Court of Justice (ICJ) has been vague in distinguishing the legal issues submitted by various subjects of rights, and the ICJ has not yet defined the legal issues, thus giving some international subjects an opportunity to take advantage of this loophole and submit some political or confusing issues to the ICJ when submitting requests for advisory opinions. For example, the previous Kosovo Independence Advisory Case was essentially a case in which the subjects concerned disguised their political intentions as legal issues to confuse the public and use the authority of the ICJ to realize their political ambitions and selfish interests. Therefore, it is necessary to clarify the criteria for national courts to judge legal issues, and the determination of the nature of the issue cannot be solely at the discretion of the ICJ. If the issue itself is a mixed issue containing both legal and political issues, the ICJ's discretionary judgment on its nature may lead to the issuance of an opinion by the ICJ on a political issue, and the issuance of an advisory opinion with political elements may indirectly affect the interests of sovereign states, which is contrary to the principles of international and domestic law. Ensuring the right of States to choose the resolution of disputes in the international community and respect for the principle of national sovereignty.

5.4 Analysis of the Feasibility of Using the Jurisdiction of the International Court of Justice to Settle Disputes in China in the Future

To this day, China has not declared in any way that it accepts the jurisdiction of the ICJ, nor has it ever referred disputes arising in the course of its international dealings to the ICJ. Since the reform and opening up, China's interaction with other sovereign countries has inevitably led to various kinds of friction and even disputes in the process of increasing the degree of openness. And due to the influence of geographical factors, some historical problems have also led to the disputes between China and other countries in terms of sovereignty are gradually emerging. Although the final advisory opinion of the International Court of Justice is not legally binding, it has a certain binding force and real influence in fact.

In recent years, China's attitude towards the exercise of advisory jurisdiction in the referral to the ICJ has also gradually changed from a passive rejection at the beginning to a positive acceptance. This can be fully reflected in China's

participation in the advisory proceedings of the Kosovo Independence case. China, as one of the permanent members of the Security Council, made an oral statement and issued a written statement on the case, which is considered to be the first important turning point in China's attitude toward participation in the ICJ's management activities. Since the establishment of the ICJ in 1946, it has been more than 70 years, and China's attitude toward the ICJ has become increasingly positive as it continues to participate in the resolution of international affairs. In the face of the global community of destiny and China's rise as an emerging power, it should actively safeguard the authoritative status of the ICJ in order to better exert its influence as a responsible power in the international community. For example, in the resolution of historical issues such as the Diaoyu Islands and the South China Sea, there are limitations to China's traditional negotiation to resolve international disputes. If we can rely on the International Court of Justice to make a fair and reasonable and effective judgment for our country in international disputes, we can also set a good example for other countries in the world to actively participate in the management activities of the International Court of Justice. It can solve the problems, but also protect the legitimate interests of each sovereign state from infringement, promote the development of the rule of law in the international community, and promote the process of the rule of law in the international community.

In view of the various problems and limitations of the ICJ in practice, we should integrate the actual situation and put forward practical suggestions for improvement, so as to promote the development of the ICJ jurisdiction system. In order to respond to the changes in the international community and to ensure that the rights and interests of sovereign states are fully realized. The ICJ should also overcome its shortcomings in enforcement and jurisdictional issues, and take the initiative to reform and bring into play its function as the main judicial body of the United Nations. It should provide sovereign states with authoritative and effective opinions on settlement and play an active role in resolving international disputes.

In the future, when China participates in the exercise of the jurisdiction of the International Court of Justice, we should take a positive attitude, give full play to our international

influence, and lead neighboring countries to actively participate in the international advisory activities by leading them with a line. In the past, China did not express its own position on many international disputes, but from the beginning of China's participation in the advisory process of the Kosovo unilateral declaration of independence case, China timely participated in it and fully expressed its position and opinions. This process is not only a manifestation of helping the International Court of Justice to effectively exercise its jurisdiction and perform its functions, but also a manifestation of our country's voice in the international arena and enhancing our international discourse and comprehensive national power. In the past, China was more inclined to use diplomatic means to solve the friction or disputes arising from international interactions, and its effectiveness is evident. With the continuous improvement of China's comprehensive strength and certain achievements in the process of rule of law construction, we gradually realize that it is not realistic to rely on diplomacy alone to negotiate and solve various international dispute issues, and the legitimate interests of the country are not effectively protected. Therefore, it is appropriate to seek judicial remedies from the International Court of Justice to guarantee that in certain special issues, both national sovereignty is defended and international disputes can be resolved in a fair and just manner.

6. Conclusion

With the development of international globalization and the trend of political and economic integration, the modern advisory jurisdiction system of the International Court of Justice has both opportunities and challenges. In the context of world unification and peaceful development, the international community urgently needs an authoritative institution recognized by the international community to come forward and assume this important responsibility. The International Court of Justice, as the most authoritative, unified and representative judicial institution in the international community, is undoubtedly the most important player in the construction of the international rule of law system. It is urgent to establish a unified, orderly and hierarchical international judicial system by relying on the International Court of Justice. During this period, we should not only recognize the effective

binding power of the International Court of Justice in exercising its advisory jurisdiction, but also restrict its infringement on the sovereignty of the state beyond the sovereignty of the state, and play its central position in the entire international legal system. Our country should also properly deal with historical legacy issues and disputes with other countries that may arise at any time while continuously expanding international contacts and cooperation, and proactively seek dispute resolution by the ICJ.

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