Accountability, rule of law and ICJ advisory opinions

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This lack of clarity also leaves undefined the outer limits of the IMF's specialized economic mandate. The lack of clear principles establishing how the IMF should incorporate 'political' issues like human rights into its calculations makes its decisions in this regard appear arbitrary and influenced by the interests of its richer Member States.

4. Legal nature of the IMF's standby arrangement

For many years the IMF has maintained that the standby arrangement through which it provides much of its financing is not a legal contract. This means that a Member State that does not meet the performance criteria or other requirements of the standby arrangement will not incur any legal liability. Until recently, the IMF also relied, in part, on this characterization to avoid publicizing the Member State's Letter of Intent.

The IMF's formalist position had a certain utilitarian value when the IMF functioned as the manager of the par value system, and the conditions attached to its financing included a change in the par value of the currency. The same considerations do not apply to its current operations.

The IMF's position is problematic for two reasons. First, if the arrangements were treated as international agreements they would be registered with the United Nations. Consequently, the IMF could require, rather than - as it currently does - encourage, Member States to publish their Letters of Intent.

Second, as IMF transactions become more complex, there is a greater need for these arrangements to be subjected to predictable principles of interpretation. The reason is that it is now possible for disagreements to arise about what constitutes sufficient compliance with the conditions of the agreement to justify allowing the country to obtain the next tranche of the funds. The lack of obviously applicable rules of interpretation renders the transactions amenable to ad hoc and arbitrary interpretation. This reduces our ability to hold either the Member State or the IMF accountable for the execution and interpretation of these Arrangements.

NOTE


REMARKS BY LAURENCE BOISSON DE CHAZOURNES*

ACCOUNTABILITY, RULE OF LAW AND ICJ ADVISORY OPINIONS

INTRODUCTION

The concept of accountability stands for answerability for the performance of an actor towards others.1 Two kinds of accountability can be distinguished: an internal ac-

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countability and an external one. In the case of international organizations, the internal system of accountability refers to the structure of accountability within them, i.e., towards the Member States. The external accountability focuses on accountability towards the international community at large (which includes States, international organizations, non-governmental organizations (NGOs) and other non-State actors). Accountability for the respect for the rule of law falls within both types of accountability: internal and external.

Application of the rule of law contributes to better accountability towards others in increasing the legitimacy of the decision-making process within an international organization. It provides for objective standards and rules and helps reaching agreed positions among members of an organization. It thus detracts from subjective assessment and unilateralism in favor of a third-party evaluation.

At a time when international organizations are increasingly placed in the turmoil of identifying agreed policy positions on a number of highly controversial issues such as the struggle against international terrorism, the legality of the use of force, the challenges posed by global environmental problems or the elimination of weapons of mass destruction, it is all the more important to assess the means of identifying the legal principles which can or could resolve such issues.

Advisory opinions and more specifically the ones rendered by the International Court of Justice (ICJ), is one means among others to this end. They constitute a channel through which legal considerations may find their way into the international debate. In rendering these opinions, the Court contributes to the clarification of the applicable law and in so doing helps to prevent uncertainties, tensions and disputes from arising within the organization and outside the organization. Advisory opinions provide for legal parameters, which then contribute to assessing the conduct of an organization. They contribute to making the legal "rules of the game" less controversial.

Up until now, the vast majority of the advisory opinions given by the Court have essentially dealt with issues of a constitutional nature. They, however, can also play an important role in identifying the law and policy issues which are of interest to an international organization.

Noteworthy is the fact that better legal certainty goes hand-in-hand with increased legalization of the international discourse, which is taking place in world politics. It is perhaps the legal discourse being engaged in, and applied to, non-State actors that is the most striking in this context. An example can be found in the increased submission by civil society of amicus briefs to Courts and tribunals as a means of having their opinions heard when legal proceedings are instituted.²

For international organizations and their organs to be able to have legal issues clarified, and by the same token to increase their internal and external accountability, an important issue to be dealt with is access to the ICJ. It is also important to analyze the way advisory proceedings are conducted, and more specifically the involvement of States, international organizations and non-State actors in these proceedings. Openness and inclusiveness criteria contribute to the legitimacy of the identification process of the rule of law.

1. **The Request for an ICJ Advisory Opinion**

Article 65 of the ICJ Statute provides that the Court may give an advisory opinion "on any legal question at the request of whatever body may be authorised by or in accor-
dance with the Charter of the United Nations to make such a request". The Charter of the United Nations in its Article 96 states that "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. 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".

In practice, in addition to the two UN principal organs foreseen by the Charter, other organs have been granted this privilege: they are the Economic and Social Council, the Trusteeship Council and the Interim Committee of the General Assembly. All specialized agencies with the exception of the Universal Postal Union have been granted this possibility.

It is interesting to note that most of the requests have emanated from the General Assembly or from other plenary bodies of specialized agencies, which comprehend almost all States of the international community. In such circumstances, one cannot but note "a general presumption that the request reflects a profound concern of the international community requiring a judicial answer". In a context of profound questioning, not to say search for identity, with respect to the means for promoting common interests, it is hoped that the international organizations' plenary organs become even more active. Examples are numerous where there is a need for increased legal clarity and certainty.

The possibility to request advisory opinions granted to specialized agencies was given at a time when the creation of an international organization was a novelty. The organizations whose creation was foreseen in the 1940s were universal and were supposed to be part of a system. Indeed, according to the ICJ, "[...] the Charter of the United Nations laid the basis of a "system" designed to organize international co-operation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers. The exercise of these powers by the organizations belonging to the "United Nations system" is co-ordinated, notably, by the relationship agreements concluded between the United Nations and each of the specialized agencies [...]". It was as yet inconceivable that most of the organizations to be created thereafter would not be part of the UN system as conceived in 1945.

It is true that cooperation with regional organizations had also been foreseen by the UN Charter in the area of peace and security issues. The eligible organizations were those with jurisdiction in dispute-settlement and enforcement matters. However, these organizations were not granted the right to request advisory opinions.

This point is to be borne in mind, as direct access to the ICJ is currently the privilege of a very small number of international organizations. The possibility of extending access to advisory opinions to international institutions other than the ones already granted that right, would be a means to promote respect for the rule of law. It would also contribute to increasing consistency in the interpretation of core principles of international law in a world with numerous actors, institutions and dispute-settlement procedures.

International organizations are important fora for promoting respect for the rule of law as well as for involving all concerned actors, by enabling them to have a say in the decision-making process. This is all the more true in a context of multiplication of
international organizations, whether they are universal or regional. Their functions might overlap or create uncertainty as to the legality of the actions to be taken. One can think, for example, of the recent developments in the area of collective security with NATO, OSCE and the EU as well as other regional organizations, being increasingly active in a field where, traditionally, the Security Council was the sole “maître du jeu”. One way to strengthen respect for the rule of law would be for international organizations to be able to submit legal questions to the ICJ. Not being specialized agencies in the meaning of the UN Charter, one could envisage that their requests be conveyed by the General Assembly, the Security Council or any one of the specialized agencies.

Noteworthy in this context, is the path followed by the 1993 Chemical Weapons Convention which provides that “The Conference and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Organization. An agreement between the Organization and the United Nations shall be concluded for this purpose [...]”.7

One could also consider the possibility of amending the Statute of the ICJ so as to enable these organizations established beyond the United Nations circle to make such requests directly.8

II. ABOUT THE OPENNESS AND INCLUSIVENESS OF THE ICJ ADVISORY PROCESS

Having dealt with the issue of the institutions entitled to request an advisory opinion, it is then interesting to assess the current openness of the ICJ Advisory proceedings when such a request has been brought. Openness and inclusiveness are seen as ways to contribute to increasing the legitimacy of the procedure as well as the chances that the identified rule of law by the ICJ finds application. The public character of the advisory opinions proceedings is also a means to this end by helping to avoid contests and tensions.

In the context of advisory proceedings, Article 66(2) of the ICJ Statute provides that “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”. All Member States of an organization that has brought a request have the right to make oral and written statements in the course of the procedure by means of a “special and direct communication.” They can thus express their views. This was widely exemplified by the requests on the legality of nuclear weapons brought by the WHO and the General Assembly. Forty-two States participated in the written phase of the pleadings, the largest number ever to join in proceedings before the Court. Among the participants to the written stage, four of the five declared nuclear weapons States participated, as did one “threshold” nuclear weapons State, NATO members as well as many developing countries that had not previously contributed to proceedings before the ICJ. During the oral proceedings, twenty-two States participated.9
In advisory proceedings the Court can request and receive submissions from “international organizations” considered by the Court as likely to be able to provide information on the question. This is the case with the organization that has brought a request before the ICJ. Other international organizations and institutions that are competent in the fields dealt with by a request, can also submit written statements and make oral comments before the Court. They can be universal or regional organizations, specialized agencies or non-specialized agencies, organs of the UN or otherwise. Such was the case with the International Labour Organization, the Organization of American States and the UN Secretary General in the context of the request brought by the General Assembly on Reservations to the Convention on Genocide. The Organization of African Unity did the same at the oral stage in the Namibia case. The UN Secretary-General, for his part, made communications in the Mazilu and Cumaraswamy cases.

The participation of all interested and concerned organizations in advisory proceedings is all the more important in an era of increased interdependence where issues become linked to each other and need to be looked at in a more holistic manner.

A question arises as to the proper means for identifying an international organization in the context of a request for an advisory opinion. So far, the Court has limited the scope of Article 66 (2) of the ICJ Statute by interpreting the notion of “international organizations” as referring to “inter-governmental organizations”. One should, however, note the difference in wording between Article 66 (2) and Article 34 (2). Article 34 (2) refers to “public international organizations” and Article 66 (2) is not limited by the adjective “public”. In addition in Article 66 (4), which allows States and organizations to comment on the submissions by other States and organizations, the word organization is used without any further specification that it is limited to international organizations.

If one were to consider that advisory proceedings are only open to international organizations as understood by international treaty practice, as for example the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, there might be difficulties as some international institutions do not fit within a definition based on the unique involvement of States in the creation of an organization through a constitutive treaty-type instrument.

One might think for instance of the institutions established under multilateral environmental treaties (MEAs), known as “Conference of the Parties” or “Meeting of the Parties” whose creation as international organizations was not foreseen by the parties to the MEAs, but which overtime gained such standing. There are also cases of institutions where international organizations, States and NGOs are acting in partnership such as for example the Global Initiative Alliance for Vaccines and Immunization (GAVI). And what about the International Red Cross Committee (ICRC) whose legal standing in the international order makes it a subject of international law? Should the openness of the advisory process be further strengthened so as to allow for broader participation? But what should be the criteria for allowing access to the ICJ?

Notwithstanding the existing possibilities for international organizations’ involvement before the Court, in practice their participation has been very limited. While international organizations have on occasion been requested to provide information to the Court, particularly in relation to advisory proceedings, they have rarely sought to become involved on their own initiative.
The openness of the advisory proceedings also raises the issue of access given to non-State actors. With the exception of the International League for the Rights of Man which was accorded permission to make a written statement to the Court in the South West Africa case, but failed to do so, NGOs have been firmly excluded from the proceedings.

It is interesting to note that since the South West Africa opinion, the Court and the Registrar have made it clear that the right to provide information in advisory or contentious proceedings under either Article 34 or 66 of the Statute is limited to international organizations. The only pathway for NGOs – or other members of the international civil society – intervention before the Court is for their statements to be joined to States’ communications.

International law, however, is no longer a field in which States have an absolute monopoly of interest and action. This complexity of the world “stage” brings transformations in the decision-making process. This was vividly evidenced through the requests for advisory opinions on the legality of resorting to nuclear weapons. They have raised concerns with respect to the legitimacy of the process for requesting advisory opinions because of the intervention of non-State actors. This was even commented upon by Judge Guillaume in his Separate Opinion in the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons requested by the General Assembly, when he said:

“I am sure that the pressure brought to bear [by the NGOs who in the last analysis initiated the request] did not influence the Court’s deliberations, but I wondered whether, in such circumstances, the requests for opinions could still be regarded as coming from the Assemblies which have adopted them or whether, piercing the veil, the Court should not have dismissed them as inadmissible. However, I dare to hope that Governments and inter-governmental institutions still retain sufficient independence of decision to resist the powerful pressure groups which besiege them today with the support of the mass media. I also note that none of the States which appeared before the Court raised such an objection [emphasis added]. In the circumstances I did not believe that the Court should uphold it proprio motu.”

Insights from past practice are interesting to take into account, as the majority of the requests transmitted by the Council to the Permanent Court of Justice were not in substantial terms requests of the Council. They were actually submitted at the instance of States or of an international organization other than the League of Nations. In the 14th Annual Report of the Permanent Court, sixteen such requests are identified. Six are identified as deriving from the ILO. And interestingly enough, the Court’s report lists among the international organizations interested in the case not only the ILO but various non-governmental organizations as well. These were the International Confederation of Christian Trade Unions and the Netherlands General Confederation of Trade Unions. It would seem that this practice could be revived.

CONCLUSION: RULE OF LAW AND ACCOUNTABILITY

There are many global policy issues under discussion where the question of the applicable law is one of the core questions. There is, in other words, a quest for legal answers to public policy concerns. The United Nations, its specialized agencies, as well as other institutions, confront such issues on a daily basis in the course of their activi-
ties. Advisory opinions while providing an answer to legal questions can also be seen as a means for improving accountability. The promotion of the rule of law is a means to this end as it sets criteria against which practices can be assessed. In addition, the contribution of the courts to legal queries, especially if it emanates from advisory opinions, has certain advantages, notably that it may reduce the influence of the most politically powerful States. All States are able to express their views in advisory proceedings and this contributes to a levelling of the playing field. Furthermore, increased participation of international organizations in, as well as access for NGOs to, advisory proceedings would make the process more inclusive and contribute to shaping in judicial terms the changes that are taking place in the international decision-making process. States are no more the only actors involved in law-criteria and law-application functions. Others are claiming such privilege, and more specifically non-State actors. There is however a lack of formal and substantial criteria for their involvement in international arenas. Their participation in advisory proceedings would contribute to identifying these criteria.

NOTES

5. See, for example, the statement made by the ICJ with respect to the legal personality of the United Nations in Reparation for Injuries suffered in the Service of the United Nations, Advisory Opinion of II April 1949, ICJ Reports 1949, p. 182: "The Court is here faced with a new situation. The question to which it gives rise can only be solved by realizing that the situation is dominated by the provisions of the Charter considered in the light of the principles of international law [...]".
7. Article XIV, para. 5.
10. See Reservations to the Convention on Genocide, Advisory opinion, ICJ Reports 1951, p.18.
14. "The Court, subject to and in conformity with its Rule, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative".

On the issue of the definition of an international organization, see First report on responsibility of international organizations by Mr. Giorgio Gaia, Special Rapporteur, Doc. A/CN.4/532, paras. 12-34.


R. Mackenzie and Ch. Chinkin, op. cit., p. 159.


R. Mackenzie and Ch. Chinkin, op. cit., p. 140.

For example, a resident of the Marshall Islands described what has happened following the series of hydrogen bomb tests conducted in the 1950s during the proceedings on the Legality of the Threat or Use of Nuclear Weapons.

The negotiations of the Rome Statute establishing the International Criminal Court or the negotiations of the Ottawa Convention on the elimination of landmines have revealed the increased role of non-State actors in the creation of international law.


S.M. Schwabe, 'Was the Capacity to Request an Advisory Opinion Wider in the Permanent International Court of Justice than it is in the International Court of Justice?', LXII BYIL (1991) p. 81.


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THE GROWING IMPACT OF THE PRINCIPLES OF GOOD GOVERNANCE IN STRENGTHENING THE APPLICATION OF THE RULE OF LAW IN EUROPEAN CONTEXT

INTRODUCTION

The term “good governance” does as yet not have a clearly defined legal definition in any system of law. In the European context, the term embodies a range of traditional legal and non-legal concepts and applies as well as to governmental organizations as well as to private organizations.

In this paper we will especially focus on the monitoring by European Institutions of compliance with good governance by its institutions and the Member States. Compliance by business and corporate organizations with these principles of good governance, which is nowadays a hot item not only in the USA (Enron, Worldcom) but also in the Netherlands (Worldonline, Ahold) will be dealt with under the session of Corporate Governance.

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