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David Lenefsky

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ADVISORY OPINIONS AS A PROBLEM SOLVING PROCESS*

BY DAVID LENEFSKY†

I.

INTRODUCTION

ARTICLE sixty-five of the Statute of the International Court of Justice provides: "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." The jurisprudence of both the Permanent Court of International Justice and the International Court of Justice demonstrates the importance of advisory opinions. The Permanent Court rendered thirty-one judgments in litigious cases and gave twenty-seven advisory opinions. Thus far the International Court has rendered seventeen judgments and has given advisory opinions on thirteen requests. The advisory jurisdiction of the International Court has been invoked for some of the most serious and difficult international problems, such as admission to membership in the United Nations, South-West Africa and the expenditures of the United Nations operations in the Middle East and Congo.

Plaudits have been heaped upon the International Court's judicial authority to render advisory opinions; and States have been criticized for not taking advantage of the advisory process "where a legal issue may be resolved free of political interests or dialectics." It has been said that advisory proceedings provide "a means for peacefully deciding questions of fact and law. . . . (E)ven disputes of a political character may include an underlying or pertinent legal issue, such as the interpretation of a treaty, which, if impartially and authoritatively resolved, may contribute to the settlement of the larger problems." (Emphasis added.) It is this allegation, but only with advisory opinions rendered by the International Court of Justice, which is the primary concern of this article.

* The author records his debt to Professor Thomas M. Franck of New York University School of Law for his many stimulating thoughts on International Law.
2. 40 Foreign Affairs 465 (1962).
3. Id. at 467, 470.

(525)
The International Court of Justice, when deciding whether or not to assume jurisdiction in an advisory proceeding, has often had to refute some combination of the following jurisdictional objections: 1) that the question put to the court is intertwined with political questions; 2) that the court is not competent to interpret the Charter of the United Nations; 3) that the question interferes or intervenes in the domestic jurisdiction of States according to Article 2, paragraph 7, of the Charter; and, 4) that an advisory opinion cannot be rendered without the consent of all interested States. 4

It is the major thesis of this paper that the International Court of Justice, when deciding whether or not to assume jurisdiction in advisory proceedings, should consider — in addition to refuting jurisdictional objections contemplated by Articles 65 and 68 of the Statute of the International Court of Justice — whether or not rendering an advisory opinion would help solve the problem which gave rise to the request for the opinion. 5

The two advisory opinions concerning the admission of a State to membership in the United Nations, the two opinions concerning the Peace Treaties with Bulgaria, Hungary and Romania, and the three opinions concerning the Territory of South-West Africa will first be considered. A cursory examination of the events which induced the General Assembly to request an advisory opinion, an analysis of the questions submitted to the court, and the answers given will demonstrate that the General Assembly should not have requested the court for some of these advisory opinions, and that the court, regardless of its judicial ability to refute various jurisdictional objections, should not have always assumed jurisdiction.

II.

The Two Admission Opinions 6

Article 4 of the Charter of the United Nations states:

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

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5. 5 S. Stat. Int'l Cr. Just. art. 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."

2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.\(^7\)

At the 204th meeting of the Security Council, on September 25, 1947, the applications of Bulgaria, Finland, Hungary, Italy and Romania for admission to the United Nations were considered.\(^8\) The delegate from the United Kingdom expressed his opinion that Italy fulfilled the conditions for admission required by Article 4, paragraph 1.\(^9\) Poland introduced a draft resolution proposing that the Security Council vote on one resolution that would recommend the admission of all five applicants.\(^10\) The delegate from the Soviet Union said: "We are ready to agree to the admission of Italy to the United Nations, but only on the condition that all other countries which are in the same position — namely — Bulgaria, Romania, Hungary and Finland are also admitted." (Emphasis added.)\(^11\)

Belgium was the first to introduce the thought that the Polish draft resolution, requiring a "collective decision," would add to the conditions of admission established by Article 4, paragraph 1, of the Charter.\(^12\) A dispute then arose between the Western Powers and the Soviet Union and its associates on the Council over the behavior of the Governments of Bulgaria, Hungary and Romania. The United States contended that Bulgaria, Hungary and Romania did not fulfill the requirements for admission established by Article 4. It was alleged that the three ex-enemy States were violating the Peace Treaties because the rights and liberties of their respective peoples were jeopardized, and that the present governments, supported only by a minority, replaced governments elected at the end of World War II that were "responsive to the will of the people."\(^13\)

At the 206th meeting, a Belgian proposal requiring separate and final votes was adopted over Soviet objection.\(^14\) The applications

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7. U.N. Charter art. 4, paras. 1-2.
9. Id. at 2409.
10. Id. at 2412.
11. In conclusion, I am submitting to the Security Council a draft resolution which can settle the whole question. The text is as follows:

   The Security Council,
   Having received and examined the applications for membership in the United Nations submitted by Hungary, Italy, Romania, Bulgaria and Finland,
   Recommends to the General Assembly that these countries be admitted as Members of the United Nations.
12. Id. at 2414.
13. Id. at 2421.
14. Id. at 2425, 2446, 2453.
of Bulgaria, Hungary and Romania were then rejected because of failure to obtain the affirmative votes of seven members. The applications of Italy and Finland were rejected because one (USSR) of the two (USSR and Poland) votes opposed was a permanent member.

On November 17, 1947, the General Assembly adopted a resolution requesting the court to give an advisory opinion to the following questions:

Is a member of the United Nations which is called upon in virtue of Article 4 of the Charter, to pronounce itself by its vote, either in the Security Council or in the General Assembly, on the admission of a State to membership in the United Nations, juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 of the said Article? In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?

The court concluded that a member of the United Nations is not juridically entitled to make its consent to the admission of a State dependent on conditions not expressly provided by paragraph 1; and, that a member cannot subject its affirmative vote to the additional condition that other States be admitted to membership together with that State.

It is submitted that the General Assembly should not have presented these questions to the court for an advisory opinion and that the court was in error in assuming jurisdiction. The questions presented to the court concerned the conduct of the Soviet delegate in the Security Council. The important point is that the problem of adherence to the opinion depended solely upon the behavior of one State.

When the General Assembly adopted the resolution requesting the court to render an advisory opinion, the majority of the General Assembly placed themselves — figuratively, not legally — before the court. The Assembly did not place the Soviet Union before the court nor did the Soviet Union do so by submitting a written statement.

15. Id. at 2475–76. Australia, Belgium, Brazil, China, the United Kingdom and the United States abstained in the voting on Hungary. China, Columbia, France and Syria voted in favour of Romania’s application. Only Syria voted for Bulgaria’s application.
16. Id. at 2476.
18. Conditions of Admission, supra note 4, at 65.
on the merits of the question submitted to the court.\(^1\)\(^9\) The party (Soviet Union) whose actions would determine whether or not the advisory opinion would be implemented was not the party (Assembly) which requested the opinion. The General Assembly could have stood on its head and performed all sorts of mental gymnastics, but it could not have implemented the opinion because the questions submitted to the court by the Assembly were formulated in such a manner that they would not allow the Assembly to implement the answers.

According to the Charter of the United Nations, "solving international problems" is a primary purpose of the Organization.\(^2\)\(^0\) The Statute of the International Court of Justice provides that the court is "the principal judicial organ of the United Nations."\(^2\)\(^1\) It is submitted that after "the principal judicial organ of the United Nations" rendered it first advisory opinion, the United Nations was no more closer to solving the admissions problem than it was before the Assembly requested the opinion.

It has been said: "While in a formal sense it may be true that an opinion does not have the binding force of a judgment, practically it does, as an authoritative statement of law, have almost the same legal effect."\(^2\)\(^2\) This is simply jurisprudential polemics.

The United Nations was, at this time, in the midst of a momentous international problem. Applications for admission to membership were being rejected because of a dispute between the Soviet Union and the West. In fact, only five States achieved membership between September 25, 1947, the day of the 204th Security Council meeting, and December 14, 1955, when the dispute was finally settled\(^2\)\(^3\) — at which time sixteen States received recommendations from the Security Council.\(^2\)\(^4\)

Obviously, the crucial questions are: to whom are advisory opinions "authoritative statements of law," and, to whom does an advisory opinion "have almost the same legal effect" as a judgment. If advisory opinions are "authoritative statements of law," and, if opinions "have almost the same legal effect" as judgments, then this is true only to law students and to the majority of the General Assembly who re-

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\(^1\) Conditions of Admission of a State to Membership in the United Nations — Pleadings, Oral Arguments, and Documents 29 (I.C.J. 1948).
\(^2\) U.N. CHARTER art. I, para. 3.
\(^3\) STAT. INT'L CT. JUST. art. I.
\(^5\) Pakistan and Yemen, September 30, 1947; Burma, April 19, 1948; Israel, May 11, 1949; Indonesia, September 28, 1950.
\(^6\) Albania, Austria, Bulgaria, Cambodia, Ceylon, Finland, Hungary, Ireland, Italy, Jordan, Laos, Libya, Nepal, Portugal, Romania, Spain. The fantastic political compromise that ended this eight year deadlock consisted of individual voting on all applicants "about which no problem of unification arises." U.N. GEN. ASS. OFF. REC. 10th Sess., Supp. No. 19, at 8 (918(X)) (1955).
quested the opinion. The first Admission advisory opinion was not an "authoritative statement of law" and did not "have almost the same legal effect" as a judgment to the only State that could have implemented the opinion. It seems self-evident that the majority of the Assembly cannot expect to aid the solution of problems by requesting the court to render an opinion which the Assembly cannot effectively utilize.

The General Assembly, at its 177th plenary meeting on December 8, 1948, adopted a resolution which "recommends that each member of the Security Council and the General Assembly, in exercising its vote on the admission of new Members, should act in accordance with the foregoing opinion of the International Court of Justice."25 Certainly, no one could possibly contend that this resolution could aid the solution to the admissions problem. If the majority of the Assembly desires aid from the court in solving an international problem, then the questions submitted for the court's advisory opinion must, in reality, concern the conduct of the majority of the Assembly and the questions must be formulated in such a manner that the majority of the Assembly will determine whether or not the advisory opinion will be implemented.

At the 428th meeting of the Security Council, on June 21, 1949, the Soviet delegate declared: "To facilitate the solution of this problem, the Government of the Soviet Union is submitting a proposal for the simultaneous admission to membership in the United Nations of all twelve States. . . ."26

On November 22, 1949, the General Assembly adopted a resolution requesting the court to render an advisory opinion on the following question:

Can the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent Member upon a resolution so to recommend?27

By a vote of twelve to two the court declared that the admission of a State to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, cannot be effected by a decision of the General Assembly without a prior recommendation from the Security Council.28

Of course, the second Admission opinion did not solve the admissions problem, that is, it did not provide a solution whereby the membership of the United Nations could be increased pursuant to Article 4 of the Charter. However, this was obviously not a defect in the question submitted to the court. The question presented in the second request was a proper subject for an advisory opinion and, therefore, the court was correct in assuming jurisdiction. The party requesting the opinion was the only one capable of implementing the opinion. The utility of the opinion did not depend upon one State. If the court had declared that the Assembly could admit a State to membership without a prior recommendation from the Security Council, then — contrary to the questions submitted in the first admission request — the implementation of the second Admission opinion would depend upon the will of the majority of the Assembly and one State could not have prevented adherence to the opinion.

III.

The Two Peace Treaties Opinions

The articles of the Peace Treaties concluded with Bulgaria, Hungary and Romania in 1947, pertinent to the "dispute" herein reported, and which the International Court of Justice had to consider in its advisory opinions of March 30, and July 18, 1950, are as follows:

Except where another procedure is specifically provided under any article of the present Treaty, any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission acting under Article 35, except that in this case the Heads of Mission will not be restricted by the time-limit provided in that Article. Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment. 

30. Article 36 of the Treaty with Bulgaria, to which correspond Article 40 of the Treaty with Hungary and Article 38 of the Treaty with Romania.
United States notes dated April 2, 1949 to Bulgaria, Hungary and Romania alleged that these Governments breached an international obligation created by Article 2 of the Treaty with Bulgaria, Article 2, paragraph 1, of the Treaty with Hungary, and Article 3, paragraph 1, of the Treaty with Romania. The United States contended that these three ex-enemy States regularly denied large numbers of their populace basic human rights secured for them under these Treaties of Peace. The note to Bulgaria mentioned the execution of Nikola Petkov, National Agrarian Union Leader, "who dared to express democratic opinions which did not correspond to those of the Bulgarian Government." The proceedings against Cardinal Mindszenty and Lutheran Bishop Ordass were noted to the Hungarian Government as an attempt to substitute members of the Communist Party for "independent" clergymen, thereby constituting a violation of religious freedom provided by the Treaty of Peace. The trial and sentence to life imprisonment of Iuliu Maniu, President of the National Peasant Party, and other leaders were cited to the Romanian Government as violations of political freedom and perversion of judicial process.

The United States was informed by a Hungarian note of April 8, 1949, a Bulgarian note of April 21, 1949, and a Romanian note of April 18, 1949, that compliance with the provisions of the Peace Treaties were insured because "all discrimination as to race, sex, language and religion" which existed under previous regimes, were abolished.

Following this, United States notes of May 31, 1949, to Bulgaria, Hungary and Romania stated that the notes received from these Governments did not provide "a satisfactory reply to the specific charges set forth" by the United States notes of April 2, 1949. The Governments of Bulgaria, Hungary and Romania were told that as a consequence of such deficiency, a dispute had arisen concerning the interpretation and execution of the Peace Treaties which these Governments had not attempted to settle by direct diplomatic negotiations. As a result, the United States was forced to refer the dispute to the Governments of the United Kingdom and the Soviet Union for joint consideration under the provisions of Article 36 of the Treaty with

32. Id. at 24, 26, 27.
33. Id. at 24.
34. Id. at 27.
35. Id. at 29.
36. Id. at 30, 32, 34.
37. Id. at 36, 37, 38.
Bulgaria, Article 40 of the Treaty with Hungary, and Article 38 of the Treaty with Romania.\textsuperscript{38}

On the same day, the United States Minister in Sofia, the Charge D'Affaires in Budapest and the Minister in Bucharest dispatched letters to the Soviet Ambassadors in these countries. Allegations, similar to those in the notes to Bulgaria, Hungary and Romania, were repeated. The Soviet Ambassadors were requested to communicate to the United States Legations the earliest date available for a Heads of Mission meeting.\textsuperscript{39}

The Union of Soviet Socialist Republics note of June 11, 1949 to the United States stated that the behavior of the Governments of Bulgaria, Hungary and Romania was within the domestic jurisdiction of sovereign States because the behavior was "directed toward the fulfillment of the Peace Treaties which obligates the said countries to combat organizations of the fascist type and other organizations which have as their aim denial to the people of their democratic rights."\textsuperscript{40}

As a result, the Soviet Government had no reason for participating in a Heads of Mission meeting.

A United States note of August 1, 1949 to Bulgaria, Hungary and Romania stated that since the dispute had neither been settled by direct negotiation between the United States and the three countries, nor by the Three Heads of Mission, the United States Government was requesting that the dispute be referred to a Commission in accordance with the previously mentioned provisions of the respective Peace Treaties.\textsuperscript{41}

A Hungarian note of August 26, 1949, a Bulgarian note of September 1, 1949 and a Romanian note of September 2, 1949 informed the United States Government that since their Governments had continuously satisfied the Peace Treaties, no dispute existed concerning the interpretation or execution of the Peace Treaties. As a result, the United States Government did not establish any need for the creation of a Treaty Commission.\textsuperscript{42}

Joinder of issue was raised by the United States notes of September 19, 1949. The Governments of Bulgaria, Hungary and Romania were informed that they had no right to declare unilaterally that a dispute over the interpretation of the Peace Treaties did not exist. Since the interpretations placed upon the behavior of the Bulgarian, Hungarian and Romanian Governments by the interested parties

\textsuperscript{38} Ibid.

\textsuperscript{39} Id. at 38-44.

\textsuperscript{40} Id. at 52.

\textsuperscript{41} Id. at 58-61.

\textsuperscript{42} Id. at 61-64.
did not correspond with each other, it was charged that the existence of a dispute was obvious. The Governments of Bulgaria, Hungary and Romania were accused of breaching a second international obligation by their refusal to join with the United States in forming a Commission. United States interference in the sovereignty of Bulgaria, Hungary and Romania was justified on the grounds that international obligations, arising from the Peace Treaties, limit the sovereignty of all signatories, including the United States.43

Similar exchanges occurred between the United Kingdom and Bulgaria, Hungary, Romania and the Soviet Union.44

While these diplomatic notes and letters were being exchanged, the Charter provision declaring that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language, or religion,"45 was used as justification by the Assembly for considering the question of the "observance of human rights and fundamental freedoms" in Bulgaria, Hungary and Romania.46

On October 22, 1949, the General Assembly adopted a resolution requesting the court to render an advisory opinion to the following questions:

1. Do the diplomatic exchanges between Bulgaria, Hungary and Romania, on the one hand, and certain Allied and Associated Powers signatories to the Treaties of Peace, on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria. Article 40 of the Treaty of Peace with Hungary, and Article 38 of the Treaty of Peace with Romania?

   In the event of an affirmative reply to question 1:

2. Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the articles referred to in question 1, including the provisions for the appointment of their representatives to the Treaty Commissions?47

By eleven votes to three, the court declared that the diplomatic exchanges disclosed disputes contained in the Peace Treaties, and that the Governments of Bulgaria, Hungary and Romania were under an

43. Id. at 65–69.
44. Id. at 72–85, 88–104, 108.
45. U.N. Charter art. 55(c).
international obligation to appoint representatives to the Treaty Com-
missions.48

Although the subject matter of the questions submitted to the court in the first Interpretation opinion had nothing in common with the questions submitted in the first Admission opinion, both requests submitted questions of the same kind. The questions submitted in the first Interpretation opinion were formulated in such a manner that only Bulgaria, Hungary and Romania could have implemented the advisory opinion.

Before answering the questions submitted, the court refuted many jurisdictional objections, one of which was that without the consent of all interested States (Bulgaria, Hungary and Romania), the court could not render an advisory opinion.49 The court distinguished contentious cases, where the consent of all States party to a dispute is the basis of the court’s jurisdiction, from advisory proceedings, where the court’s reply is only of an advisory character, and, as such, the opinion has “no binding force.”50 The court stated: “It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an advisory opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take.” (Emphasis added.)51

What action could the General Assembly take in order to implement this advisory opinion? The passage of a resolution noting that the Governments of Bulgaria, Hungary and Romania have refused to appoint their representatives to the Treaty Commissions could neither implement the opinion nor aid the solution to the problem.52

On July 18, 1950, the court rendered the second phase of the Interpretation opinion. By a vote of eleven to two the court answered in the negative, the following question:

If one party fails to appoint a representative to a Treaty Com-
mission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary General of the United Nations authorized to appoint the third member of the Com-
misson upon the request of the other party to a dispute according to the provisions of the respective Treaties?53

48. Interpretation of Peace Treaties, First Phase, supra note 29, at 77.
49. Id. at 71.
50. Ibid.
51. Ibid.
53. Interpretation of Peace Treaties, Second Phase, supra note 29.
The similarities between the two Admission opinions and the two Interpretation opinions are too striking to pass without comment. In both initial requests, the General Assembly requested judicial guidance concerning specific international problems; nevertheless, in order for the advisory opinions to be an effective aid in solving those problems, the positive responses of one member of the United Nations and three nonmembers were required. Nothing that the General Assembly could have done in response to the advisory opinions could have aided the solution of the problems.

The questions submitted in both of the second requests were proper for an advisory opinion in the sense that they permitted the General Assembly to implement, and thereby utilize, the opinions. In the second phase of the Interpretation opinion, if the court had declared that the Secretary-General could appoint a Treaty Commissioner, then nothing that the Governments of Bulgaria, Hungary or Romania could have done, would have prevented the advisory opinion from being implemented.

IV.

THE SOUTH-WEST AFRICA OPINIONS

The similarities between the two Admission opinions and the two Interpretation opinions must be extended to include some aspects of the South-West Africa opinions.

On February 9, 1946, the General Assembly, at its 27th plenary meeting, adopted a resolution requesting States administering territories held under mandates received from the League of Nations, to negotiate trusteeship agreements for submission to the United Nations. Thereafter, the Union of South Africa requested the General Assembly to


Is the following rule on the voting procedure to be followed by the General Assembly a correct interpretation of the advisory opinion of the International Court of Justice of 11 July 1950:

Decisions of the General Assembly on questions relating to reports and petitions concerning the Territory of South-West Africa shall be regarded as important questions within the meaning of Article 18, paragraph 2, of the Charter of the United Nations?

If this interpretation of the advisory opinion of the Court is not correct, what voting procedure should be followed by the General Assembly in taking decisions on questions relating to reports and petitions concerning the Territory of South-West Africa?

Obviously, the questions submitted were proper for an advisory opinion.

approve the annexation of the Territory of South-West Africa.\(^5^6\)

On December 14, 1946, the request was denied by an Assembly resolution which also repeated the invitation to the Union to place the Territory under the Trusteeship System.\(^5^7\) At the 33d meeting of the Fourth Committee, on September 27th, 1947, the Union declared that it was not under an international obligation to place the Territory under the Trusteeship System, and that "the right to petition (from the inhabitants of the Territory) had ceased to exist with the disappearance of the League of Nations, the authority to which petitions could be addressed. In the absence of a trusteeship agreement, the United Nations had no jurisdiction over South-West Africa and therefore no right to receive petitions.\(^5^8\)

On December 6, 1949, the General Assembly adopted a resolution requesting the court to render an advisory opinion on, *inter alia*, the following question: "Does the Union of South Africa continue to have international obligations under the Mandate for South-West Africa and, if so, what are these obligations?\(^5^9\)

By twelve votes to two, the court declared that the Union had an international obligation to transmit petitions from the inhabitants of the Territory to the United Nations.\(^6^0\)

After six years of refusing to transmit petitions to the United Nations, the General Assembly, on December 3, 1955, requested the court to render an advisory opinion on whether it was consistent with the advisory opinion of July 11, 1950 for the Committee on South-West Africa to grant oral hearings to petitioners on matters relating to the Territory of South-West Africa.\(^6^1\) The majority of the court declared that although oral hearings were not granted to petitioners by the Permanent Mandates Commission of the League of Nations,\(^6^2\) the grant of oral hearings by the Committee on South-West Africa would be consistent with the advisory opinion of 1950.\(^6^3\)

Do judicial declarations — that a State cannot condition its vote, that a State has an international obligation to appoint a Treaty Commissioner and that a State has an international obligation to transmit petitions — help the United Nations solve international problems?


\(^{60}\) International Status, *supra* note 54, at 143.


\(^{62}\) Admissibility of Hearings, *supra* note 54, at 28.

\(^{63}\) Id. at 32.
After the first Admission opinion, the Assembly had to return to the court and ask whether or not it could by-pass the Security Council in order to admit States to membership in the United Nations. After the first Interpretation advisory opinion, the Assembly had to return to the court and ask whether or not the United Nations could by-pass the Peace Treaties by establishing a Treaty Commission which would not consist of a Commissioner from Bulgaria, Hungary or Romania. After the first South-West Africa advisory opinion, the Assembly again found it necessary to return to the court and inquire whether or not the United Nations could by-pass the procedure of the League of Nations by granting oral hearings to petitioners.

Let us backtrack for a moment and take a slightly different view of the Assembly’s conduct in order to determine what possible value, if any, these requests for advisory opinions might have in solving these three international problems.

On November 17th, 1947, the day that the Assembly adopted the resolution requesting the court to render the first Admission opinion, the Assembly (before the request resolution was adopted) had adopted resolutions requesting the Security Council to reconsider the applications of, inter alia, Italy and Finland. Both resolutions stated “that the opposition to the above mentioned application (Italy and Finland) was based on grounds not included in Article 4 of the Charter.” Obviously, the majority of the General Assembly was of the opinion that a State was not juridically entitled to subject its affirmative vote to the condition that other States be simultaneously admitted to membership in the United Nations. What practical effect could an advisory opinion have under these circumstances?

If the court had said that a State could subject its affirmative vote to the condition that other States be simultaneously admitted to membership, then the majority of the Assembly would have had the choice between disregarding the advisory opinion or adhering to an advisory opinion which juridically rejected their previously stated position. This is indeed an impossible and humiliating choice. The Western Powers opposed the applications of Bulgaria, Hungary and Romania on the grounds that the applicants did not satisfy Article 4 of the Charter, and not because the Soviet Union was conditioning its vote. If Western opposition continued (as it did), then the Soviet Union (as it did) would have continued to oppose the applications of, inter alia, Italy and Finland. In short, no matter how the court answered the questions in

64. See note 17 supra.
65. Ibid.
66. See note 13 supra.
the first admission request, the General Assembly could not have effect-
ively used that advisory opinion in solving the admissions problem.

The very same resolution requesting the court for the first Interpre-
tation advisory opinion states:

Whereas the General Assembly, on 30 April, 1949, adopted Reso-


duction 272(111) concerning this question in which it expressed its deep concern at the grave accusations made against the Go-

governments of Bulgaria and Hungary regarding the suppression of human rights and fundamental freedoms in those countries . . . and most urgently drew the attention of the Governments of Bulgaria and Hungary to their obligations under the Peace Treaties, including the obligation to cooperate in the settlement of the question. . . .

Obviously, the majority of the General Assembly was of the opinion that disputes existed which were subject to the provisions of the Peace Treaties, and that an international obligation existed to appoint Treaty Commissioners.

The same fact pattern with identical consequences existed with the South-West Africa problem. The resolution requesting the court for the first South-West Africa opinion included references to three Assembly resolutions which recommended that the Territory be placed under the Trusteeship System. Once again, it is obvious that the majority of the Assembly was of the opinion that the Union was obligated to transmit petitions to the United Nations. If the court had said that the Union was not under an international obligation to transmit petitions, then the majority of the Assembly would have had the same choice that it would have had if the court said "yes" in the first Admission opinion, and "no" in the first phase of the Interpre-
tation opinion. In fact, such a choice was imposed upon the majority of the Assembly as a result of the first South-West Africa opinion. The Assembly, in the first South-West Africa request, asked the court whether Chapter XII of the Charter was applicable to the Territory. The court interpreted this question to mean whether the Charter imposed an international obligation upon the Union to place the Terri-


tory under the Trusteeship System. The court declared that the Union was not under an international obligation to do so. As a result, the majority of the Assembly had the choice between disregard-


68. See note 59 supra.

69. Ibid.

70. International Status, supra note 54, at 139.

71. Id. at 144.
ing the opinion or adhering to an opinion which juridically did not help the majority, which, at the very least, believed that a moral obligation was imposed upon the Union to place the Territory under the Trusteeship System. \(^{72}\) Recall that the Assembly's resolution of December 14, 1946, which denied the Union's request to annex the Territory, was adopted by a vote of thirty-seven in favor and nine abstentions. \(^{73}\) On the other hand, if the court said that an international obligation did exist to place the Territory under the Trusteeship System, then the majority of the Assembly would not have been capable of implementing the opinion.

The Assembly, in the first South-West Africa request, also asked the court whether the Union had "the competence to modify the international status of the Territory of South-West Africa. . . ." \(^{74}\) The negative reply by the court \(^{75}\) did not undo what was already partially accomplished. When the Assembly rejected the Union's request to annex the Territory, the Secretary-General received a letter from the Union stating: "The Union Government have therefore decided not to proceed with the incorporation of the Territory desired by its inhabitants (however, the Union Parliament did decide that the) Territory should be represented in the Parliament of the Union as an integral portion thereof. . . ." \(^{76}\)

V.

The Expenses Advisory Opinion \(^{77}\)

The Charter of the United Nations provides:

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly. \(^{78}\)

It has been the position of some States that the operations of the United Nations, in the Middle East (hereinafter referred to as UNEF) and in the Congo (hereinafter referred to as ONUC),

\(^{72}\) The French delegate thought that "the Mandatory Power had no legal obligation under the Charter to submit a trusteeship agreement. . . . Passing to the moral obligation of the Mandatory Power to submit a trusteeship agreement, he considered that it was certainly a very strong one." U.N. Gen. Ass. Off. Rec. 2d Sess., 4th Comm. 11-12 (A/334, A/334/Add.1 and A/C.4/94) (1947).

\(^{73}\) See note 57 supra.

\(^{74}\) See note 59 supra.

\(^{75}\) International Status, supra note 54, at 144.


\(^{78}\) U.N. CHARTER art. 17, paras. 1-2.
were undertaken in violation of the Charter of the United Nations. As a result, it has been contended that the expenditures for these operations are not expenses of the United Nations and therefore, not apportionable among the member States by the General Assembly pursuant to Article 17, paragraph 2.\textsuperscript{79}

On December 20, 1961, the General Assembly adopted a resolution requesting the court to render an advisory opinion on whether the expenses of UNEF and ONUC were “expenses of the Organization” within the meaning of Article 17, paragraph 2, of the Charter.\textsuperscript{80} Obviously, it was hoped that an affirmative answer would encourage payment from those States in arrears.

It seems that the expenses question submitted to the court fits somewhere in between those questions, the answers to which the Assembly can implement, and those questions, the answers to which the Assembly cannot implement. An affirmative answer does not provide the United Nations with money; nevertheless, an affirmative answer does permit the majority of the Assembly to effectively utilize the opinion. The majority of the Assembly would not be in the position that it was after the court rendered the first Admission, Interpretation and South-West Africa advisory opinions. An affirmative answer in the Expenses advisory opinion would not induce the majority of the Assembly to return to the court to inquire whether the United Nations could by-pass the Charter. With an affirmative answer, the majority of the Assembly could include the costs of UNEF and ONUC in the budget of the Organization, and could apportion those expenses among the members of the Organization. Additional utilization of the advisory opinion, by the Assembly, could be had with Article 19 which provides that the Assembly has the power to suspend a member’s vote in the Assembly “if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years.”\textsuperscript{81} Of course, the majority of the Assembly might desire another advisory opinion from the court concerning some aspect of Article 19; however, the point is that, contrary to the admissions, interpretations and South-West Africa problems, Article 19 provides the Assembly with power to effect a decision. The Charter provides no explicit provision permitting the Assembly to vote on applications to membership without a prior recommendation from the Security


\textsuperscript{81} U.N. CHARTER art. 19.
VI.
The Remaining Five Advisory Opinions

In order to avoid confusion, it is necessary to report, in outline form, the quintessence of the questions submitted to the court in the remaining five advisory opinions.

1) Reparation for Injuries Suffered in the Service of the United Nations.85 "Has the United Nations, as an Organization, the capacity to bring an international claim against the responsible de jure or de facto government with a view to obtaining the reparation due . . . ?"86

2) Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.87 "Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?"88

3) Effects of Awards of Compensation Made by the United Nations Administrative Tribunal.89 "Has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent?"90

4) Judgments of the Administrative Tribunal of the International Labour Organization Upon Complaints Made Against the United Nations Educational, Scientific and Cultural Organization.91 "Was

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82. See U.N. Charter art. 4.
83. See note 30 supra.
84. See note 62 supra.
87. Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] I.C.J. Rep. 15. This paper is not concerned with whether or not these questions were too broad in scope to permit a useful "yes" or "no" answer.

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the Administrative Tribunal competent, under Article II of its Statute, to hear the complaints introduced against the United Nations Educational, Scientific and Cultural Organization. . . . In any case, what is the validity of the decisions given by the Administrative Tribunal . . . ?" 92

5) Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization. 93 "Is the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization, which was elected on 15 January 1959, constituted in accordance with the Convention for the Establishment of the Organization?" 94

It immediately becomes apparent that, no matter what answer the court renders, the opposition of one State will not prevent the organ requesting the advisory opinion to effectively utilize and implement the opinion. It is submitted that the advisory process is best suited, and therefore should only be used, for these types of questions. In the Reparation for Injuries advisory opinion, the position of one State could not prevent the majority of the General Assembly from authorizing the Secretary-General to act "as efficaciously as possible with a view to obtaining any reparation due. . . ." 95 In the Reservation to Genocide Convention advisory opinion, the majority of the signatory States could decide whether or not a reserving State could be regarded as a party to the Convention. In the Awards of Administrative Tribunal advisory opinion, the majority of the General Assembly could give effect to an award of compensation made by the Administrative Tribunal. In the Administrative Tribunal of I.L.O. advisory opinion, the majority of the Executive Board of the United Nations Educational, Scientific and Cultural Organization could give validity to the decisions given by the Administrative Tribunal. The Administrative Tribunal of I.L.O. advisory opinion must be distinguished from all other advisory opinions rendered by the court because Article XII of the Statute of the Administrative Tribunal of the International Labour Organization provides that when an Executive Board of an international organization tests the validity of the Tribunal's decision by requesting an advisory opinion from the court, then "the opinion given by the court shall be binding." 96 Finally, in the Maritime Safety Committee advisory opinion, the majority of the Assembly of the Inter-

92. Id. at 79.
94. Id. at 151.
95. Reparation for Injuries Suffered, supra note 85, at 175.
96. Administrative Tribunal of I.L.O., supra note 91, at 78.
Governmental Maritime Consultative Organization could dissolve the existing Maritime Safety Committee and elect a new Committee in accordance with the Convention as interpreted by the advisory opinion.97

Whether or not the bodies requesting the advisory opinions will adhere to the opinions is altogether another matter. The crucial point is that if a majority does desire to implement the advisory opinion, then a majority of the requesting body can do so.

VII.

Conclusion

Since the active participation of one State was the sine qua non for the implementation of the first Admission, Interpretation and South-West Africa advisory opinions, it is submitted that the issues presented to the court in these requests were more appropriate to contentious litigation than the advisory process. The court was indeed faced with such an allegation in the first Interpretation advisory opinion;98 however, the court refuted this allegation on jurisdictional grounds, namely, that advisory opinions have "no binding force."99 If the advisory opinion's capacity to aid in the solution to the particular problem confronting the United Nations had been used as the criterion, then it is submitted that the General Assembly should not have requested the first Admission, Interpretation and South-West Africa opinions, and that the court was in error in assuming jurisdiction.

Possessing an "authoritative statement of law"100 did not help the United Nations solve the admissions, interpretation and South-West Africa problems. Authoritative statements of law obtained from these advisory opinions merely provided certain members of the United Nations with an additional argumentative item that could be used against the Soviet Union, Bulgaria, Hungary, Romania and the Union of South Africa.

This article is neither espousing the proposition that the development and utility of international law depends upon the existence of an effective international police system, nor the proposition that the International Court of Justice should only adjudicate minor issues. What is submitted is the thought that the only issues appropriate for the impartial third-party advisory process are those issues that, upon

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98. See note 49 supra.
99. See note 50 supra.
100. Sloan, Advisory Jurisdiction of the International Court of Justice, 38 CALIF. L. Rev. 830, at 855 (1950).
adjudication, are directed to the requesting body. By definition, an adversary proceeding must at least have two parties. On the other hand, the International Court’s advisory procedure, in order to be functional as a problem solving technique, can only advise the requesting body about its own conduct.

Advisory opinions not dependent for implementation upon the requesting body are not appropriate to the advisory method of settlement. The success of the Expenses advisory opinion ultimately depended upon whether certain States would pay their assessed contributions to the United Nations. On the other hand, the success of the Awards of Administrative Tribunal advisory opinion only depended upon payment being made by the United Nations.101 The rights of the inhabitants of the Territory of South-West Africa to have their petitions transmitted to the United Nations solely dependent upon the acts of the Union of South Africa. In contrast, in the Administrative Tribunal of I.L.O. case, “the right of the officials to the benefit of the judgments of the Tribunal” only depended upon the acts of the United Nations Educational, Scientific and Cultural Organization.102

The “international person” has been challenged to perform huge creative tasks. Disputes unresolved by negotiation and compromise must yield to impartial third-party law. However, as this article has attempted to indicate, not all disputes are appropriate to the advisory procedure of the International Court of Justice. Additional forms of impartial third-party intervention are needed desperately.

101. Effect of Award of Compensation, supra note 89.
102. Judgments of the Administrative Tribunal, supra note 91, at 86.