

ADVISORY OPINIONS ON HUMAN RIGHTS: MOVING BEYOND A PYRRHIC VICTORY

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INTRODUCTION

In theory, advisory opinions are authoritative but usually nonbinding statements or interpretations of international law by an international tribunal or arbitral body.¹ Since advisory opinions do not bind states, international bodies can issue opinions relating to a state's internal affairs without obtaining that state's consent. They are also in theory less confrontational than contentious cases because states are not parties and do not have to defend themselves against formal charges.² Overall, advisory opinions are said to be "soft" law because they are not binding.³ Absent a binding legal obligation, advisory opinions must encourage, but not compel, states to behave in a certain manner.⁴ Yet, in practice, the recent International Court of

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1. Interpretation of Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion, 1950 I.C.J. 65, 71 (Mar. 30) [hereinafter *Peace Treaties*].

2. *Id.* (stating that advisory opinions are non-binding because the state is not present to represent itself); Jo M. Pasqualucci, *Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law*, 38 STAN. J. INT'L L. 241, 246 (2002) (stating that advisory opinions are meant to be less confrontational).

3. Judicial decisions in contentious cases are said to be "hard" because states have given the court jurisdiction to issue binding opinions; advisory opinions are said to be "soft" because in most instances states have not given the court jurisdiction to issue binding opinions. José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 427 (2003). Alvarez also states that even contentious decisions of the ICJ are "soft" given that they are not enforced and the uncertainty of enforcement norms, such as whether a state has a continuing obligation to comply with an ICJ decision if the Security Council considers and rejects a plea to enforce ICJ rulings. *Id.* He notes that even for contentious cases, the Security Council has enforced only one ICJ decision against Libya and only with that state's concurrence. *Id.* at 416 (citing JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 3-12 (2002) (discussing the sole example, Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6 (Feb. 3)).

4. Pasqualucci, *supra* note 2, at 246.

Justice (ICJ) and the Inter-American Court of Human Rights' (IACHR) advisory opinions suggest attempts at using this soft law to impose binding obligations on states through their development of international custom and treaty norms. To the praise of some and the displeasure of others, the courts are arguably eroding state sovereignty by using advisory opinions to rule on state practice even though the state has not consented to the court's jurisdiction.

In the 1970s and 1980s, several studies were conducted regarding the general use and scope of the advisory jurisdiction of the ICJ and the IACHR.⁵ Yet, a study specifically analyzing the use of advisory jurisdiction in relation to human rights cases and law is needed given the ICJ and the IACHR's recent human rights advisory opinions. These opinions include the ICJ *Construction of a Wall* opinion and the IACHR *Vienna Convention on Consular Relations (VCCR)* and *Migrant Worker* opinions. These opinions reflect both courts' elevation of individual rights over state rights. Yet, this active advisory jurisdiction raises questions regarding the jurisdictional power of advisory courts. These questions concern what states and entities can request advisory opinions, whether the opinions create any binding obligations on states through interpretations of binding treaty and custom norms, and how much power such opinions have on states that have not consented to the advisory courts' jurisdiction.

The Israeli Supreme Court (ISC) decision in *Mara'abe v. The Prime Minister of Israel* illustrates these concerns.⁶ In *Mara'abe*, the ISC considered what obligations the ICJ's holding in the *Construction of a Wall* opinion placed on Israel when the ISC examined the legality of Israel's separation wall. Although eventually diverging from the ICJ's opinion, the ISC deferred to the non-binding opinion because it held that the ICJ's interpretation of international law should be given full weight. The ISC's attention to the ICJ opinion is especially important given that Israel vehemently fought against the legality of the ICJ's right to issue the opinion in the first place. Yet, ultimately, the ISC argued that the ICJ did not base its opinion on full factual information, and used this rationale to disregard the ICJ opinion and

5. See KENNETH JAMES KEITH, THE EXTENT OF THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE *passim* (1971) (discussing the advisory jurisdiction of the ICJ); DHARMA PRATAP, THE ADVISORY JURISDICTION OF THE INTERNATIONAL COURT *passim* (1972) (discussing the advisory jurisdiction of the ICJ); Thomas Burgenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1 *passim* (1985) (describing the Inter-American Court's advisory opinion jurisprudence).

6. For a discussion on *Mara'abe*, see *infra* Part II.A.

invoke its own domestic law for analyzing the legality of the wall. The entire wall, as designated by the ISC, was not against international law, as the ICJ had held. This holding illustrates how the theoretical desire for advisory jurisdiction to play an important role in the development of human rights norms will fall short in the absence of states willingly accepting, adopting, and applying the norms developed in advisory opinions. Examining the weaknesses in the system will offer insight on how to achieve the desired state compliance in the absence of any binding legal or judicial enforcement.

Further, the development and use of advisory jurisdiction by the ICJ and the IACHR is important in relation to how other human rights courts will utilize their advisory power, including the European Court of Human Rights (ECHR) and the recently created African Court of Human and People's Rights (ACHPR). The issue is most prevalent relative to the ACHPR as it contains broad advisory jurisdiction.

Thus, this Note first compares the theoretical construct of advisory power to its role in practice. Part I of this Note presents an overview of how the advisory jurisdiction provisions of the ICJ, IACHR, ECHR, and the ACHPR operate in theory. Second, given that the ECHR has not used its advisory power, and the ACHPR is not yet operational, this Note discusses how the ICJ and the IACHR's use their advisory jurisdiction in practice. Part II focuses on the ICJ's recent use of advisory jurisdiction in human rights cases, and Part III focuses on the IACHR. In Part IV, this Note compares the advisory opinions of the ICJ and the IACHR and identifies the possible effects of an active advisory jurisdiction in human rights. It also proposes salutations on how to make these opinions have a more effective influence on the development of human rights norms and obligations.

I. INTERNATIONAL COURTS' USE OF ADVISORY JURISDICTION

Various international courts have advisory jurisdiction. This Note focuses on advisory jurisdiction and human rights, and, therefore, focuses primarily on the international courts that have advisory jurisdiction and deal with human rights. These include the ICJ, the IACHR, the ECHR, and the ACHPR.

A. The ICJ

The ICJ bases its advisory jurisdiction on the principle “that a qualified international intergovernmental organ, and not an individual State or group of States, may ask the Court for an advisory opinion on legal questions.”⁷ Furthermore, unlike decisions with which states must legally comply, states do not have the legal obligation to comply with advisory opinions.⁸ Under the predecessor to the ICJ, the Permanent Court of International Justice (PCIJ), only organs representing states, including the League Council and Assembly of the League, could ask for advisory opinions.⁹

During the period of the PCIJ, states determined whether to consult the court, as well as the terms of the consultation, ’by consensus.¹⁰ This prevented the advisory power from being used excessively by one state.¹¹ Further, under the PCIJ, the opinions requested were rarely abstract and the legal nature of the questions was rarely contested.¹² Michla Pomerance, in *The Advisory Role of the ICJ and its Judicial Character*, stated:

[T]he desire of the Court not to permit the advisory function to adversely affect the judicial character, prestige, and general standing of the Court in the world community, was powerfully buttressed (save in the *Eastern Carelia* and *Customs Union* aberrations) by the steady practice of the League Council and the organs whose legal questions it transmitted. This joint League-Court legacy was to undergo radical changes in the period of the UN and the International Court of Justice.¹³

These “changes” under the United Nations Charter included extending the right of the General Assembly to grant advisory opinions to other organs of the United Nations (U.N.) and

7. ROSENNE’S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 86 (Terry D. Gill ed., 6th ed. 2003) [hereinafter ROSENNE].

8. *Id.*

9. League of Nations Covenant art. 14; Protocol Concerning the Revision of the Statute of the Permanent Court of International Justice, annex, arts. 65-68. The Assembly never utilized its advisory power. ROSENNE, *supra* note 7, at 15.

10. Except in the Status of the Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 (July 23) and Mosul Boundary Case, 1925 P.C.I.J. (ser. B) No. 12 (Nov. 21), as noted by Michla Pomerance, *The Advisory Role of the ICJ and Its Judicial Character*, in THE INTERNATIONAL COURT OF JUSTICE 285 (A.S. Muller et. al. eds., 1997).

11. ROSENNE, *supra* note 7, at 87.

12. Pomerance, *supra* note 10, at 284.

13. *Id.* at 285.

Specialized Agencies.¹⁴ Currently, all principal agencies of the United Nations (except the Secretariat) and the Specialized Agencies are now authorized to request advisory opinions.¹⁵ The organizations authorized by the General Assembly can only request advisory opinions on legal questions arising “within the scope of their activities.”¹⁶ Under Article 96(1), the Security Council (S.C.) and General Assembly (G.A.) have no such explicit restriction, suggesting they have a broader advisory jurisdiction.¹⁷ Yet, Kelsen maintains that the words “arising within the scope of their activities” in Article 96(2) of the U.N. Charter are redundant because the Security Council and the General Assembly can only act if it is under their jurisdiction.¹⁸ Determining their jurisdiction means making sure that the organ is not acting outside its scope of activity.¹⁹ Thus, despite the

14. U.N. Charter art. 96 states: “(1) [T]he G.A. or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question. (2) Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request an advisory opinion of the Court on legal questions arising within the scope of their activities.”

15. ROSENNE, *supra* note 7, at 88. The inclusion of the Secretariat was championed by Stephen Schwebel, the former President of the International Court of Justice, in his note, *Authorizing the Secretary-General of the United Nations to Request Advisory Opinions of the International Court of Justice*, 78 AM. J. INT’L L. 869 (1984). Schwebel argued that Article 96 allows the United Nations to grant advisory authority to any organ. *Id.* at 869-70. Given that the Secretariat is an organ, the GA may authorize the Secretariat to request advisory opinions from the court. *Id.* If the Secretariat or the Secretary General was given the authority, they would be limited to questions arising within the scope of their activities. *See* U.N. Charter art. 96, para. 2. Yet, the Secretary-General acts in all meetings of the General Assembly, Security Council, Economic and Social Council, Trusteeship Council, and their subsidiary organs; thus, all the activities of such organs are arguably within the scope of the activities of the Secretary General. Schwebel, *supra* at 874. In 1992, then Secretary-General Dr. Boutros-Ghali, in his Agenda for Peace, recommended that the Secretary-General be authorized to take advantage of the advisory competence of the Court. Boutros Boutros-Ghali, An Agenda for Peace, U.N. GAOR, 47th Sess., item 10 of the prelim. list at 11, U.N. Doc. A/47/277, S/24111 (June 17, 1992). Yet, the General Assembly and Security Council did not act on this suggestion.

16. U.N. Charter art. 96, para. 2. Although twenty-one organs and agencies can use the advisory process, it has only been used once by the S.C., three times by the Committee on Applications for review of Administrative Tribunal Judgments, twice by ECOSOC, twice by the WHO, once by UNESCO, and once by IMCO. *See* Cesare P.R. Romano, *International Organizations and the International Judicial Process: An Overview*, in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 3, 22-23 (Laurence Boisson de Chazournes et al. eds., 2002).

17. U.N. Charter art. 96, para. 1.

18. HAN KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 546 (1950).

19. *Id.*

lack of an explicit restriction under Article 96(1), the ICJ should not accept cases where any organ is acting outside its jurisdiction.²⁰

The ICJ statute also provides the ICJ with discretionary power, allowing it to decline to give advisory opinions.²¹ It states that the ICJ “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 U.N. to make such a request.²² Overall, the ICJ has limited its discretionary power to instances of “compelling reasons.” Over the years, many reasons have been invoked, but none have been found sufficiently compelling.²³ Instead, the ICJ has only refused a request for an opinion once based on lack of jurisdiction.²⁴ Despite its discretionary power, the ICJ has not rejected an advisory opinion request based on objections from countries claiming that the advisory jurisdiction is being used to circumvent the ICJ not having contentious jurisdiction over the state.²⁵

Thus, since its inception in the PCIJ, the ICJ’s advisory jurisdiction has arguably increased in scope given that more entities can access it. Yet, the ICJ has only issued twenty-six advisory opinions in the last fifty years, compared to the twenty-seven of the PCIJ in less than two decades.²⁶ The key difference, however, rests not on the number of advisory opinions issued, but on which organs are using the advisory authority, and what type of opinions are being

20. This may possibly arise in cases where the General Assembly is acting to request an advisory opinion on a matter already addressed by the Security Council. Further, it could arise in areas where members not subject to the contentious jurisdiction of the Court find themselves subject to the Court’s review.

21. Statute of the International Court of Justice art. 65, June 26, 1945, 59 Stat. 1031 [hereinafter ICJ Statute].

22. *Id.*

23. Pomerance, *supra* note 10, at 298.

24. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 561, para. 24 (July 8). See also H.E. Judge Shi Jiuyong, President of the ICJ, Speech to the Sixth Committee of the General Assembly of the United Nations (Nov. 5, 2004) (transcript available at http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeech_President_Shi_Speeches_SixthCommittee_20041105.htm) (citing the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* as the only opinion where the ICJ held it lacked jurisdiction to reply to a request submitted to it) [hereinafter Speech of ICJ Judge Shi]. The ICJ rejected the request from the WHO “because the request did not relate to a question within the scope of the activities of that Organization as required by Article 96, paragraph 2, of the Charter.” *Id.*

25. See, e.g., the discussion *infra* Part II on the *Western Sahara* and the *Construction of a Wall* advisory opinions. See sources cited *infra* notes 66 and 68 for *Western Sahara* and the *Construction of a Wall*, respectively.

26. Pomerance, *supra* note 10, at 291.

requested. During the PCIJ era, the Assembly of the League, the body now represented by the General Assembly, had authority to request advisory opinions. Yet, all advisory requests were initiated by the League Council, the body now represented by the Security Council, and focused on disputes.²⁷ Now, the majority of advisory requests come from the General Assembly, and rarely focus on “interstate disputes.”²⁸ The current legal questions mirror the types of contentious cases usually brought before the ICJ when a state has given the ICJ contentious jurisdiction. This switch highlights a shift in power dynamics between the General Assembly and the Security Council, where factions within the G.A. can use their power to request opinions on issues that the S.C. has chosen not to address. Further, the ICJ facilitates this shift in power dynamics in favor of the G.A. by accepting jurisdiction over the requests when the ICJ has the power to decline them. The effects and interpretation of the ICJ’s advisory opinions will be discussed in Part II.

B. The Inter-American Court of Human Rights

The IACHR has “competence with respect to matters relating to the fulfillment of the commitments made by the States party to the Convention.”²⁹ Unlike its contentious jurisdiction, the advisory jurisdiction of the IACHR can be utilized without additional state consent, and the opinions are not binding.³⁰ Under the statute, an Organization of American States (OAS) party has an absolute right to request an advisory opinion under both paragraphs 1 and 2 of

27. Pomerance notes that the different political backdrop of the PCIJ and the ICJ may explain each court’s use of the advisory procedure. *Id.* The League of Nations operated to enforce a Peace Settlement or to maintain the status quo, so advisory jurisdiction was used as a vital tool to enforce this end. *Id.* The United Nations operated within the East-West divide, which created friction in the organization and made using the advisory function to solve legal problems more problematic. *Id.* at 294 (stating that the legitimacy of turning to the ICJ was quite regularly contested under the ICJ era, “usually on the grounds that the question was not ‘legal’—or, at least not ‘essentially’ so”).

28. *Id.* at 292. Pomerance further argues that, if disputes are implicated, they are “not strictly interstate but rather between the Organization and a single state (or group of states).” *Id.*

29. Basic Documents Pertaining to Human Rights in the Inter-American System, Inter-Am. Ct. H.R., OEA/Ser.L./V/II.82, doc. 6 rev (1948) [hereinafter Basic Documents]. The American Convention entered into force on July 18, 1978 and established the Inter-American Commission on Human Rights. Buergenthal, *supra* note 5, at 1.

30. Pasqualucci, *supra* note 2, at 249 (noting that, although the advisory opinion is not binding like a Court’s judgment in a contentious case, “it does have undeniable legal and moral effects on both national and international law”). *See also* Basic Documents, *supra* note 29, at 15 (describing the IACHR’s jurisdiction).

Article 64, even if the state is not a state party to the American Convention.³¹ Likewise, states that have not ratified the American Convention may find themselves subject to review of the IACHR.³²

In general, the right of states to access the IACHR is unique to the IACHR, as the ICJ does not allow any states to utilize the advisory mechanism. Terry Gill, editor of the *World Court and How it Works*, is critical of allowing states to access the advisory mechanism. Gill argues that the difference between “access” to contentious jurisdiction and “access” to the advisory procedures is that in the former a state could go to the court on its own responsibility, while the latter requires the concurrence of other states.³³ Thus, allowing individual states to access the advisory function of the IACHR would be to allow states to substitute the advisory jurisdiction for the contentious—“a real distortion of the true function of the Court.”³⁴ IACHR legislative history, however, demonstrates that the drafters wanted to design the advisory jurisdiction in the “broadest terms possible.”³⁵

To further broaden the IACHR’s power, the drafters also extended the advisory right to the organs listed in Chapter X of the

31. See Organization of American States, American Convention on Human Rights, art. 64, para. 1, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention] (“[T]he member states of the Organization may consult the Court regarding the interpretation of the Convention or of other treaties on the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the court.”); see also American Convention art. 64, para. 2 (“[T]he Court, at the request of any member state of the Organization, may provide that state with opinions regarding the compatibility of any of the said States domestic laws with the aforementioned international instruments.”). Importantly, the request must be made by someone in authority to speak for government, and states cannot use Article 64 to obtain an opinion on another state’s domestic law, even if the law has a possible effect on the requesting state. See Pasqualucci, *supra* note 2, at 253.

32. The IACHR’s authority over members of the OAS requires placing the relation between the IACHR and the OAS in perspective. The OAS General Assembly adopted the statute of the IACHR, and this is seen as providing the authority of the IACHR to oversee all OAS members. Burgenthal, *supra* note 5, at 2 n.9 (quoting OAS Charter art. 60) (“The Court shall draw up its Statute which it shall submit to the [OAS] General Assembly for approval.”). The OAS General Assembly approved the Court in October 1979, and the Statute entered into force on January 1, 1980. *Id.*

33. ROSENNE, *supra* note 7, at 87.

34. *Id.*

35. Pasqualucci, *supra* note 2, at 250 n.53 (citing “Other Treaties” Subject to the Consultative Jurisdiction of the Court, Advisory Opinion, Inter-Am. Ct. H.R. (ser. A) No. 1, para. 17 (Sept. 24, 1982)). Despite the broad jurisdiction, the Court cannot bring an advisory opinion on its own motion. *Id.* at 253.

OAS charter.³⁶ Organs may only seek advisory opinions “within their spheres of competence.”³⁷ In *Effect of Reservations*, the IACHR held that the petitioning organ must show a “legitimate institutional interest” in the legal question posed in the request.³⁸ Initially, each organ decides whether the request falls within its sphere of competence. Yet, the IACHR makes the final determination by reference to the OAS charter and the constitutive instrument and legal practice of the particular organ.³⁹ The majority of advisory opinions are requested by states or the Inter-American Commission.⁴⁰

The IACHR’s jurisdiction covers (1) questions regarding interpretation of the American Convention under Article 64, paragraph 1; (2) questions relating to the interpretation of “other treaties concerning the protection of human rights in the American states” under Article 64, paragraph 1; and (3) requests pertaining to whether a state’s domestic laws are compatible with the American Convention or “other treaties” under Article 64, paragraph 2. The IACHR in all instances is limited to interpretation of legal questions. Like the ICJ, the IACHR is given discretion to decide when to issue an opinion.⁴¹ The IACHR bases its opinion on “considerations that transcend merely formal aspects.”⁴²

Under the IACHR’s Rules of Procedure, all member states once informed of an advisory request can participate in public hearings and submit briefs.⁴³ Despite not being mentioned in the IACHR’s statute, the IACHR also allows amicus briefs.⁴⁴ In advisory opinions, the

36. Now under ch. VIII, art. 53 of the amended OAS Charter by the Protocol of Buenos Aires, including the General Assembly, the Meeting of Consultation of Ministries of Foreign Affairs, the Councils, the Inter-American Judicial Committee, the Inter-American Commission on Human Rights, the General Secretariat, the Specialized Conferences, and the Specialized Organizations. *Id.*

37. American Convention art. 64, para. 1.

38. Burgenthal, *supra* note 5, at 4 n.18 (citing *Effect of Reservations on the Entry into Force of the American Convention*, Advisory Opinion, 1982 Inter-Am. Ct. H. R. (ser. A) No. 2, para. 14 (Sept. 24 1982)).

39. *Id.*

40. Pasqualucci, *supra* note 2, at 255 (“Notwithstanding the advantages that would accrue to organs that request advisory opinions, the Inter-American Commission is the only organ that has availed itself of the Court’s advisory jurisdiction to date.”).

41. American Convention art. 64, para. 1.

42. Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion, 1999 Inter-Am. Ct.H.R. (ser. A) No. 16, paras. 31, 42 (Oct. 1, 1999) [hereinafter *Consular Relations*].

43. Rules of Procedure of IACHR art. 52, paras. 1-2 ((Dec. 8, 2000), *reprinted in* Basic Documents, *supra* note 29, at 136.

44. Burgenthal, *supra* note 5, at 15.

IACHR joins jurisdictional objections to merits of the request.⁴⁵ The IACHR has also held that once states request an advisory opinion, such a request cannot be withdrawn.⁴⁶ The IACHR argued that other states may have an interest in the matter before it.⁴⁷

The IACHR's broad jurisdiction has led to several challenges. States have argued that the Inter-American Commission should not be allowed to ask for advisory opinions on a state's domestic laws. In *International Responsibility for the Promulgation and Enforcement of Laws*,⁴⁸ Peru argued that, by doing so, the Commission encroached on the state's right to request an advisory opinion in regard to its domestic law.⁴⁹ Peru claimed that the Commission was seeking "to obtain indirectly what it is prevented from achieving directly."⁵⁰ The IACHR held that the Commission had standing to request the advisory opinion under Article 64 because the Commission had the function to consult with member states on how to ensure their domestic laws comply with the American Convention.⁵¹ The effects and interpretations of the IACHR opinions will be discussed in Part III.

45. See *Restrictions to the Death Penalty*, Advisory Opinion, 1983 Inter-Am. Ct. H.R. (ser. A) No. 3, paras. 21-23 (Sept. 8, 1983). Court stated it made no sense in a contentious case "to examine the merits of the case without first establishing whether the parties involved have accepted the Court's jurisdiction." Burgenthal, *supra* note 5, at 17 (citing *Restrictions to the Death Penalty*, 1983 Inter-Am. Ct. H.R. (ser. A) No. 3, para. 21). However, in advisory proceedings, the same is not true. *Id.*

46. Reports of the Inter-American Commission on Human Rights, 1997 Inter-Am. Ct. H.R. (ser. A) No. 15, para. 28 (Nov. 14, 1997) (*contra* the PCIJ, which allowed withdrawal of request).

47. *Id.* para. 28.

48. *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, Advisory Opinion, 1994 Inter-Am. Ct. H.R. (ser. A) No. 14, para. 12 (Dec. 9, 1994) [hereinafter *International Responsibility*] (citing Peru as arguing that, under Article 64(2) of the IACHR, only those states "whose domestic laws are at issue, are empowered to resort to the Court's advisory jurisdiction when there is a perceived incompatibility between one of their domestic norms and the Convention").

49. Pasqualucci, *supra* note 2, at 254 (citing Peru's discontent with the court when the Commission, in *International Responsibility*, 1994 Inter-Am. Ct. H.R. (ser. A) No. 14, para. 12, asked the court for an advisory opinion when the state broadened application of its death penalty).

50. *Id.* (quoting *International Responsibility*, 1994 Inter-Am. Ct. H.R. (ser. A) No. 14, para. 12).

51. Pasqualucci, *supra* note 2, at 254.

C. The European Court of Human Rights

Compared to the ICJ and the IACHR, the ECHR has limited advisory jurisdiction. The ECHR may only give advisory opinions on “legal questions concerning the interpretation of the European Convention and the protocols thereto.”⁵² The subject matter is limited to questions that do not relate “to the content or scope of the right or freedoms defined in [those instruments], or with any other question which the [European] Court or the Committee of Ministers might have to consider in consequence of any such proceeding as could be instituted in accordance with the Convention.”⁵³ Given this limited jurisdiction, only one advisory case has been brought before the ECHR. In that case, the ECHR declined to review the case based on lack of jurisdiction.⁵⁴

D. The African Court of Human and People’s Rights

The ACHPR is the most recent human rights court created and has broad advisory jurisdiction power. The Protocol states that the ACHPR may render advisory opinions on “any legal matter relating to the Charter or any other relevant human rights instrument, provided the subject matter of the opinion is not related to a matter

52. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 47, Nov. 4, 1950, 213 U.N.T.S. 221.

53. *Id.*

54. In May 2004, the Committee of Ministers of the Council of Europe requested the Court, under Article 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”), to give an advisory opinion on the matter raised in Recommendation 1519(2001) of the Parliamentary Assembly of the Council of Europe, concerning “the co-existence of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States and the European Convention on Human Rights,” and the implications for states which had ratified both Conventions. Press release issued by the Registrar, *First Decision on Court’s Competence to Give an Advisory Opinion*, European Court of Human Rights, June 2, 2004, <http://www.echr.coe.int/Eng/Press/2004/June/DecisiononAdvisoryopinion.htm> [hereinafter *First Decision on Court’s Competence*]; ECHR, Grand Chamber, Annual Activity Report 2002, available at <http://www.echr.coe.int/NR/rdonlyres/5CD0E552-0D28-4A95-B335-6DB669C7E078/0/2002GrandChamberactivityreport.pdf>. The Court stated that Article 47(2) sought to exclude the Court’s jurisdiction on the legal questions submitted to it where the Court may be called in the future to address in its “primary judicial function” the examination of the admissibility or merits of concrete cases. *Id.* As applied to the case before them, the Court noted it was possible that the procedure under the CIS Convention might later have to be examined in a substantive application to determine whether it was a “procedure of international investigation or settlement.” *Id.* Therefore, the court held that the request for an advisory opinion was not within the Court’s competence as defined in Article 47 of the Convention. *Id.*

being examined by the African Commission.”⁵⁵ The ACHPR’s proposed jurisdiction authorizes member states of Organization of African Unity (OAU) (now called the African Union (AU)), the AU, any AU organ, and any African organization recognized by the AU to request advisory opinions.⁵⁶ These opinions would not be binding, but the ACHPR could use them as a reference for interpretations of the African Charter of Human Rights and other Human Rights Conventions.⁵⁷ The necessary ratification for the ACHPR was reached early in 2004, but the ACHPR is still not functional.⁵⁸ Yet, the ICJ and IACHR’s use of their advisory power could demonstrate what role the ACHPR’s broad advisory jurisdiction will have on human rights.

II. THE INTERNATIONAL COURT OF JUSTICE’S ADVISORY JURISDICTION IN PRACTICE

The above descriptions indicate that international courts may be relying on a broad advisory jurisdiction to oversee human rights laws. Those opinions are meant to be “soft” and non-binding. Yet, José Alvarez, in his article *The New Dispute Settlers*, depicts this “soft law” as a half-truth because international adjudicators are hardening previous soft law norms in their soft law decisions.⁵⁹ For instance, he notes that it is unlikely that states would predict that a “merely” advisory opinion by the Inter-American Court of Human Rights could turn the “soft” declaration on the rights and Duties of Man into

55. Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights, art. 4, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (111) (June 9, 1988), available at http://www.africa-union.org/rule_prot/africancourt-humanrights.pdf.

56. *Id.*

57. Association for the Prevention of Torture, *The African Court on Human and Peoples’ Rights: Presentation, Analysis and Commentary: The Protocol to the African Charter on Human and Peoples’ Rights, establishing the Court I.B.* (Jan. 2000), <http://www.apct.ch/africa/African%20Court.pdf> (last visited Feb. 8, 2006).

58. Stephen Mbogo, *African Union Creates Continent-Wide Rights Court*, Jan. 27, 2004, <http://www.cnsnews.com/ForeignBureaus/Archive/200401/FOR20040127d.html>; Project on International Courts and Tribunals, *African Court of Human and Peoples’ Rights (ACHPR)*, <http://www.pict-pecti.org/courts/ACHPR.html> (stating that “[t]he statute of the ACHPR has not yet been promulgated and a seat for the court has yet to be determined, therefore much of the data regarding its functioning is not yet available”).

59. Alvarez, *supra* note 3, at 427 (citing Loayza Tamayo, 1997 Inter-Am. Ct. H.R. (ser. C) No. 33, para. 80 (Sept. 17, 1997) (holding that parties to the American Convention “[have] the obligation to make every effort to apply with the recommendations” of the Inter-American Commission)).

a binding obligation on all members of the OAS.⁶⁰ Arguably, this was not foreseeable to all or most OAS members when they adopted the Statute of the Court granting the IACHR the power to issue non-binding advisory opinions. Yet, this is the reality of advisory jurisprudence, as advisory opinions often interpret binding custom and treaty norms. As a result, states could limit their entanglement with the soft law human rights regimes. Further, states could also narrowly construe advisory opinions by distinguishing the issuing courts' interpretation of facts. This would effectively limit the theoretical goals of advisory jurisdiction to advance human right norms. Thus, the next two Parts of this Note look at how the ICJ and the IACHR have utilized and defined their advisory jurisdiction in practice.

A. The ICJ's Interpretation

It has been argued that many ICJ opinions, particularly those involving advisory jurisdiction, "reflect a teleological, even dynamic, interpretation of the U.N. Charter."⁶¹ These interpretations differ in scope and breadth from the PCIJ and in turn define how the ICJ perceives its role as an advisory consultant. The ICJ broadly views its advisory power, as evidenced by the fact that the ICJ does not view state consent as a bar, has never turned an opinion down for political reasons despite having the power to do so, and has accepted an advisory opinion from the General Assembly on a matter already pending before the Security Council. Each of these issues will be addressed below.

First, the ICJ held that state consent is not needed where the ICJ's reply is "only advisory" and has "no binding force" even in situations where the request relates to a legal question actually pending between two states or is actually a matter pending before a domestic court.⁶² There have been five prominent cases where the

60. Alvarez, *supra* note 3, at 426 (citing Dinah Shelton, *Commentary and Conclusions, in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 449, 451 (Dinah Shelton ed., 2000) (reference to advisory opinion)).

61. *Id.* at 431 (citing José E. Alvarez, *Constitutional Interpretations in International Organizations, in* THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 104 (Jean-Marc Coicaud & Veijo Heinsakanen eds., 2001)).

62. *Peace Treaties*, 1950 I.C.J. at 71 (holding that the Court could render an advisory opinion). See also ROSENNE, *supra* note 7, at 173-74 (stating that the Court construes it has jurisdiction over dissenting state opposition to the opinion and acting contrary to the principles

ICJ has dealt with issues of non-consent, including *Peace Treaties*,⁶³ *Namibia*,⁶⁴ *Western Sahara*,⁶⁵ *Privileges and Immunities*,⁶⁶ and the *Construction of a Wall*⁶⁷ opinion. Yet, unlike the PCIJ in the *Eastern Carelia* opinion, for the most part, the ICJ minimized the “quasi-contentious aspects” and instead emphasized that the opinion was given to the organization for its enlightenment.⁶⁸ Members of the ICJ disagreed over the implications that advisory opinions had in actual application. In his dissent in the *Peace Treaties* case, Judge Winiarski argued that the ICJ minimized the force of advisory opinions.⁶⁹ He noted that “states see their rights, their political interests, and sometimes their moral position affected by an opinion of the Court, and their disputes are in fact settled by the answer which is given to a question relating to them[.]”⁷⁰ The ICJ also refused to recognize the objections of states in advisory opinions involving application of provisions where the ICJ’s opinion would have a binding effect.⁷¹

of the PCIJ); *infra* notes 87-91 (discussing the ICJ decision to issue the *Construction of a Wall* opinion despite the ISC issuing a decision on the same matter.)

63. *Id.* (holding that the Court could render an advisory opinion despite states’ objections).

64. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16 (June 21, 1971) (addressing arguments over the competence of the Court to hear arguments regarding the continued presence of South Africa in Namibia).

65. *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16) (despite Spain’s objection, the ICJ ruled anyway and unanimously held that the land was not *terra nullis* at time of Spanish colonization). The ICJ held that there were legal ties between the territory and the Kingdom of Morocco and there were legal ties between the territory and the Mauritanian entity. Morocco refused to accept the court’s holding. This resulted in guerilla conflict plaguing the area which is still unresolved. The opinion also caused a strain in relations between Morocco and Algeria, who claimed a stake in the area. ROSENNE, *supra* note 7, at 174.

66. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 177 (Dec. 15) (stating that the immunities provision is applicable in the case of Mr. Dumitru Mazilu as a special rapporteur).

67. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131 (July 9) [hereinafter *Construction of a Wall*].

68. Pomerance, *supra* note 10, at 299.

69. *Id.* at 300 (citing *Peace Treaties*, 1950 I.C.J. at 89).

70. *Id.* (citing *Peace Treaties*, 1950 I.C.J. at 92).

71. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 177, paras. 37-39 (Dec. 15). The ICJ stated that it had recognized in its earlier jurisprudence that in “certain circumstances . . . the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court’s judicial character.” It stated that such instances would be when “the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.” (citing *Western Sahara*, 1975 I.C.J. 12). The Court held that in the present case to give a reply would have no such effect. *Id.*

Pomerance argues that, in exercising both its contentious and advisory jurisdiction, the ICJ asserts jurisdiction over what previously would have been questionable grounds.⁷²

In *Construction of a Wall*,⁷³ an important human rights opinion, the ICJ rendered an advisory opinion on the legality of the separation wall being built in Israel. Israel objected to ICJ jurisdiction because, *inter alia*, the advisory process was being invoked to circumvent the fact that Israel had not given the ICJ jurisdiction over the wider, contentious dispute between Israel and Palestine.⁷⁴ In *Western Sahara*, the ICJ had noted that it did not have to render an advisory opinion when it would have the “effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent.”⁷⁵ Further, the ICJ could have invoked the precedent of the PCIJ case the *Status of the Eastern Carelia*.⁷⁶ Yet, the ICJ in *Construction of a Wall* stated that “lack of consent to the Court’s contentious jurisdiction by interested States has no bearing on the Court’s jurisdiction to give an advisory opinion.”⁷⁷ Rather, the ICJ stated that the issue involved a broader question that was “of particularly acute concern to the United Nations[.]”⁷⁸

The ICJ’s decision to hear the case was most significant because the Israeli Supreme Court (ISC) was already hearing a case on a similar matter.⁷⁹ This raises the issue of whether the ICJ should have refrained from giving an opinion when a domestic court is addressing a similar question. On June 30, 2004 (one week before the ICJ opinion), the Israeli Supreme Court in *Beit Sourik Village* held that a forty-kilometer stretch of fence was illegal.⁸⁰ Although only

72. Pomerance, *supra* note 10, at 307.

73. *Construction of a Wall*, 2004 I.C.J. 131, para. 1.

74. *Id.* para. 46.

75. *Western Sahara*, 1975 I.C.J. at 25.

76. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 95, para. 15 (July 8) (citing Status of Eastern the Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 (July 23)) [hereinafter *Nuclear Weapons*] (stating that the Court could not reply to a question put to it because it concerned an existing dispute and “one of the state parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations”).

77. *Construction of a Wall*, 2004 I.C.J. 131, 151-52, para. 47.

78. *Id.* at 155, para. 50.

79. HCJ 2056/04 Beit Sourik Vill. Council v. Government of Israel [2004] IsrSC, draft available at [http://domino.un.org/unispal.NSF/5ba47a5c6cef541b802563e000493b8c/380fd102b1711ea48525705a00524cf6/\\$FILE/H CJ%20ruling.pdf](http://domino.un.org/unispal.NSF/5ba47a5c6cef541b802563e000493b8c/380fd102b1711ea48525705a00524cf6/$FILE/H CJ%20ruling.pdf) (last visited Mar. 26, 2004).

80. *Beit Sourik Vill.*, HCJ 2056/04, para. 62.

considering a small portion of the fence, it was argued by anti-wall advocates that, upon close scrutiny, the decision “makes a very strong case against the Wall in general though its ruling only regarded only one small 40 km stretch of the Wall.”⁸¹ The ISC reached its decision using a more domestically acceptable proportionality argument.⁸² The ICJ used less commonly accepted specific treaty/convention law in its opinion.⁸³ Thus, the ISC decision held that the wall, albeit the small forty-kilometer portion was illegal based on traditionally accepted legal norms of proportionality.⁸⁴ This is an easier argument for the Israeli people to accept, rather than a opinion from the ICJ that effectively appears to be commandeering Israel’s domestic agenda.

After the ISC decision, the ICJ released *Comments on the Israeli Supreme Court decision of June 30, 2004*.⁸⁵ The ICJ stated:

[The Israeli Supreme Court] judgment reflects that even the fight against terrorist acts must be conducted within the rule of law and not by abrogating the law. . . . [T]he broader practical value of this decision will be judged on whether the Israeli Government urgently re-evaluates the Barrier, not only in this 40 km stretch, but along its

81. John Sigler, *The Israeli High Court of Justice and the Apartheid Wall*, THE ELECTRONIC INTIFADA (Jul. 15, 2004), <http://electronicintifada.net/v2/article2916.shtml>.

82. *Id.* The ISC decision used the general legal principles of proportionality, a legal concept more Singler argues is more acceptable to Israeli’s than ICJ’s invocation of Israel’s international obligations stemming from international treaties and conventions. *Id.* In particular, the third element of the Israeli proportionality test requires determining whether the administrative authority chose the proper and most moderate means of achieving its objective. The proportion between the benefit and the damage to the citizen must be proportionate. The ISC analyzed proportionality based on the general normative structure of their legal system, which recognizes human rights and the necessity of ensuring the provision of the needs and the welfare of the local inhabitants that preserve “family honour and rights.” *Id.* (noting that all these are protected in the framework of the humanitarian provisions of the Hague Regulations and the Geneva Convention).

83. *Id.* The ISC used proportionality to conclude that seven of the eight confiscation orders under review to be illegal. *Id.* Yet, Sigler contends that the Israeli ruling is not all good, as it falsely characterizes all Palestinian resistance as “terrorism.” Sigler, *supra* note 81 (citing *Beit Sourik Vill.*, H CJ 2056/04, para. 1 (stating that “[t]he forces fighting against Israel are terrorists: they are not members of a regular army; they do not wear uniforms; they hide among the civilian Palestinian population in the territories, including inside holy sites; they are supported by part of the civilian population, and by their families and relatives”).

84. *But see Mara’abe*, H CJ 7957/04 at para. 59 (where, instead of focusing on different interpretative norms, the ISC noted the difference between the ICJ ruling and *The Beit Sourik Case* as a lack of factual information before the ICJ, which prevented the ICJ from concluding that the wall was a military necessity).

85. ICJ Comments on the Israeli Supreme Court Decision of *Beit Sourik Vill.*, <http://www.nad-plo.org/palisraeli/wall/primary/israelicourt.pdf> (last visited Mar. 30, 2006).

entire route and swiftly makes substantial changes based on the reasoning set out by the three judges.⁸⁶

The comments highlight the ICJ's satisfaction with Israel's invocation of the "rule of law." The ICJ called on the Israeli government to re-evaluate the whole barrier in light of the *Beit Sourik* holding. Yet, on July 15, 2004, the ICJ released the opinion condemning the wall. Given the *Beit Sourik* decision, it may have been more desirable for the ICJ to delay releasing its opinion to see how the Israeli government reacted to their own domestic decision. Instead, the ICJ opinion highlighted Israel's responsibility under international law.⁸⁷ It stated that Israel "has the obligation to cease forthwith" construction of the wall and dismantle the completed portions.⁸⁸ Further, the ICJ stated that all off Israel's regulatory and legislative acts authorizing construction of the wall "must forthwith be repealed or otherwise neutralized."⁸⁹ The ICJ concluded that Israel was obligated "to make reparation for the damage caused to all the natural or legal persons concerned," and that included paying damages to anyone adversely affected and returning land or olive trees taken from any person and used in constructing the wall.⁹⁰ The language used, such as "responsibility" and "cease forthwith," suggested binding obligations.⁹¹

Recently, the Israeli Supreme Court in *Mara'abe v. The Prime Minister of Israel* (2005)⁹² considered the ICJ's ruling in the *Construction of a Wall* opinion. The ISC's consideration of the ICJ opinion represents an important example how such non-binding opinions can arguably create binding obligations through the ICJ's interpretation of international treaty and custom norms. For example, although the ISC stated that the ICJ holding was not binding on Israel, the ISC noted that the opinion would still be considered because "the opinion of the [ICJ] is an interpretation of international law, performed by the highest judicial body in international law. . . . The ICJ's interpretation of international law

86. *Id.*

87. *Construction of a Wall*, 2004 I.C.J. 131, para. 147.

88. *Id.* para 151.

89. *Id.*

90. *Id.* para. 153. The ICJ majority also stated that other States have legal obligations as a result of Israel's activities. *Id.* para. 154.

91. *Id.* paras. 150-51.

92. HCJ 7957/04 [2005] IsrSc, available at http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.HTM (last visited Mar. 30, 2006).

should be given its full appropriate weight.”⁹³ The ISC noted that the ICJ’s *Construction of a Wall* opinion and the ISC’s decision in the *Beit Sourik Village* case were based on common norms. Yet, the ISC stated the two courts reached different outcomes. The ICJ said the wall was illegal per se, whereas the ISC found there was a military necessity to erect the fence and that each segment must be analyzed to determine if it disproportionately affected each resident’s right.⁹⁴

The ISC stated that the ICJ and ISC decisions on the wall differed in their conclusions because of the different factual basis upon which each court made its decision.⁹⁵ The ICJ made its factual opinions from the Secretary-General’s report, his written statement, the Dugard report, and the Zeigler report. The ISC made its factual opinions from information from Palestinian petitioners, from the state, and from military experts who requested the opportunity to present their position as *amici curiae*.⁹⁶ The ISC noted that the ISC was presented with substantial information regarding the military necessity to build the fence; yet, the military necessity was mentioned only minimally in the sources upon which the ICJ based its opinion.⁹⁷ According to the ISC, Israel presented such information to the ICJ, but this information did not make its way into the ICJ’s opinion.⁹⁸

The ISC also noted that the dissenting judges in the ICJ *Construction of a Wall* opinion noted the paucity of factual information.⁹⁹ Further, the ISC noted that the factual information in regards to the infringement upon local residents’ rights was “far from precise” and included figures that Israel believes are “exaggerated,” “not precise,” and “completely baseless.”¹⁰⁰ The ISC concluded that, although it shall give full weight to the norms of international law developed by the ICJ in its Advisory Opinion, the ICJ’s conclusion—based on a factual basis different than the one before them—was not

93. *Id.* para. 56.

94. *Id.* para. 59.

95. *Id.* para. 61.

96. *Id.*

97. *Id.* para. 63 (noting that the SG report contained only one line to the security-military need; the SG written statement did not mention it at all; the Dugard report and Zeigler report have no data on the issue).

98. HCJ 7957/04 [2005] IsrSc, para 63, available at http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.HTM (last visited Mar. 30, 2006).

99. *Id.* para. 64 (citing *Construction of the Wall*, 2004 I.C.J. 131, Judge Burgenthal’s dissent) (“I am compelled to vote against the Court’s finding on the merits because the Court did not have before it the requisite factual basis for its sweeping findings.”).

100. *Id.* para. 67.

res judicata. As such, the ISC said it would continue to examine each segment of the fence in relation to the norms of international law and will not hold the whole fence as violating international law as per the ICJ opinion.¹⁰¹

The ISC's discussion in *Mara'abe* highlights both how such opinions can be considered binding through the ICJ's interpretation of international law; and how a domestic court can easily dismiss or distinguish the advisory holding, thus ultimately allowing its own domestic law to control. The ISC's criticism of the ICJ's opinion reflects an inherent view that the ICJ's opinion was political based on facts supplied by those requesting the opinion.¹⁰² Further, Israel contends that the facts they provided to the ICJ did not make it into the opinion. Advisory opinions are different from contentious cases in regards to what information the court considers and what mechanisms a party has to represent itself. Thus, using the ICJ advisory power to rule on what in reality is a contentious case prevents the party, in this case Israel, from having the opportunity to fully represent itself. This can ultimately lead to opinions that appear factually biased.

The second way the ICJ broadly interprets its advisory power is that, as noted above, it has never turned down a request for political reasons even though it is authorized to do so under Article 65.¹⁰³ For instance, after declining the *Nuclear Weapons* request by the World Health Organization (WHO), it granted the same request by the G.A.¹⁰⁴ The ICJ accepted the opinion even though it was an abstract question and that in answering the question the ICJ could arguably be assuming a legislative role. Despite the fact that it was the first advisory opinion by the ICJ to deal with a question not relating to matters currently before the requesting body, the ICJ deferred to the G.A.'s judgment. . The ICJ held that "the question put to the court has relevance to many aspects of the activities and concerns of the

101. *Id.* para. 74.

102. *But see* Sigler, *supra* note 81 (stating that Israel falsely concludes that all Palestinian resistance is terrorism).

103. *See Construction of a Wall*, 2004 I.C.J. 131, para. 44. In this opinion, the ICJ noted that it had not rejected the WHO opinion request because it asserted a political question. *Id.* para. 44; *see also* Speech of ICJ Judge Shi, *supra* note 24 ("Furthermore, the Court has, to this day, never found that political arguments surrounding a legal question put to it, constituted a compelling reason for it to decline to exercise its advisory jurisdiction.").

104. *Nuclear Weapons*, 1996 I.C.J. 95, para. 19.

G.A. including those relating to the threat or use of force in international relations.”¹⁰⁵

The ICJ also refused to apply discretion in the *Construction of a Wall* opinion.¹⁰⁶ The ICJ concluded that the lack of consent from Israel and the fact that the opinion could adversely affect the negotiation process currently taking place in the Middle East at the hands of the Security Council did not constitute “compelling reasons” to use its discretion.¹⁰⁷ The ICJ again downplayed the possible effects the opinion could have on the already volatile situation. The ICJ noted that, although states may have an interest in the outcome of the advisory opinion, that alone would not deprive the ICJ from exercising its discretion.¹⁰⁸ The ICJ asserted that it gives its opinion to the United Nations as a whole, rather than to individual states. The ICJ also affirmed its own power, noting that the advisory function allowed the ICJ to reflect its appropriate “participation in the activities of the Organization, and, in principle, should not be refused.”¹⁰⁹

Third, it is evident that the ICJ broadly interprets its advisory power because it accepted an advisory opinion request by the G.A. on a matter already addressed by the S.C. In doing so, the ICJ has engaged in a quasi-judicial review of the S.C.¹¹⁰ The language of Article 96(1) states that the Security Council or the General Assembly “may request the [ICJ] to give an advisory opinion on any legal question.”¹¹¹ The ICJ has stated that, despite the language of Article 96(1), it may require “certain indications as to the relationship between the question the subject of a request for an advisory opinion and the activity of the General Assembly.”¹¹² Under this

105. *Id.* para 12.

106. *Construction of a Wall*, 2004 I.C.J. 131, para. 163(3). *See also id.* (Buergenthal, J. dissenting) (noting that there are “serious questions,” and that—although he agreed with many parts of the advisory opinion—he was “compelled to vote against the Court’s findings on the merits because [it] did not have before it the requisite factual bases for its sweeping findings; it therefore should have declined to hear the case”).

107. *Id.* paras. 27, 47, 65.

108. *Id.* para. 47.

109. *Id.* paras. 44, 47 (citing previous ICJ decisions reflecting this discretionary power).

110. *See, e.g.*, Alvarez, *supra* note 3, at 431 (citing José E. Alvarez, *Judging the Security Council*, 90 AM. J. INT’L L. 1, 8 (1996)).

111. U.N. Charter art. 96, para. 1.

112. *Construction of a Wall*, 2004 I.C.J. 131, para. 16 (citing *Peace Treaties*, 1950 I.C.J. 65, 70 and *Nuclear Weapons*, 1996 I.C.J. 95, paras. 11-12). This view is consistent with that of Kelsen that the words “within the scope of their activities” of Article 96(2) are redundant because the

interpretation, the ICJ would be justifiable in rejecting an advisory request by the General Assembly when that action conflicts with one taken by the Security Council. This would be consistent with the ICJ construing Article 96(1) with the other concepts and provisions of the U.N. Charter, mainly Article 12. Yet, in practice, the ICJ has chosen instead to broaden the power of the General Assembly in relation to that of the Security Council.

The *Construction of a Wall* opinion addresses this issue. In the opinion, Israel argued that the General Assembly's advisory opinion request was *ultra vires* because Article 12 of the U.N. Charter forbade the G.A. from making recommendations if the situation was on the Council's agenda.¹¹³ Israel "claimed that in adopting resolution 1515 (2003), which endorsed the 'Roadmap,' before the adoption by the [G.A.] of [G.A. Res. ES-10/14], the [S.C.] continued to exercise its responsibility for the maintenance of international peace and security" over the Israeli/Palestinian conflict.¹¹⁴ Given this, the G.A. was not entitled to ask for the advisory opinion.¹¹⁵ The ICJ rejected Israel's analysis. The ICJ noted that traditionally the Security Council and the General Assembly had applied and interpreted Article 12 such that "the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda."¹¹⁶ Yet, the ICJ noted that this practice had subsequently evolved, and now the different bodies could simultaneously address different facts of the same matter. The ICJ noted that, while the S.C. may concentrate on the aspects related to international peace and security, the G.A. focuses on broader issues, considering the humanitarian, social and economic aspects.¹¹⁷

Court cannot exercise jurisdiction over any entity that is not operating within the scope of their activity. See KELSEN, *supra* note 18, at 546.

113. *Construction of a Wall*, 2004 I.C.J. 131, para. 25 (citing U.N. Charter art. 12, para. 1) (stating that, "[w]hile the Security Council is exercising in respect to any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests"). The Court noted that the "request for the advisory opinion is not itself a 'recommendation' by the General Assembly 'with regard to [a] dispute or situation.'" *Id.* However, the ICJ stated that the G.A. adoption of resolution ES-10/14 was the *ultra vires* act. *Id.*

114. *Id.* para. 29.

115. *Id.* paras. 29-32.

116. *Id.* para. 27.

117. *Construction of a Wall*, 2004 I.C.J. 131, para. 27.

Yet, the bulk of the ICJ's justification for expanding Article 12 focused on the G.A.'s own broad interpretation of Article 12. For example, the opinion cited "a response to a question posed by Peru during the Twenty-third session of the [G.A.], [where] the Legal Counsel of the [U.N.] confirmed that the Assembly interpreted the words 'is exercising the functions' in [Article 12] as meaning 'is exercising the function at this moment.'"¹¹⁸ The ICJ also noted that the G.A. "deemed itself entitled in 1961 to adopt recommendations in the matter of the Congo . . . while [this case] still appeared on the Council's agenda."¹¹⁹ Yet, the ICJ did not perform its own interpretative analysis of Article 12. Rather, the ICJ allowed the G.A. to request an advisory opinion on a matter before the Security Council because the G.A. had determined that it had the authority to do so.¹²⁰

Israel also contended that advisory opinion request was *ultra vires* because "it did not fulfill the essential [procedural] conditions set by the [G.A. Res. 377 A(V) United for Peace resolution], under which the Tenth Emergency Special Session was convened."¹²¹ Israel argued that 377 A(V) required the emergency special session to only be convened within twenty-four hours of the Secretary-General receiving a request for the session from the Security Council. Israel stated that because the specific issue had "never been brought before the [Security] Council, the General Assembly could not rely on any inaction by the Council to make such a request."¹²² Yet, the ICJ held that the Tenth Emergency Special Session was properly reconvened, and thus the G.A. could adopt "any resolution falling within the subject-matter for which the Session had been convened . . . including

118. *Id.*

119. *Id.*

120. The Court further limited the power of the Security Council by determining that Article 24 of the Charter, describing the Security Council as having "primary responsibility for the maintenance of international peace and security," referred only to primary, not exclusive jurisdiction. *Id.* para. 26.

121. *Id.* para. 29. See also U.N. GAOR, 5th Sess., 302d plen. mtg. at 10, U.N. Doc. A/1481 (1950) [hereinafter U.N. Doc. A/1481] ("If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to make appropriate recommendations to Members for collective measures."). It has been used ten times since its inception. See *A U.N. Alternative to War: "Uniting for Peace"*, Feb. 10, 2003, <http://www.warpeace.org/article.php?story=20040120133120352>.

122. *Construction of a Wall*, 2004 I.C.J. 131, para. 29.

a resolution seeking the Court's opinion."¹²³ The ICJ argued that at the time of the Tenth Emergency Special Session the S.C. had been unable to make a decision on the Occupied Palestinian Territory because of the negative votes of the permanent member, and that *there did exist a threat to international peace and security*.¹²⁴ This determination by the ICJ eroded the power of the Security Council to determine when such threats exist.¹²⁵

The ICJ further stated that there had been no procedural irregularities because the Emergency Special Session "appear[ed] to have been convened in accordance with Rule 9(b) of the Rules of Procedure of the General Assembly, and the relevant meetings had been convened in pursuance of the applicable rules."¹²⁶ The ICJ, as with the interpretation of Article 12, deferred to the General Assembly because they complied with the 377 process, but the ICJ ignored that that process in itself may be *ultra vires*. In 377, the General Assembly gave itself the power to override the Security Council in instances where a lack of unanimity causes the Security Council not to fulfill its obligations for maintaining peace and security.¹²⁷ The ICJ did not address whether the General Assembly was authorized to give itself this power.

Overall, the ICJ's advisory power indicates the role that the ICJ has in shaping the dynamics between the different organs of the United Nations. The ICJ has not only broadened its advisory jurisdiction but, as evidenced by its accepting the *Construction of a Wall* opinion, the ICJ has changed the interpretation of U.N. Charter provisions to increase its advisory power. The human rights considerations of *Construction of a Wall* may have factored into that

123. *Id.* paras. 31-32.

124. *Id.* para. 31.

125. See U.N. Charter art. 24, para. 1 (describing the Security Council as having "primary responsibility for the maintenance of international peace and security").

126. *Construction of the Wall*, 2004 I.C.J. 131, para. 35. The Court pointed to its *Namibia* opinion where it stated that a "resolution of a properly constituted organ of the United Nations which is passed in accordance with that organ's rules of procedure, and is declared by its President to have been so passed, must be presumed to have been validly adopted." *Id.* (citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16 (June 21, 1971)). The Court also concluded that no reason for rebutting this presumption was presented in this case. *Id.* para. 35. However, the *Namibia* opinion dealt with the procedural requirements of the Security Council to request an advisory opinion; thus, indicating that the Court affords the same latitude to the General Assembly as it does the Security Council.

127. See U.N. Doc. A/1481377(V), *supra* note 121.

opinion, as the ICJ attempted to stretch the Charter's written procedural limitations to fit the United Nations' overall mandate. This indicates that the ICJ may be a useful in providing a pathway to address those political issues that the Security Council does not address because of its inherent politicization. Yet, without state support from the country' affected by the opinions, the ICJ efforts may ultimately fail given its lack of enforcement power. For example, at the end of the *Construction of a Wall* opinion, the ICJ recognized that the General Assembly and the Security Council should consider further action needed to terminate the illegal situation resulting from the wall's construction.¹²⁸ On July 20, 2004, the General Assembly "overwhelmingly adopted" a resolution by a 150-6 vote with 10 abstentions "demanding that Israel comply with the ICJ 'advisory opinion'" on the "Apartheid" Wall.¹²⁹

The General Assembly Resolution indicates that the G.A. finds the advisory opinion to be authoritatively binding upon Israel. The ICJ is thus implicitly empowering the General Assembly to overrule the Security Council on issues of human rights. Yet, the Security Council is the only organ that can declare military action under the U.N. Charter,¹³⁰ and it has taken no action against Israel.¹³¹ This in turn may render the overall objectives of the ICJ moot. Without Security Council enforcement, the ICJ will have to rely on individual states to willingly adhere to its advisory opinions. This is less likely to occur in situations where the ICJ accepts an opinion in blatant disregard of a state's valid objections. For instance, Israel has not responded favorably to the *Construction of a Wall* opinion. It has "acknowledged that it had international legal obligations; however, it asserted that the request for the advisory opinion *improperly*

128. *Construction of a Wall*, 2004 I.C.J. 131, para. 162.

129. *UN General Assembly Resolution "Acknowledging" the Advisory Opinion of the ICJ on Israel's Apartheid Wall on 9 July 2004*, PALESTINE MEDIA CENTER, Mar. 21, 2006, <http://www.palestine-pmc.com/details.asp?cat=11&id=84>.

130. U.N. Charter ch. VII. See also Warren Hoge, *Remove Wall, Israel Is Told by the U.N.*, NY TIMES, July 21, 2004, at A10 ("Resolutions from the 191-member General Assembly are nonbinding and largely symbolic, unlike those passed by the 15-member Security Council. Israel said in advance that the vote would not alter its resolve to continue building the barrier.").

131. See *U.N. Experts Mark Anniversary of ICJ 'Wall Opinion', Call on Israel Halt Construction of Wall*, U.S. FED. NEWS, Aug. 4, 2005, available at 2005 WLNR 12403177 (stating that, since the G.A. resolution, neither the G.A. nor the S.C. has taken any measure to seek compliance with the ICJ opinion).

politicized the Court and its functions [emphasis added].”¹³² Israel has also noted that the conflict in the Middle East would also not be resolved unless the Palestinians owned up to their responsibilities, “including abandoning terror as one of its strategies.”¹³³ It is, in fact, evident from the ISC’s decision in *Mara’abe* that Israel believes the ICJ incorrectly categorized the security threat that Israel faces from the Palestinian terrorists.¹³⁴ In regards to the *Construction of a Wall* opinion, the Israeli ambassador stated that “we have indeed reached the point where the inmates are running the asylum.”¹³⁵ Without independent enforcement power, the ICJ’s actual effectiveness will be blocked as long as states find the advisory process illegitimate.

B. The Practical Effect of the Court’s Advisory Opinions

The effects of the ICJ’s opinions on political issues have been small.¹³⁶ For example, in the *Reparations* case, the Secretary General successfully recovered the United Nations’ reparation claim from Israel but failed to recover from any other states involved.¹³⁷ The second phase of the *Peace Treaties* opinion had no practical effect on Bulgaria, Hungary, and Romania because at no point in time did it recognize the Assembly’s or the ICJ’s right to consider the question,

132. Fr. Robert J. Araujo, *Implementation of the ICJ Advisory Opinion—Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Fences [Do Not] Make Good Neighbors?*, 22 B.U. INT’L L.J. 349, 389 (2004).

133. *Id.* at 389.

134. See *Mara’abe*, HCJ 7957/04, paras. 59-61 (stating that the ICJ “was not persuaded that the route of the wall . . . is necessary for achieving” Israel’s security objectives because of how the proceedings were conducted and the inconclusive factual information the court relied on). The ISC further stated that the information Israel presented to the court on terrorism and its repercussions did not “find their way to the opinion itself.” *Id.* para. 63.

135. Araujo, *supra* note 132, at 391 (citing Press Release, General Assembly, General Assembly Emergency Session Postpones Action on Draft Resolution Concerning Israel’s Separation Barrier, U.N. Doc. GA/10247 (July 19, 2004)). The Ambassador noted that the “Palestinian Authority was in no position to preach to anyone about law and order.” *Id.*

136. PRATAP, *supra* note 5, at 249. See ROSENNE, *supra* note 7, at 24 (stating that “[s]everal of the Court’s judgments and advisory opinions . . . have in the end not been successful in terms of laying the basis for the resolution of the political difficulties in connection with which they were requested”). *But see* Speech of ICJ Judge Shi, *supra* note 24 (discussing the Court’s success in clarifying legal parameters, determining the current status of particular principles and rules of international law, and settling points of law of international organizations). See also *id.* (discussing the importance of international organizations accessing advisory jurisdiction because those entities have no recourse to the court’s contentious jurisdiction).

137. PRATAP, *supra* note 5, at 250-51. The Court interpreted its advisory jurisdiction broadly in the *Reparation Advisory Opinion*. See *id.* It stated that the United Nations possessed the “international personality” to advance “international claims against states,” whether or not members of the organization. *Id.*

thus refusing to appoint their representatives in compliance with the opinion.¹³⁸ The *South West Africa* opinion may have clarified the complicated legal issue, but it had “no effect in solving the problem.”¹³⁹ Israel has not ceased construction of its wall in light of the ICJ advisory opinion against it.¹⁴⁰

Yet, in contrast, the majority of advisory opinions by the Permanent Court of International Justice were effective.¹⁴¹ Several of the opinions helped further the work of the League Council and some led to the settling of the disputes that gave rise to the request.¹⁴² Further, its “renowned dicta” had significant impact on international law, including “the interpretation and application of the Paris Peace Treaties, tensions regarding German minorities, the status of Danzig and ILO requests concerning conditions for working women.”¹⁴³ During the PCIJ, it was also noted that the advisory proceedings were sometimes used as a compromise instead of taking a contentious route.¹⁴⁴

The perceived effectiveness of the PCIJ and the ineffectiveness of the ICJ can be explained by the voting process for obtaining an advisory opinion in each court. Under the League of Nations, votes on substantive issues required unanimity or virtual unanimity, while procedural matters required only a simple majority.¹⁴⁵ The PCIJ never clearly categorized an advisory opinion request as substantive or procedural, yet the PCIJ was cautious not to allow advisory opinions when one party expressed opposition.¹⁴⁶ For example, the

138. *Id.* at 251.

139. *Id.* at 252. Yet, it may have played a role in containing the situation. *Id.*

140. See *infra* Part II.A for an analysis of *Mara'abe*, discussing the Israeli continuation of building the wall.

141. PRATAP, *supra* note 5, at 248.

142. *Id.* at 249 (citing the decision in the *Nationality Decrees*, the *Jaworzina*, and the *Railway Traffic between Lithuania and Poland* cases as leading to settlement of disputes between the states concerned). *But see id.* (pointing out that the decision on the *Mosul* case had no effect, as Turkey refused to accept the opinion which was given without its consent). Pratap further notes that even in cases such as the *Austro-German Customs Unions* case, although the parties dropped the proposal for the Customs Union two days before its delivery by the Court, the process of the Council requesting and the Court giving the opinion gave the politicians time to reach a solution even without aid of the opinion. *Id.*

143. Speech of ICJ Judge Shi, *supra* note 24.

144. *Id.* (citing Jurisdiction of the European Commission of the Danube between Galatz and Braila, 1927 P.C.I.J. (ser. B) No. 14 (Dec. 8) (during which a settlement was reached after Romania rejected adjudication via the contentious procedure)).

145. ROSENNE, *supra* note 7, at 88.

146. *Id.* at 88 n.26 (citing Frontier between Turkey and Iraq Case, 1925 P.C.I.J. (ser. B) No. 12 (Nov. 21)).

PCIJ declined to give an advisory opinion when one state opposed the opinion because “it was then not a member of the League and the request involved its interests.”¹⁴⁷ In comparison, U.N. organs and its agencies’ organs request advisory opinions only after having the required majority vote.¹⁴⁸ Further, in the G.A., the United Nations replaced the unanimity rule on substantive issues with a rule requiring a 2/3 majority of those present and voting on “important questions.”¹⁴⁹ Other issues require a simple majority of members who are present and voting.¹⁵⁰ It is not clear whether advisory opinion requests are classified as “important questions,” but it appears that they are not, and, therefore, they only require a simple majority of present and voting members.¹⁵¹ ECOSOC requires a majority of the members present and voting to make a decision.¹⁵² The Security Council requires “a majority of nine out of fifteen, including all five of the permanent members.”¹⁵³ Specialized agencies also require majority vote.¹⁵⁴ Overall, without the unanimity rule, a decision on an advisory request can be made against the strong opposition of a number of States, even if those states’ interests are concerned.¹⁵⁵ This illustrates the factual bias that Israel noted in the *Construction of a Wall* opinion.

C. Other Ways the ICJ’s Advisory Jurisdiction Is Broadened

The ICJ’s use of its advisory power has other effects. First, not all members of the United Nations give compulsory jurisdiction to the

147. *Id.* at 88 n.27 (citing *Status of the Eastern Carelia*). *Cf.* Pomerance, *supra* note 10, at 307 (stating that the “prospects that the [ICJ] will refuse to give an opinion because of the absence of state consent are remote”). An illustration of this can be found in the cases discussed *supra*, such as *Construction of a Wall*, 2004 I.C.J. 131, para. 1.

148. Romano, *supra* note 16, at 23.

149. U.N. Charter art. 18, para. 2.

150. *Id.* para. 3; Romano, *supra* note 16, at 23.

151. Romano, *supra* note 16, at 23 (citing G.A. Res. 49/75(k), A/Res/49/75(k), (Dec. 15, 1994)) (referring to the legality of the threat or use of nuclear weapons adopted by the General Assembly by a vote of 78-43-38).

152. *Id.*

153. *Id.*

154. *Id.*

155. ROSENNE, *supra* note 7, at 88. *See, e.g., id.* at 177 (citing WHO Regional Headquarters opinion (1980), with a vote of 53 to 43, and 20 abstentions, as “the highest number and the highest percentage of negative votes on any resolution requesting an advisory opinion in any body to date”).

ICJ.¹⁵⁶ This raises issues of the ICJ using advisory jurisdiction to get around compulsory jurisdiction. It also allows states who do not give the ICJ compulsory jurisdiction to use advisory jurisdiction to make political points without making themselves liable before the court.¹⁵⁷ Second, the ICJ's jurisdiction is broadened when entities without the power to request advisory opinions encourage organs that have advisory jurisdiction to request an opinion. For instance, in *Legal Status of United Nations Rapporteur*, the advisory opinion request came in a roundabout manner, as the Sub-Commission on the Prevention of Discrimination and Protection of Minorities had to get ECOSOC to request the opinion.¹⁵⁸ This raised questions as to whether the circle for international organs allowed to request opinions should be widened.¹⁵⁹ Yet, the ICJ's opinion in the *WHO Nuclear Weapons* opinion highlighted that the ICJ will limit organs granted advisory jurisdiction under 96(2).¹⁶⁰

Third, the advisory jurisdiction of the ICJ has been increased in the form of "binding" advisory opinions. There are two types of binding opinions. First, although advisory opinions should not be binding, they could be binding if a competent international organ adopted the advisory opinion.¹⁶¹ If the international organ adopted the advisory opinion, there would be no way to distinguish it from any other resolution of that organ.¹⁶² Second, in *Binding Advisory*

156. See United Nations, International Court of Justice Documents, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicUNmembers.html> (last visited Apr. 2, 2006) (indicating the number of countries that give compulsory jurisdiction to the ICJ as 65 out of 191).

157. For example, as of 2006, 65/191 of the countries in the G.A. grant the ICJ compulsory jurisdiction. *Id.* Yet, 111 states have voted to request the Construction of the Wall opinion. United Nations, General Assembly, Emergency Special Sessions, at 21, <http://www.un.org/ga/documents/liemps.htm> (follow "10th session" hyperlink; then follow "A/ES-10/PV.23" hyperlink) (noting that the vote was 111 to 7, with 55 abstentions). It is also important to note that, out of the Uniting Resolution's twenty-eight sponsors, only five (Djibouti, Egypt, Senegal, Somalia, Sudan) have issued declarations in recognition of the ICJ's compulsory jurisdiction. See *United Nations, International Court of Justice Documents*, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicUNmembers.html> (last visited Apr. 2, 2006).

158. ROSENNE, *supra* note 7, at 191.

159. *Id.*

160. *Id.* at 209 (noting that the Court held that, for the purposes of Article 96(2), the WHO's activities in regards to use of nuclear weapons would be the same whether they were legal or illegal).

161. *Id.* at 236.

162. *Id.* See discussion *supra* Part II.A (noting this was demonstrated above with the General Assembly Resolution ordering Israel to comply with the ICJ advisory opinion on the Construction of the Wall).

Opinions of the International Court of Justice, former ICJ judge Roberto Ago highlighted the possible use of “special advisory procedures” leading to “compulsive opinions.”¹⁶³ He noted that there are:

[C]ertain provisions, designed for the purpose, that are contained in instruments other than the Charter and the Statute and were adopted separately by the United Nations itself or other institutions within the UN system, resort to the procedure may pursue a more ambitious aim, namely to settle a dispute to which one of those institutions is a party.¹⁶⁴

In the Administrative Tribunal of the International Law Organization upon Complaints Made against U.N. Economic and Social Council Organization,¹⁶⁵ the ICJ first considered whether it should comply with an advisory request given under a provision that would make the opinion binding. This arguably went beyond the scope attributed by the U.N. Charter and by the Statute of the Court to an Advisory Opinion. Yet, the ICJ stated that the “[t]he existence . . . of a dispute the parties to which may be affected as a consequence of the ICJ’s opinion, does not change the advisory nature of the ICJ’s task, which is to answer the questions put to it.”¹⁶⁶ The ICJ thus chose to ignore the larger implications of the “binding” advisory opinion.¹⁶⁷

163. Robert Ago, *Binding Advisory Opinions of the International Court of Justice*, 85 AM. J. INT’L L. 439, 440 (1991).

164. *Id.* at 439.

165. In *Judgments of the Administrative Tribunal of the ILO upon Complaints made against UNESCO*, Advisory Opinion, 1956 I.C.J. 77 (Oct. 23).

166. *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, 1973 I.C.J. 171, para. 14 (July 12).

167. Ago, *supra* note 1633, at 440. Scholars do not agree on whether “binding” advisory opinions would have a *res judicata* binding effect as foreseen in Article 59 of the ICJ. *Id.* Rosenne “regarded with caution the notion that such an opinion can be placed on exactly the same footing as a decision rendered in a contentious proceeding.” *Id.* (citing S. ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE* 683 (2d rev. ed. 1985)). Yet, Paolo Benvenuti supports the view that “the two procedures and their results are by and large equivalent.” Ago, *supra* note 1633, at 440 (citing P. BENVENUTI, *L’ACCERTAMENTO DEL DIRITTO MEDIANTE I PARERI CONSULTIVI DELLA CORTE INTERNAZIONALE DI GIUSTIZIA* (1985)). It was also an important oversight of the ICJ because the case represented an “indirect means” to overcome the inability of the UNESCO, an international organization, to institute contentious procedure of the ICJ to settle a dispute where it was a party. *Id.*

III. THE IACHR'S ADVISORY JURISDICTION IN PRACTICE

A. The IACHR's Interpretation

The IACHR has interpreted its power to oversee and intervene in the domestic realm of states broadly.¹⁶⁸ Advisory opinion requests may encompass the interpretation of the American Convention and other human rights treaties applicable in the territory of the member states of the OAS.¹⁶⁹ In *Other Treaties*, Peru asked the IACHR to interpret the phrase “or of other treaties concerning the protection of human rights in the American States.”¹⁷⁰ The IACHR held that “other treaties” meant:

[A]ny provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto.¹⁷¹

The IACHR further held that a treaty deals with the protection of human rights when it “has bearing upon, affects or is of interest” in the area of human rights.¹⁷² The IACHR thus held that it has the “jurisdiction to interpret, in addition to the American Convention, ‘other treaties concerning the protection of human rights in the American States.’”¹⁷³ The IACHR has also interpreted its procedural rules liberally by allowing the use of amicus briefs.¹⁷⁴ This has allowed human rights organizations to play an active role in the proceedings.¹⁷⁵ The IACHR did note that it maintained discretionary power to decline a request for an advisory opinion due to the special circumstances of the case or because:

168. Pasqualucci, *supra* note 2, at 242.

169. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Compare with discussion of ECHR limiting advisory proceedings to procedural issues *supra* Part I.

170. See “Other Treaties” Subject to the Consultative Jurisdiction of the Court, Advisory Opinion, 1982 Inter-Am. Ct. H.R. (ser. A) No. 1, para. 8 [hereinafter *Other Treaties*].

171. *Id.* para. 52.

172. *Consular Relations*, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, para. 72.

173. *Id.* para. 69; see also *id.* para. 76 (stating that “a treaty can concern the protection of human rights, regardless of what the principal purpose of that treaty might be”) (emphasis in original); Pasqualucci, *supra* note 2, at 267 (stating that “this interpretation grants the court an extremely broad jurisdiction to interpret human rights provisions”).

174. Pasqualucci, *supra* note 2, at 280.

175. *Id.*

[T]he issues raised deal[t] mainly with international obligations assumed by a non-American State or with the structure or operation of international organs or bodies outside the inter-American system, or because granting the request might have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being.¹⁷⁶

Further, the IACHR said it would not give an advisory opinion when the issue raised by a request is a jurisdictional question that would “be used for purely academic speculation, without a foreseeable application to concrete situations justifying the need for an advisory opinion.”¹⁷⁷

Unlike the ICJ, the IACHR refused to exercise jurisdiction for political reasons.¹⁷⁸ In *Compatibility of Draft Legislation*, Costa Rica asked the IACHR whether its draft legislation establishing a court of criminal appeals and providing for the right to appeal complied with the requirements of Article 8(2)(h) of the Inter-American Convention of Human Rights.¹⁷⁹ Yet, claimants had cases pending before the Human Rights Commission involving the same provision. The IACHR said it had jurisdiction but refused to exercise such jurisdiction because the question presented “could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings.”¹⁸⁰ The IACHR’s judicial restraint in that matter may be explained because, unlike the ICJ, the IACHR allows states to ask for advisory opinions. In this regard, the IACHR must be more diligent in monitoring for possible substitution of the advisory process for the contentious. The IACHR has issued two main questionable interpretations of its advisory power.

176. Burgenthal, *supra* note 5, at 6 (citing Other Treaties, 1982 Inter-Am. Ct. H.R. (ser. A) No. 1, paras. 22-25).

177. Judicial Guarantees in States of Emergency, 1987 Inter-Am. Ct. H.R. (ser. A) No. 9, paras. 16, 17 (Oct. 8, 1987).

178. See Pasqualucci, *supra* note 2, at 274 [hereinafter *Compatibility of Draft Legislation*] (citing *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights*, 1991 Inter-Am. Ct. H.R. (ser. A) No. 12, para. 28 (Dec. 6, 1991)).

179. *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights*, Advisory Opinion, 1991 Inter-Am. Ct. H.R. (ser. A) No. 12, para. 2.

180. Pasqualucci, *supra* note 2, at 275 (citing *Compatibility of Draft Legislation*, 1991 Inter-Am. Ct. H.R. (ser. A) No. 12, para. 28).

1. *The Court's Interpretation of the Treaty Provision of 64(1)*. Two recent opinions of the IACHR indicate the breadth the IACHR attaches to its advisory process under the Treaty provision. First, the IACHR ruled on the advisory opinion from the Commission on the *Vienna Convention on Consular Relations (VCCR) Treaty* (1999)¹⁸¹ despite the fact that the matter was before the ICJ. Some states believe that, if cases overlap between the IACHR and the ICJ, the IACHR should not act because there is a risk of inconsistency between the findings of the tribunals.¹⁸² Yet, the IACHR in the *Consular Relations* case proceeded anyway.¹⁸³ The IACHR held that it is “not unusual to find that on certain occasions courts reach conflicting or at the very least different conclusions in interpreting the same rule of law.”¹⁸⁴ The IACHR held that “it could not be restrained from exercising its advisory jurisdiction because of contentious cases filed with the ICJ” because it is an “autonomous judicial institution.”¹⁸⁵ The IACHR also noted that Paraguay had pulled its case regarding the VCCR from the ICJ. Further, Germany had filed the *La Grande* case regarding the interpretation of the VCCR in March 1999, more than a year after Mexico submitted its

181. *See* Right to Information on Consular Assistance, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, para. 1 [hereinafter *Consular Relations*].

182. Pasqualucci, *supra* note 2, at 278-79. *See also* ROSENNE, *supra* note 7, at 240 (“[A] regional court or tribunal of limited jurisdiction, both *ratione personae* and *ratione materiae*, should show the greatest restraint before embarking upon the hazardous and delicate task of interpreting the application of a universal instrument adopted under the auspice of the United Nations, and which itself provides for the jurisdiction of the International Court of Justice. The fact that the advisory opinion was requested by an interested state in the context of a pending contentious case on the same issue in the International Court of Justice is an added reason for caution.”).

183. *Consular Relations*, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, para. 61. It is also important to note that the United States did not argue that the IACHR had trespassed its jurisdiction by giving an opinion on a question before the ICJ when it interpreted Article 36 of the VCCR. Monica Feria Tinta, *Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the LaGrand Case*, 12 EUR. J. INT'L L. No. 2 (quoting T. Buergenthal, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 220 (2nd ed. 1995) (1988)), available at <http://www.ejil.org/journal/Vol12/No2/sr2.rtf> (last visited Feb 10, 2006). The United States is not a member of the American Convention and probably did not represent itself to demonstrate that it thought the IACHR proceedings were without legal merit. *See id.* Yet, Monica Tinta notes that, by not challenging the court's jurisdiction, the United States left unchallenged the real “legal value” of the opinion. *Id.* She argues that “one should thus bear in mind that the fact that the IACHR has made a pronouncement in an advisory opinion rather than a contentious case ‘does not diminish the legitimacy or authoritative character of the legal principle enunciated.’” *Id.*

184. *Consular Relations*, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, para. 61 (citing *Other Treaties*, 1982 Inter-Am. Ct. H.R. (ser. A) No. 1, para. 50).

185. *Id.* para. 61.

request for the advisory opinion and eight months after the IACHR concluded the oral phase of their proceedings.¹⁸⁶

The IACHR also stated that “the possibility of conflicting interpretations is a phenomenon common to all those legal system that have certain courts which are not hierarchically integrated.”¹⁸⁷ Yet, the IACHR failed to focus on the fact that the treaty it was asked to interpret, the Vienna Convention on Consular Relations, had an optional protocol referring disputes and cases to the ICJ. Thus, the contractual parties to the treaty had indeed designated an apparatus or judicial body to handle problems arising under the treaty.¹⁸⁸ This presented ample reason for the IACHR to use its discretionary power.

The *Consular Relations*¹⁸⁹ opinion was also controversial because it involved a treaty that some argued was not related to human rights.¹⁹⁰ Although the United States did not present arguments in the *Consular Relations* opinion, in the *LaGrande* case before the I.C.J., the United States argued that Article 36(1) of the Consular Relations treaty was not connected to human rights, but reciprocity.¹⁹¹ The United States stated that reciprocity was an alien concept to human rights, and that Article 36(1) could not contain a human right because it was subject to the rules of reciprocity.¹⁹² A national of a state that has not ratified the Convention would not be entitled to the Convention.¹⁹³ The United States further argued that the VCCR established legal rules governing relations between states, not rules that operate between states and individuals.¹⁹⁴ In the *Consular Relations* opinion, the IACHR rejected this line of argument. The

186. *Id.* para. 56.

187. *Id.* para. 61 (citing *Other Treaties*, 1982 Inter-Am. Ct. H.R. (ser. A) No. 1; para. 50.)

188. Tinta, *supra* note 1833.

189. *Consular Relations*, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, para. 1.

190. Tinta, *supra* note 1833, Sec. C (stating that the United States argued that the VCCR was not related to human rights). The decision involved the applicability of Article 36(1) of the Consular Relations Treaty to the obligations of the United States over Mexican prisoners being prosecuted without having the rights afford in the Treaty. *Id.* section B. The United States did not challenge the opinion. The decision was unanimous. El Salvador, Guatemala, Dominican Republic, Paraguay, Costa Rica, and Honduras all made representations for this case. *Id.*

191. *Consular Relations*, 1999 Inter-Am. Ct. H.R. No. 16, at 15, para. 26.

192. Tinta, *supra* note 1833.

193. *Id.* (noting that in the judgment in *United States Diplomatic and Consular Staff in the Tehran*, the ICJ stated that “the obligations of the Iranian Government here in question are not merely contractual obligations established by the Vienna Conventions of 1961 and 1963, but also obligations under general international law.”).

194. *Consular Relations*, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, para. 26.

IACHR held that the relevant portions of the Vienna Convention conferred rights on individuals and found that those rights qualified as human rights.¹⁹⁵ Thus, although the Vienna Convention was not a human rights treaty per se, the IACHR exercised jurisdiction because it held that the Article 36 provisions were applicable to the protection of individual human rights within the territory of member states of the Inter-American system.¹⁹⁶

The *Consular Relations* opinion was also important because the IACHR was interpreting a non-regional treaty. The IACHR found that it had the power to review treaties concerning the protection of human rights in the American States, including the International Covenant on Civil and Political Rights.¹⁹⁷ Initially, scholars remained optimistic about the effects of the IACHR's jurisdiction over a non-regional, quasi-human rights treaty. They noted that, after the opinion, the U.S. Department of State disseminated a handbook to all local, state and federal law enforcement departments in the U.S. explaining the importance of compliance with the procedures required by the Vienna Convention.¹⁹⁸ Yet, later the United States announced its decision to pull out of the Optional Protocol to the VCCR.¹⁹⁹ The Protocol gave the ICJ jurisdiction to make the final decision over the Treaty.²⁰⁰

The United States withdrew to protect “against future International Court of Justice Judgments that might similarly interpret the consular convention or disrupt our domestic criminal system.”²⁰¹ Although the U.S. action does not directly implicate the IACHR opinion, it suggests that an aggressive jurisprudence in human rights might not have the satisfactory effect the IACHR would hope for. It also indicates that the United States does not take the IACHR advisory opinion as precedent; but rather, that by severing its responsibility under the Protocol, it believes it is no longer subject to international judicial intervention in its domestic actions.

195. Pasqualucci, *supra* note 2, at 268 (citing *Consular Relations*, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, paras. 74, 82, 84, 86-87).

196. *Consular Relations*, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, para. 124.

197. *Id.* paras. 36-38.

198. *See, e.g.*, Pasqualucci, *supra* note 2, at 242.

199. Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1, A10.

200. *Id.* The United States initially backed the measure. *Id.* It was also the first country to invoke the protocol before the ICJ when it sued Iran in 1979. *Id.*

201. *Id.*

The IACHR's other controversial opinion involving the treaty provision occurred in *Juridical Condition and Rights of the Undocumented Migrants* (2003).²⁰² In the opinion, Mexico sought an advisory opinion on the status of undocumented workers under international law.²⁰³ The request came in May 2002 as the Mexican government's reaction to the U.S. *Hoffman Plastics* decision.²⁰⁴ *Rights of the Undocumented Migrants* represented one of the first times a member state sought a ruling on an issue tied to the practice of another state.²⁰⁵ Yet, Mexico tailored the request generically, claiming the Mexican nationals as "working outside Mexico," even though almost all Mexican emigrants were in the United States.²⁰⁶ By doing so, Mexico did not directly implicate the United States.²⁰⁷ Mexico also did not address *Hoffman Plastics* directly, addressing it only in a footnote.²⁰⁸

The IACHR unanimously held that every migrant worker was entitled to non-discrimination and equality before the law, no matter what his migratory status might be, and that every migrant worker is entitled to due process.²⁰⁹ Law Professor Beth Lyon argued that the IACHR focused on the problem as a potential violation of the international right to non-discrimination and equality before the law and, in doing so, declined the opportunity to develop economic,

202. *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, para. 1 (Sept. 17, 2003) [hereinafter *Undocumented Migrants*].

203. *Id.*

204. *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Rel. Bd.*, 535 U.S. 137, 137 (2002) (holding that it was beyond the National Labor Relations Board's remedial discretion to award back pay to an undocumented alien employee who was not legally authorized to work in the United States because a back pay award ran counter to federal immigration policy).

205. See Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Worker's Rights for the Hemisphere: A Comment on Advisory Opinion 18*, 28 N.Y.U. REV. L. & CHANGE 547, 565 (2004).

206. *Id.* at 566.

207. *Id.*

208. Lyon, *supra* note 205, at 566. In addition to the Mexican government, governments of Canada, Costa Rica, El Salvador, Honduras, and Nicaragua offered written and oral interventions in OC-18. Several inter-governmental organizations intervened in the case as well, including the Inter-American Commission on Human Rights and the Consejo Centroamericano de Procuradores de Derechos Humanos, the U.N. High Commissioner for Refugees. Other representatives from civil society, including eleven universities, two private law firms, and fifty-seven non-governmental organizations. *Id.* at 567-88. U.S. government never spoke publicly, although many of the civil society interveners were U.S.-based. *Id.* at 568.

209. *Undocumented Migrants*, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, paras. 119, 121.

social, and cultural rights law for the region.²¹⁰ She stated that “this may also have reflected a cautious sensibility in advancing workers rights on a less controversial legal foundation.”²¹¹ She also noted that Mexico framed that request to the IACHR in terms of treaty norms applicable to the United States, primarily the International Covenant on Civil and Political Rights. However, the IACHR does not have to limit itself to that application.²¹² The IACHR has broad advisory opinion power; thus it could have *sua sponte* raised the economic, social and cultural rights.²¹³ Its focus on civil and political rights reflects a choice not to develop economic and social rights jurisprudence.²¹⁴ Yet, despite the IACHR’s slight to economic, social, and cultural rights, the IACHR did broadly expand the overall right, holding that the probation on discrimination had risen to the level of a *jus cogens* norm. Lyon noted that this “decision marked the first time that a human rights tribunal has designated nondiscrimination a *jus cogens* norm giving rise to obligations *erga omnes*.”²¹⁵ She further argued that the implication that non-discrimination of workers is a *jus cogens* norm that may be important for migrant workers in the United States, as a *jus cogens* norm may be invoked in the U.S. courts, whereas many treaty provisions may not.²¹⁶

Under this analysis, undocumented workers in the United States could possibly invoke the *Rights of the Undocumented Migrants* opinion that nondiscrimination is a *jus cogens* norm under the Alien Tort Claims Act (ATCA).²¹⁷ The ATCA provides standing to aliens who are victims of torts in violation of the law of nations.²¹⁸ Violations of the law of nations arguably include violations of *jus cogens* norms.²¹⁹ Yet, despite Lyon’s optimism, this interpretation

210. Lyon, *supra* note 205, at 592. Lyon notes that the IACHR focused on political rights primarily because that is how Mexico and other parties framed the issue. *Id.*

211. *Id.* at 585.

212. *Id.*

213. *See id.* at 593 (*Other Treaties*, 1982 Inter-Am. Ct. H.R. (ser. A) No. 1, para. 29) (When interpreting Article 64 of the American Convention, “the Court enjoys an important power of appreciation” when deciding whether to grant a request for an advisory opinion, “enabling it to weight the circumstances of each case”).

214. *Id.* at 592.

215. Lyon, *supra* note 205, at 586-87.

216. *Id.*

217. *Id.* at 594-95.

218. Lyon also states that, in the United States, “there appears to be a slight opening toward the application of international legal norms.” *Id.* at 594. She notes that the U.S. Supreme Court cited international legal sources in addressing individual rights in two 2003 decisions. *Id.*

219. *Id.* (citing 28 U.S.C. §1350 (2004); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)).

seems unlikely, given the U.S. Supreme Court's limitation to the ATCA's in the *Sosa v. Alvarez-Machain* decision (2004).²²⁰ In *Sosa*, the U.S. Supreme Court stated:

[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted. . . . This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. . . . And the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.²²¹

The U.S. Supreme Court indicated that it will narrowly define the laws of nations in accordance with those that existed among civilized nation when the law was enacted. Furthermore, the U.S. Supreme Court indicated that its own judges should determine the laws of nations in accordance with what is favorable for the federal courts. This holding seems to thwart the idea of invoking the *Rights of the Undocumented Migrants* advisory opinion holding in American courts. Yet, it still leaves unresolved the larger issue of the IACHR's power to define *jus cogens* norms per se and whether the IACHR interpretation would be usable before the ICJ.

The *Rights of the Undocumented Migrants* opinion granted unauthorized workers rights beyond pre-existing interpretations of international law.²²² It corresponded to the IACHR's broad application of its advisory jurisprudence, while at the same time raising issues as to the hierarchy among international courts and the enforceability of the IACHR's opinion in domestic courts.

2. *Implications on State Sovereignty.* Critics assert that, by interpreting its jurisdiction broadly, the IACHR is interfering with state sovereignty. As discussed above, states argue that contentious cases are presented in the disguise of advisory opinions. This criticism is more poignant in the IACHR because states may request opinions. States also object because the Inter-American Human Rights Commission may bring a request for an advisory opinion to IACHR on a legal issue in dispute with a state that is not party to the

220. 542 U.S. 692, 692 (2004).

221. *Id.* at 732-33.

222. Lyon, *supra* note 2055, at 591.

American Convention. They argue that this is not fair, given that the Commission may bring such cases to the IACHR only if the states concerned have accepted the IACHR's jurisdiction.²²³ In *Restrictions to the Death Penalty*,²²⁴ the IACHR accepted the Commission's request because its opinion provided the Commission with assistance to perform its functions under Art 112 of the OAS.²²⁵ This was true even though Guatemala had not accepted the IACHR's contentious jurisdiction.²²⁶ The IACHR argued that its advisory jurisdiction offered "an alternate judicial method of consultative nature, which is designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism . . . associated with the contentious judicial process."²²⁷

Judge Burgenthal of the ICJ hypothesized that the IACHR's advisory jurisdiction could actually be used by the Commission or any interested state in the midst of a pending contentious proceeding.²²⁸ Yet, the IACHR in the *Death Penalties* opinion stated that using the advisory process "might in certain situations interfere with the proper functioning of the system of protection spelled out in the Convention or it might adversely affect the interests of the victim of the human rights violations."²²⁹ Thus, the IACHR maintains its discretionary right.

IV. THE IMPACT OF ADVISORY OPINIONS

The analysis indicates that both the ICJ and the IACHR interpret their advisory power broadly to oversee a state's implementation of human rights. Overall, the ICJ and IACHR have problems, first, with getting countries to accept compulsory jurisdiction and, second, with countries trying to break free from compulsory jurisdiction after an adverse ruling. This suggests that the ICJ and the IACHR may be expanding their advisory power to indirectly subject those states to an adjudicative process.

In theory, advisory opinions are non-binding. Yet, both courts' jurisprudence indicates that their opinions could have binding effects

223. Burgenthal, *supra* note 5, at 9

224. *Restrictions to the Death Penalty*, 1983 Inter-Am. Ct. H.R. (ser. A) No. 3, para. 43.

225. *Id.* para. 37.

226. *Id.*

227. *Id.* para. 43.

228. Burgenthal, *supra* note 5, at 11.

229. *Restrictions to the Death Penalty*, 1983 Inter-Am. Ct. H.R. (ser. A) No. 3, para. 36 (citing to the *Other Treaties* opinion).

through the courts' development of human rights custom and treaty norms. First, although the advisory opinions are non-binding, the courts interpret treaties that are usually binding on the parties involved. For instance, in the *Construction of a Wall* opinion, the ICJ referred to Israeli's binding obligations under treaty and customary law.²³⁰ Similarly, in the *Rights of the Undocumented Migrants* opinion, the IACHR interpreted the United States' obligations under the International Covenant of Civil and Political Rights, a treaty with binding obligations, which the United States had signed and ratified.²³¹ In this sense, advisory opinions serve to enforce the human rights obligations that would otherwise be left unenforceable because there is no central organization to oversee their implementation.

Yet, at the same time, these courts lack any formal enforcement mechanism or power. There is no executive branch of international courts, and, as discussed *supra*, few states willingly comply with the advisory opinions. Yet, the reputation of the courts and their interpretation of international law may be undermined when states flagrantly violate the courts' opinions. Israel illustrated this concern when it rejected the *Construction of the Wall* opinion in *Mara'abe*.²³² This indicates that the courts' hesitance to exercise discretion to refuse to answer opinions is misplaced. Since there is a high probability that the court's opinions will be ignored or distinguished, they should use their discretion to avoid answering the arguably contentious requests.²³³ Jonathan Carney contends that the ICJ should avoid cases where a judgment is likely to be resisted and instead establish a record of success in cases where the parties would probably live up to their obligations.²³⁴

This could be accomplished by using more judicial discretion in accepting advisory requests. With regard to the ICJ, dismissing cases for lack of jurisdiction or because of compelling reasons could lend its opinions more credibility. The ICJ, like the PCIJ, could be more cautious in entering opinions against the strong interests of states or

230. 2004 I.C.J 131, paras. 89-99, 102-12, 123, 134, 136, 137.

231. 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, paras. 3, 109, 124, 141(5).

232. HCJ 7957/04, para. 58.

233. Pomerance, *supra* note 10, at 318.

234. Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 435 (2004) (citing Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance*, in INTERNATIONAL COURT OF JUSTICE AT CROSSROADS 388 (Lori Fisler Damrosch ed. 1987)).

where a states domestic court is already hearing the issue. Yet, this could undermine the 'ICJ's desire to deal with questions sometimes ignored by the Security Council through politicization and polarization. At a minimum, the ICJ should make sure its opinions are based on fair and accurate facts, a concern voiced by Justice Burgenthal in his dissent in the *Construction of a Wall Opinion* and the ISC in *Mara'abe*.²³⁵ The situation is more poignant in regards to the IACHR. As a regional court, it must find a footing between the ICJ and domestic courts. Discretion could be more advisable in the IACHR, especially on issues already before the ICJ. It is interesting that the IACHR declined jurisdiction when its opinion arguably conflicted with the duties of the Commission, but chose to accept a case whose subject matter was already directly before the ICJ.²³⁶ This contradictory result suggests that the IACHR holds its own organs above that of other international bodies. But, it could also mean that after *Consular Relations*, the IACHR will now take a more active role in general. Regardless, judicial restraint could have the affect of giving the opinions the courts' render more credibility and create a balance between it and other international courts.

Both courts also face the criticism that the inmates are now running the asylum, meaning that states that live outside the law have the power to request opinions on the behavior of states that live primarily inside the law. This could be resolved by the court's better policing the procedural mechanisms invoking the advisory request. For instance, in the *Construction of a Wall* case, many states with human rights abuse records, such as the Sudan, who did not afford the ICJ contentious jurisdiction voted in favor of the advisory request against Israel.²³⁷

Israel correctly argued that there was no such mechanism that could bring the Palestinian action under judicial review. In effect, it made the opinion appear one-sided. On one hand, it would appear that the Israeli state with its political and monetary advantage was finally put in its place. Yet, on the other hand, this could have the effect of rendering it less likely that states bind themselves to human rights treaties in the first place. This defeats the central theme of human rights law, mainly to encourage states to assume the

235. HCJ 7957/04, paras. 61-64.

236. *Compare* Compatibility of Draft Legislation, 1991 Inter-Am. Ct. H.R. (ser. A) No. 12, para. 28 *with* Consular Relations, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16, paras. 54, 56, 61.

237. *See* discussion *supra* note 157.

obligations in the first place. For instance, after the *Rights of the Undocumented Migrants* and *Consular Relations* cases, it is less likely that the United States will ratify the American Convention. In comparison, the European Court of Human Rights has a narrow advisory jurisdiction, both in theory and in practice. Yet, unlike the ICJ and the IACHR, by statute all states of the ECHR have accepted its compulsory jurisdiction. The ECHR has no need to rule indirectly with advisory power, because it has the power to act directly with its compulsory jurisdiction.

CONCLUSION

The ICJ *Construction of a Wall* opinion and the IACHR *Consular Relations* and *Rights of the Undocumented Migrants* opinions reflect an elevation of individual rights over state rights. The ACHPR may also use its advisory power broadly. Yet, the ICJ and IACHR's aggressive advisory power may only seek to alienate states from the courts rather than encourage them to accept compulsory jurisdiction. It may also seek to limit states from attaching themselves from human rights treaties or regimes that may later be used against them in advisory proceedings. The courts should, therefore, use more discretion in accepting advisory opinion requests, especially by monitoring which state or entity is requesting the opinion. The courts should also pay attention to domestic courts and how they are responding to similar issues. This could remove the bulk of state criticism over the advisory practice and make the opinions that are rendered more effective for the overall enjoyment of human rights. Advisory opinions could thus become more than a pyrrhic victory.