

The next battle front with Egypt: The United Nations.

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“Whether or not we want to accept it, we are in the midst of a battle. ... There is a battle-taking place... we can become aware of this battle and must know how to live in victory, rather than in defeat. Understanding the dynamics of the battle, and how we are going to engage the enemy is vital if we want victory. Think about that... What if you were an army trying to engage an enemy and stop its advance, but you did not even know where the attack was coming from? You would be at the mercy of chance, hoping your army has enough force to repulse an attack when it comes. On the other hand, if your army had “intelligence” about the enemy, you could plan for their attack... [This is elementary rules of engagement of any battle...]

Extract from Spiritual battle plan

Robert Mcquilkin (2000)

Advisory opinion under the Statute of The International court of Justice

In recent weeks the Egyptian media has reported that Egypt is considering taking its dispute with Ethiopia over the construction of the Grand Renaissance Dam to the United Nations.¹

The Reporter Amharic online edition in its January 22, 2014 ² published an article dismissing the Egyptian announcement by saying “the ongoing construction of the Grand Renaissance dam is not being executed in violation of International law.” Further reading the Title and the general message of the contents of the article one would get the impression that the author is aiming at dismissing this news as a mere non-event. That is the general message conveyed by the article regarding Egypt’s decision to take the dam’s case to the U.N. Whichever way we may look at it, should Ethiopia indeed dismiss this news as if it is “an insignificant and non- event” and ignore it?

The aim of this article is to explore one of the “remedies” available for Egypt under International law that allows Egypt to take “its case” to the United Nations and to the attention of the International community. From Ethiopia’s stand point, it is extremely important and useful to know in advance which specific approach and strategy that Egypt might be exploring to make its case before the

International community so that the necessary preparation can be made ahead of time to best safeguard and defend Ethiopia's national interest.

The International Court Of Justice which is based in the Hague, The Netherlands, is the principal Judicial organ of the United Nations with the dual role and mandates of settling legal disputes between member states and issuing advisory opinions on legal questions referred to it by International organs and agencies.³ In my earlier articles, I have discussed extensively about ICJ's role in adjudicating legal disputes between member states.⁴ In particular, I have explained how a country can bring successfully a claim before the ICJ and that the court would have to find and secure its own jurisdiction in order to proceed with any case.⁵ In the present article, I am going to discuss the advisory role of the court and how Egypt might be attempting to use this procedure to advance its agenda and strategies of an attempt to disrupt and frustrate the ongoing construction of the Grand Renaissance Dam over the blue Nile.

So what is the substance of an Advisory opinion? Who is eligible to file such a petition? What is the procedure? What are the legal questions that ought to be asked to meet the specific requirements of ICJ? Ordinarily, seeking an "advise" may not sound a big deal. The ICJ's advisory opinions are after all "consultative in character and are therefore not binding as such on the requesting bodies."⁶ It is possible, however, that the decision of the court or the fallout in the form of an advisory opinion decision might involve the interpretation of a substantive or procedural provisions of international law providing definitive and authoritative opinion on the dispute in question and affecting the future conduct of states in International law. In other words, the final advisory opinion to be announced in the form of a decision by ICJ may well have direct or indirect legal consequences. Therefore, states take the advisory opinion proceedings very seriously as much as they do in contentious adversarial and formal disputes submitted to the court.

Pursuant to article 65 of the Statute⁷ of the International court of Justice (ICJ) the court is empowered to give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the charter of the United Nations to make such a request. Article 96 of the United Nations charter specifically provides:⁸

- (a) The General Assembly or the Security Council may request the International Court of Justice for an advisory opinion.
- (b) Other organs of the United Nations and specialized Agencies may at any time be authorized by the General assembly may also request advisory opinion of the court on legal questions arising within the scope of their activities.

Depending on the sources of request, it can be said organs that have “original right” are The Security Council and the General Assembly. Organs and agencies that also have “derivative right” of request are “other United Nations organs and specialized Agencies.”

In other words, besides request coming from original sources, “The court’s advisory procedure...is open solely to international organizations. The five organs of the United Nations and sixteen specialized agencies are currently authorized to request advisory opinions. The complete list is available here.⁹ When a request for an advisory opinion is submitted to the Court, by its rules the Court can decide which states and organizations might provide useful information. Those states and organizations are then offered the opportunity to present written or oral statements. Apart from this process, the procedure for advisory opinions is similar to that used to resolve formal legal disputes, and relies on the same body of international law.”¹⁰

Before accepting the petition submitted to it the court verifies two preconditions are fully met namely: the issue of proper authorization and the content and specificity of the question presented. With respect to authorization the court checks whether the request came directly from authorized source namely: the General Assembly or the Security Council only. Member states, for instance, cannot directly make a request to the court for an advisory opinion. With respect to the nature of the question presented the court cannot for instance accept political or some other general questions/ hypothetical questions or questions of facts. When drafting the questions, states must make sure that there are indeed legal issues raised for the court to make a judicial determination. So the first hurdle for Egypt is not only convincing these two U.N. organs, to accept its request for an advisory opinion but also to submit a request which will be acceptable to the court in the final analysis. Which one of the entities is more than likely to accept or endorse

Egypt's request for an advisory opinion in respect of the Grand Renaissance Dam or the Nile River? Let us tackle them in a little more detail:

The Security Council

Instead of throwing an assertive statement, I would like to pose a question the answer of which may determine the fate of Egypt's petition for an advisory opinion relating to the Grand Renaissance Dam or anything associated with the Nile River. Which of the permanent members of the Security Council are allied to Egypt or Ethiopia at this moment in time? If either of these two states have allies the request may be vetoed and may not get any further traction. In other words, if one permanent Security Council member exercises its veto, the request for advisory opinion will not be authorized. If, however, the permanent members of the Security Council reach some kind of consensus among themselves with respect to a specific draft proposal nothing will stop it from being sent to the International Court of Justice requesting an advisory opinion. It all depends on the nature, formulation and the type of the legal questions presented to the Security Council and eventually to the court. What might appear like an "innocent" legal question might well have a different kind of agenda behind it. Whether or not it will create or acquire the required consensus is at this stage becomes a mere speculation without examining the contents of the draft petition. In other words, to predict correctly the fate and outcome of any petition, one has to look and examine the proposal itself.

The General Assembly

The General assembly is the main deliberative organ under the United Nations Charter.¹¹ All member states participate in the General Assembly and each state has one vote.¹² The General Assembly votes on many issues and passes resolutions brought to it by sponsoring states or agenda items originating from various commissions, organs, and agencies of the United Nations. In order for an ICJ to have jurisdiction to issue an advisory opinion, the requesting agency of the united nation must show a clear relationship between the content of the question it is asking and its own specialized mission. Egypt may use this route to sneak its own agenda in the form of an advisory opinion and a legal question endorsed by one of the specialized agencies or an organ of the United Nations. Keep in mind that the only requirement for Egypt is to obtain the endorsement of

any one of the United Nations organs and Agencies. That hurdle they may bypass. Of the nineteen organs and agencies authorized to request an advisory opinion the most susceptible candidates could be any one of the following agencies: The Economic and Social Council (UNESCO);¹⁴ The Food and Agricultural Organization of the United Nations (FAO)¹⁵; The United Nations environment program and The United Nations framework convention for climate change¹⁴ just to name a few.

It is a fact that more Egyptians are represented in specialized Agencies and organs of the United Nations than Ethiopians. This might be a little bit concerning. However, it must always be looked at from a different angle: in light of enforcement and compliance of established rules of conduct at the U.N. In any event, Ethiopia may have to closely watch how things evolve and unravel especially the origin of such requests. Vigilance is important in terms of checking whether Egyptians were directly or indirectly involved in the initiation of such requests for advisory opinion either in connection with the use or utilization of the Nile River or the execution of the Grand Renaissance hydroelectric dam project in particular.

Again just like I did in the Security Council case earlier, I am going to pose yet another question in respect of the General Assembly: Assuming a draft text is tabled in the floor of the General Assembly, which of the members of the General Assembly are going to vote in favor of Egypt's petition for an advisory opinion and which are going to vote against it? Here again, I would guess, most African countries may well support Ethiopia other Middle Eastern countries might go for Egypt. It is a tossup game; the outcome cannot be definitively and accurately predicted at this stage, since we do not know how the legal question is going to be formulated and who supports who, I mean politically, definitely matters. It should be clear by now that when Egypt's petition reaches the floor of the general Assembly intense diplomatic activity will be at full gear on both sides. It is instructive to watch the position of Sudan. No one knows which side they might support since this case is a totally different matter distinct from the fact finding tripartite negotiation currently underway. Once Egypt files its petition at the United Nations, it may abandon and rescind its commitment altogether to the current "ongoing" negotiation. What will be Plan B for Ethiopia under the changed circumstances?

One final point worth mentioning is the consent of states is not required for an advisory opinion, and state objections while taken into consideration

oftentimes are disregarded and ignored. For example in the Western Sahara case Spain submitted a vigorous objections but it was not accepted. (See western Sahara case, 1975 ICJ)

What are the likely legal questions Egyptians may pose in their advisory opinion request in relation to the construction of the Grand Renaissance Dam or the waters of the Nile?

Let me begin by eliminating first what Egyptian International lawyers will not do in this instance. There are hundreds of international lawyers and professors in Egypt who have received specialized education from reputable Ivy League universities and colleges in USA, England, France, Switzerland etc. Some of them have even served as judges at the International Court of Justice (ICJ) in The Hague. For instance, Dr. Nabil ELARABY¹⁶ who served from 2001-2006 knows all the court rules and regulations. I would guess that professionally minded lawyers may not advise the Egyptian government to submit a petition for an advisory opinion based on the colonial era treaties such as “historical water rights” of Egypt or based on article 44 of the New Egyptian Constitution which they very well understand and know that it will not survive legal scrutiny under International law. That is their suicide path and will die on arrival. Whatever the underlying basis of their claim, Ethiopia may use it in support of its defense arguments. For this reasons, I expect that Egyptian lawyers most likely will not formulate a legal question and submit a petition relying on inequitable legal principles. Their primary objective is the disruption and frustrations of the construction of the Grand Renaissance Hydroelectric Dam and for that purpose they may in all likelihood use another legal theory or invent one. The most likely candidate is: international environmental law and claim for damages allegedly suffered by Egypt as a consequence of “environmental harm” and anything in between. That is my own prediction but again like everyone else, I will have to wait until the dust settles and the petition arrives.

Let me now conclude this article by submitting two concrete examples. I picked up two of the relatively most recent advisory requests namely:

The General Assembly requested an advisory opinion on the legal consequences of the separation wall built by Israel in the occupied Palestinian territories (2003)¹⁷; the General Assembly also requested an opinion on the unilateral declaration of Independence by the Provisional Government in Kosovo¹⁸ (2008). The formulated and requested questions in respect of these two cases were as follows:

Request for advisory opinion in respect of the construction of the wall by Israel¹⁹

“ What are the legal consequences arising from the construction of the wall being built by Israel, the occupying power, in the occupied Palestinian territories, including in around East Jerusalem, as described in the report of the Secretary-General, considering the fourth Geneva Convention of 1949 and relevant security council and General Assembly resolutions?”

Request for advisory opinion in respect of the Unilateral declaration of Independence by the provisional institutions of self –government of Kosovo²⁰

“Is the unilateral declaration of independence by the provisional institutions of self-Government of Kosovo in accordance with International Law.?”

Notes

1. “Egypt may take the Nile dam dispute to the U.N.” <http://www.al-monitor.com/pulse/originals/2014/01/egypt-renaissance-dam-dispute-internationalize.html>
2. <http://ethiopianreporter.com/index.php/news/item/4816-ግብፅ-የህዳሴውን-ግድብ-በመቃወም-ለተመድ-አቤት-እላለሁ-ማለቷን-ኢትዮጵያ-አጠጣለች>.
3. See: The Statute of the International court of Justice here:
<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>
4. “Ethiopia vs. Egypt: The likelihood of a case before the International court of justice.” Aiga Forum, Washington .D.C. January 2, 2014. Available at: <http://aigaforum.com/articles/Ethiopia-vs-Egypt-and-ICJ.pdf>

5. See. Ibid.

6. See. <http://www.icj-cij.org/information/index.php?p1=7&p2=2#6>. Read the explanation given by the court : Judgements delivered by the Court (or by one of its Chambers) in disputes between States are binding upon the parties concerned. Article 94 of the United Nations Charter lays down that "each Member of the United Nations undertakes to comply with the decision of [the Court] in any case to which it is a party."..As regards advisory opinions, it is usually for the United Nations organs and specialized agencies requesting them to give effect to them or by whatever means are appropriate for them. See also « decision dismisses Israel's arguments, accepts Palestinian claims without reservation » online Journal of anti defamation League July 9, 2004 available here : http://archive.adl.org/israel/court_of_justice.html#UuvWfmeA2M-

7. See. Article 65 of the Statute of The International Court of Justice. Available at: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_I

8. See. The Charter of the United Nations, effective October 24, 1945 Article 96(1) available here: <http://www.icj-cij.org/documents/index.php?p1=4&p2=1&p3=0>

9. See. For a full list of organs and Agencies authorized to request advisory opinions look here: <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1>

10. See. Anti-defamation league article Note 6 supra and also the rules of ICJ here: <http://www.icj-cij.org/court/index.php?p1=1&p2=6>

11. See. The charter of the United Nations chapter IV (articles 9- 22) its composition, powers and functions, voting issues and list of subsidiary bodies directly reporting to the General assembly. See here: <http://www.icj-cij.org/documents/index.php?p1=4&p2=1&p3=0>

12. See. Article 18(1) of the United Nations charter available at: <http://www.icj-cij.org/documents/index.php?p1=4&p2=1&p3=0>

13. See. Chapter x, Article 62 of the United Nations charter available here: <http://www.icj-cij.org/documents/index.php?p1=4&p2=1&p3=0> . The United Nations charter originally established six principal organs: The General Assembly, the Security Council, The Economic and Social Council, The Trusteeship Council, and The International Court of Justice. Today the U.N. is much larger; it has 15 Agencies and several programs and bodies. See, here: <http://www.un.org/en/ecosoc/>

14. See. <https://www.un.org/en/aboutun/structure/index.shtml>

15. See. http://unfccc.int/secretariat/environmental_responsibilities/items/3539.php# and here : http://unfccc.int/secretariat/environmental_responsibilities/items/3539.php#

16. See. Dr. Nabil Elarby's then Judge at the ICJ issued Separate advisory opinion with respect to Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Available here: <http://www.icj-cij.org/docket/files/131/1689.pdf>

17. See. The final advisory opinion decision here: <http://www.miftah.org/Doc/Documents/icj20040709.pdf>

Or here: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4>

18. See. The Kosovo advisory opinion case documents. Available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=kos&case=141&k=21&p3=0>

19. See. General Assembly Resolution A/RES/ES-10/14(A / ES-10/L.16) adopted on 8, December 2003 at the 23rd meeting of resumed tenth emergency special session (90 votes in favor, 8 against, 74 abstentions)

20. See. General Assembly resolution A/RES/63/(A/63/L.2) of October 2008