

REPERTORY OF PRACTICE OF UNITED NATIONS ORGANS
SUPPLEMENT NO. 10 (2000 – 2009)

**(Advance version, to be issued in volume II of Supplement No. 10 (forthcoming)
of the *Repertory of Practice of United Nations Organs*)**

ARTICLE 12

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TEXT OF ARTICLE 12

1. While the Security Council is exercising in respect of 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.
2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

INTRODUCTORY NOTE

1. The general structure of this study follows that of the previous *Supplements*, with the exception of the Analytical Summary of Practice, which includes two additional sections under the subheading “Consideration of and making recommendations on items already before the Council”. The two sections are entitled “The Tenth Emergency Special Session of the General Assembly: Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory” and “The Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory”. As in previous *Supplements*, the present study covers only the deliberations of the main United Nations organs, in dealing with the general question of the implementation of Article 12 and the bearing of the Article on specific political questions during the period under review.

I. GENERAL SURVEY

Article 12(1)

2. No resolution adopted by either the General Assembly or the Security Council explicitly made reference to Article 12(1) during the period covered by the present *Supplement*.

3. During the period under review, the following questions were considered by both the General Assembly and the Security Council, but Article 12 was not invoked in the discussions: “Causes of conflict and the promotion of durable peace and sustainable development in Africa”,¹ “The situation in Afghanistan and its implications for international peace and security”,² “The situation in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan”,³ “The role of diamonds in fuelling conflict”,⁴ and “Measures to eliminate international terrorism”.⁵

¹ Discussed by the Security Council as “The situation in Africa”. See e.g. General Assembly resolutions: A/RES/55/217, A/RES/56/37; A/RES/57/2; A/RES/57/7; A/RES/57/296; A/RES/58/234; A/RES/58/235; A/RES/59/255; A/RES/60/223; A/RES/61/230; A/RES/62/275; A/RES/63/304; and A/RES/64/252.

² Discussed by the Security Council as “The situation in Afghanistan”. See e.g. General Assembly resolutions: A/RES/55/174 A; A/RES/55/243; A/RES/56/220 A; A/RES/57/8; A/RES/57/113; A/RES/58/27 A; A/RES/59/112A; A/RES/60/32 A-B; A/RES/61/18; A/RES/62/6; A/RES/63/18; A/RES/64/11

³ Discussed by the Security Council as “The situation in the Middle East” and as “The situation in the Middle East, including the Palestinian question”. See e.g. General Assembly resolutions: *Peaceful settlement of the question of Palestine* -- A/RES/55/55; A/RES/56/36; A/RES/57/110; A/RES/58/21; A/RES/59/31; A/RES/60/39; A/RES/61/25; A/RES/62/83; A/RES/63/29; and A/RES/64/19. *The Syrian Golan* -- A/RES/55/51; A/RES/56/32; A/RES/57/112; A/RES/58/23; A/RES/59/33; A/RES/60/40; A/RES/61/27; A/RES/62/85; A/RES/63/31; and A/RES/64/21. *The occupied Syrian Golan* -- A/RES/55/134; A/RES/56/63; A/RES/57/128; A/RES/58/100; A/RES/59/125; A/RES/60/108; A/RES/61/120; A/RES/62/110; A/RES/63/99; and A/RES/64/95. *Jerusalem* -- A/RES/55/50; A/RES/56/31; A/RES/57/111; A/RES/58/22; A/RES/59/32; A/RES/60/41; A/RES/61/26; A/RES/62/84; A/RES/63/30; and A/RES/64/20. *Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories* -- A/RES/55/131; A/RES/56/60; A/RES/57/125; A/RES/58/97; A/RES/59/122; A/RES/60/105; A/RES/61/117; A/RES/62/107; A/RES/63/96; and A/RES/64/92. *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan* -- A/RES/55/132; A/RES/56/61; A/RES/57/126; A/RES/58/98; A/RES/59/123; A/RES/60/106; A/RES/61/118; A/RES/62/108; A/RES/63/97; and A/RES/64/93. *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem* -- A/RES/55/133; A/RES/56/62; A/RES/57/127; A/RES/58/99; A/RES/59/124; A/RES/60/107; A/RES/61/119; A/RES/62/109; A/RES/63/98; and A/RES/64/94. *Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources* -- A/RES/55/209; A/RES/56/204; A/RES/57/269; A/RES/58/229; A/RES/59/251; A/RES/60/183; A/RES/61/184; A/RES/62/181; A/RES/63/201; and A/RES/64/185. *Follow-up to the report of the United Nations Fact-Finding Mission on the*

4. There were several occasions, during the discussion of some of the items listed above, on which explicit or implicit mention was made on Article 12(1). However, there was no specific constitutional discussion of the Article.

5. No items were referred to the General Assembly by the Security Council, which could be taken as constituting requests by the Council in accordance with the provisions of Article 12(1). Nor did the Security Council request a new emergency special session of the General Assembly. However, the tenth emergency special session of the General Assembly did resume several times during the period under review.

6. The General Assembly included several items on its agenda related to international peace and security, which falls within the primary responsibility of the Security Council.⁶ While many of these items raise a range of issues, some more relevant to the work of the Security Council than others, there was no opposition surrounding the inclusion of any of these items on the agenda of the General Assembly.

Gaza Conflict -- A/RES/64/10; and A/RES/64/254. *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory* -- A/RES/ES-10/7; A/RES/ES-10/8; A/RES/ES-10/9; A/RES/ES-10/10; A/RES/ES-10/11; A/RES/ES-10/12; A/RES/ES-10/13; A/RES/ES-10/14; A/RES/ES-10/15; A/RES/ES-10/16; A/RES/ES-10/17; A/RES/ES-10/18.

⁴ Discussed by the Security Council as “The situation in Côte d’Ivoire” and as “Peace and security: natural resources and conflict”. See e.g. General Assembly resolutions: A/RES/55/56; A/RES/56/263; A/RES/57/302;

A/RES/58/290; A/RES/59/144; A/RES/60/182; A/RES/61/28; A/RES/62/11; A/RES/63/134; A/RES/64/109

⁵ Discussed by the Security Council as “Threats to international peace and security caused by terrorist acts”, as “Maintenance of international peace and security”, and as “Briefings by Chairmen of subsidiary bodies of the Security Council”. See especially, General Assembly resolution A/RES/60/288 (*The United Nations Global Counter-Terrorism Strategy*). See also e.g., General Assembly resolutions: *Measures to eliminate international terrorism* – A/RES/55/158; A/RES/56/88; A/RES/57/27; A/RES/58/81; A/RES/59/46; A/RES/60/43; A/RES/61/40; A/RES/62/71; A/RES/63/129; and A/RES/64/118. *Measures to prevent terrorists from acquiring weapons of mass destruction* – A/RES/57/83; A/RES/58/48; A/RES/59/80; A/RES/60/78; A/RES/61/86; A/RES/62/46; A/RES/63/60; and A/RES/64/38. *Preventing the risk of radiological terrorism* – A/RES/60/73. *Preventing the acquisition by terrorists of radioactive materials and sources* – A/RES/62/46.

⁶ For examples of items, see paragraph 3 along with the footnotes contained therein.

Article 12(2)

7. Acting under Article 12(2), the Secretary-General continued to notify the President of the General Assembly, with the consent of the Security Council, of “matters relative to the maintenance of international peace and security which are being dealt with by the Security Council”.⁷ The General Assembly took note⁸ of those notifications, which were based upon the “Summary statement by the Secretary-General on matters of which the Security Council is seized and on the stage reached in their consideration”, circulated each week in accordance with rule 11⁹ of the provisional rules of procedure of the Security Council.

8. The items in the notifications were the same as those in the summary statements issued during the period covered by each respective notification, with the exclusion of the items not considered “matters relative to the maintenance of international peace and security”.

9. The matters being dealt with by the Security Council were divided in the notifications into two categories: (a) matters “which are being dealt with by the Security Council” and which had been discussed during the period since the previous notification; and (b) matters of which the Security Council “remains seized” but which it had not discussed during that period. The Secretary-General obtained the consent of the Security Council to these draft notifications by circulating copies among the members of the Council.

⁷ See A/55/366 (2000); A/56/366 (2001); A/57/392 (2002); A/58/354 (2004); A/59/335 (2004); A/60/352 (2005); A/61/371 (2006); A/62/300 (2007); /63/300 (2008); and A/64/300 (2009).

⁸ See A/55/PV.34 (decision 55/405); A/56/PV.25 (decision 56/405); A/57/PV.27 (decision 57/505); A/58/PV.28 (decision 58/507); A/59/PV.24 (decision 59/505); A/60/PV.50 (decision 60/512); A/61/PV.72 (decision 61/518); A/62/PV.47 (decision 62/510); A/63/PV.53 (decision 63/514); and A/64/PV.43 (decision 64/509).

⁹ Rule 11 reads as follows: “The Secretary-General shall communicate each week to the representatives on the Security Council a summary statement of matters of which the Security Council is seized and of the stage reached in their consideration” (S/96/Rev. 7—United Nations publication, Sales No. E.83.I.4).

10. One hundred and five items¹⁰ relating to the maintenance of peace and security were notified to the General Assembly as having been removed from the list of matters of which the Council was seized during the period under review. The General Assembly took note of the notifications, as indicated in paragraph 8 above.

II. ANALYTICAL SUMMARY OF PRACTICE

**** A. Question of the scope of the term “recommendation” as used in Article 12(1)**

B. Question of the meaning of the phrase “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter”, and the effect upon the power of the General Assembly

11. During the period under review in this *Supplement*, there were a few instances where Member States expressed their view on the meaning of the limitation in Article 12(1). The delegation of Costa Rica stated that the “limitation contained in Article 12 of the Charter relates strictly to time-frames and aims to avoid any situation in which the same subject would be considered simultaneously by both bodies. However, it does not extend to an abstract subject of general interest to both bodies, such as the issue of working methods.”¹¹ During a debate on revitalizing the work of the General Assembly, the delegation from Uruguay noted, in the context of the limitation set out in Article 12(1), that “in some cases it can reaffirm a decision of the Security Council, legitimizing the decision of that principle organ.”¹²

¹⁰ For a full listing of the items, see Summary Reports referenced in note 19.

¹¹ A/60/PV.94 (20 July 2006): Costa Rica, p. 14. See also A/60/PV.48 (10 November 2005): Costa Rica, p. 15.

¹² A/62/PV.56 (26 November 2007): Uruguay, p. 14.

**** C. Inclusion in the agenda of the General Assembly, for consideration, of an item that falls within the primary responsibility of the Security Council**

D. Constitutional relationship between the General Assembly and the Security Council as envisaged in Members States proposals to amend the Charter and strengthen the United Nations

12. There was one reference to Article 12(1) with respect to the constitutional relationship between the General Assembly and the Security Council in the 2009 report¹³ of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization. The Cuban delegation proposed¹⁴ that the Special Committee on the Charter of the United Nations study the relationship between Article 12(1) and Articles 10, 11, 13 and 14, as well as to further clarify what is meant by the phrase, in Article 12(1), “is exercising in respect of any dispute or situation the functions”. Recognizing that, as a general rule, the General Assembly is prohibited from making recommendations on a matter before the Security Council, the Cuban delegation further proposed that the Special Committee analyze the following recommendations: “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 making appropriate recommendations to members for collective measures”.¹⁵

¹³ A/64/33, pp. 8-12.

¹⁴ See A/AC.182/L.93/Rev.1.

¹⁵ *Ibid.*

13. Pursuant to General Assembly decision 57/591, the Open-ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council produced a report.¹⁶ Of the five topics discussed in the Working Group's informal consultations two of the topics included the "Relationship between the General Assembly and the Security Council" and "Accountability," during which there was implicit and explicit mention of Article 12. Several delegations stressed that, although the Security Council had enforcement power on matters concerning international peace and security, by virtue of Article 12, obligations should be attached to those powers.¹⁷ For example, "numerous delegations held the view that increased transparency and improved working methods of the Security Council were crucial to ensure its accountability to the wider membership of the United Nations."¹⁸

E. Consideration of and making recommendations on items already before the Council

1. The Tenth Emergency Special Session of the General Assembly: Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory

14. The tenth emergency special session of the General Assembly was reconvened several times during the period under review,¹⁹ beginning with the 13th meeting, which was held on 18 October 2000, at the request of the members of the League of Arab States. The request was made in response to the threat, by a permanent member of the Security Council, to use its veto to

¹⁶ G A (58), Suppl. No. 47.

¹⁷ *Ibid.*, annex IV, para. 56.

¹⁸ *Ibid.*, annex IV, para. 59.

¹⁹ Since 24 April 1997, the Tenth Emergency Special Session has adjourned temporarily and been reconvened on 15 July 1997, 13 November 1997, 17 March 1998, 5 February 1999, 18 October 2000, 20 December 2001, 7 May 2002, 5 August 2002, 19 September 2003, 20 October 2003, 8 December 2003, 16 July 2004, 19 July 2004, 20 July 2004, 17 November 2006, 15 December 2006, 15 January 2009, and 16 January 2009.

block the adoption of “any resolution.”²⁰ During meetings of the tenth emergency special session, the General Assembly and the Security Council considered and made decisions on the same agenda item on two occasions.

15. The 15th meeting of the tenth emergency special session, which was held on 20 December 2001, was reconvened for the consideration of the draft resolution contained in document A/ES-10/L.7. The draft resolution was sponsored by Egypt, South Africa and Palestine as a response to two Security Council draft resolutions²¹ on the “Middle East situation, including the Palestinian question”, which were vetoed by a permanent member earlier that year. The text of part A of draft resolution A/ES-10/L.7 was identical to that of Security Council draft resolution S/2001/1199, which was vetoed on 14 December 2001. During the consideration of the draft resolution, many speakers expressed their concern with the deterioration of the situation in the Middle East and with the Security Council’s failure to fulfill its primary responsibilities in the maintenance of international peace and security due to the exercise of the veto by a permanent member.²² Some speakers suggested that the credibility of the United Nations was at stake.²³ The General Assembly adopted the draft resolution by 124 votes to 6 with 25 abstentions (resolution ES-10/8).

16. Similarly, another negative vote by the same permanent member on draft resolution S/2003/891 on the “Middle East situation, including the Palestinian question” took place at the 4828th meeting of the Security Council, which was held on 16 September 2003. The members of

²⁰ See A/ES-10/PV.13 (18 October 2000): Observer of Palestine, p. 4.

²¹ S/2001/270 and S/2001/1199.

²² See e.g. A/ES-10/PV.15 (20 December 2001): Observer of Palestine, p. 4-5; South Africa, p. 7; Iran (Islamic Republic of), p. 12; and Qatar, p. 15.

²³ See e.g. A/ES-10/PV.15 (20 December 2001): Senegal, p. 10.

the League of Arab States,²⁴ supported by the Non-Aligned Movement,²⁵ requested a resumption of the tenth emergency special session of the General Assembly. The 20th meeting of the tenth emergency special session, which was held on 19 September 2003, was reconvened for the consideration of the draft resolution A/ES-10/L.12, which was similar in substance to the earlier draft resolution vetoed in the Security Council, with identical provisions in two of the four operative paragraphs. Again, several speakers condemned the Security Council's failure to fulfill its primary responsibilities in the maintenance of international peace and security due to the exercise of a veto by a permanent member.²⁶ The General Assembly adopted the draft resolution by 133 votes to 4 with 15 abstentions (resolution ES-10/12).

17. The 28th and 29th meeting of the tenth emergency special session took place on 17 November 2006, at the request of Qatar, on behalf of the League of Arab States, and supported by Cuba, on behalf of the Non-Aligned Movement. The request to resume the session was precipitated by two vetoed Security Council draft resolutions, one in response to Israel's military operations in the Gaza Strip, the rockets fired from Gaza into Israel and the abduction of Israeli soldiers, and the second on Israel's military operations in Beit Hanoun.²⁷ Several speakers referred to the fact that the Security Council had failed to exercise its responsibilities, due to the use of vetoes, which gave rise to the need to convene the emergency special session of the General Assembly.²⁸ There was only one reference to Article 12 when a Member State expressed its support for the General Assembly exercising its inherent authority.²⁹

²⁴ A/ES-10/237.

²⁵ A/ES-10/238.

²⁶ See e.g. A/ES-10/PV.20 (19 September 2003): Observer of Palestine, p. 2; Sudan, p. 5; Cuba, p. 8; Malaysia, p. 9; South Africa, p.12 ; and Islamic Republic of Iran, p. 15.

²⁷ Draft resolutions S/2006/508 (13 July 2006) and S/2006/878 (11 November 2006) were vetoed by the United States of America.

²⁸ See A/ES-10/PV.28 (17 November 2006): Observer of Palestine, p. 2, Qatar, p.6, Senegal, p.10, Cuba p. 11, and Venezuela, p. 21. See also A/ES-10/PV.29 (17 November 2006): Egypt, p.3, Iran (Islamic Republic of), p.6, and Zimbabwe, p. 8.

²⁹ See A/ES-10/PV.28 (17 November 2006): Cuba, p.11.

18. During the 32nd meeting of the tenth emergency special session (15-16 January 2009), the Israeli delegation requested clarification on the question “How does the current meeting correspond with Article 12, paragraph 1 of the United Nations Charter”,³⁰ since the matter was already before the Security Council. The opinion of the Office of Legal Affairs was that the emergency special session could be resumed at the request of a Member State. In the present case, Malaysia, the Bolivarian Republic of Venezuela, Indonesia and the Syrian Arab Republic all made such a request.³¹ There was no further discussion or clarification to Israel’s question throughout the 32nd to the 36th meeting of the tenth emergency special session of the General Assembly. The Israeli delegation repeated their concerns that Article 12(1) prohibits the General Assembly from making any recommendations while the Security Council is seized of the matter.³² A few speakers reminded the Assembly of the limitations set out in Article 12(1), noted that the matter was currently actively considered by the Security Council, and encouraged the Assembly to support the immediate implementation of resolution 1860 (2009).³³

19. No other explicit or implicit references were made to Article 12 during the remainder of the meetings of the tenth emergency special session of the General Assembly.

*2. The Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*³⁴

³⁰ See A/ES-10/PV.32 (15 January 2009).

³¹ See documents: A/ES-10/434; A/ES-10/436; A/ES-10/440; and A/ES-10/441.

³² See statements by Israel: A/ES-10/439; A/ES-10/PV.32; A/ES-10/PV.33; and A/ES-10/PV.36.

³³ See A/ES-10/PV.33 (15 January 2009): France, p.2, and A/ES-10/PV.35 (16 January 2009): United Kingdom, p.2.

³⁴ I. C. J. Advisory opinion on the “Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory” reproduced as G. A. doc. A/ES-10/273.

20. On 8 December 2003, the General Assembly adopted resolution ES-10/14, by which an advisory opinion from the International Court of Justice (ICJ) was requested regarding the legal consequences of the construction of the wall in the Occupied Palestinian Territory. During the consideration of this item by the ICJ, jurisdictional questions were raised. Israel alleged that the General Assembly had acted *ultra vires* under the Charter in adopting the resolution because it was not in accordance with Article 12, paragraph 1.³⁵ However, the Court concluded that a “[a] request for an advisory opinion is not in itself a ‘recommendation’ by the General Assembly ‘with regard to [a] dispute or situation.’”³⁶ Furthermore, the Court emphasized that Article 24 of the Charter refers to the Security Council’s “primary responsibility for the maintenance of international peace and security”, but not necessarily exclusive competence. The Court took note of the evolving interpretation of Article 12 and brought attention to the increasing tendency “for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security,” with each organ focusing on different aspects of the matter.³⁷ This practice was consistent with Article 12, paragraph 1, of the Charter. The Court was of the view that “the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1, of the Charter”, and that the General Assembly acted within its competence.³⁸

**** F. Question of requests by the Security Council to the General Assembly in accordance with the provision on Article 12(1)**

³⁵ *Ibid.* para. 24.

³⁶ *Ibid.* para. 25.

³⁷ *Ibid.* para. 27.

³⁸ *Ibid.* para. 28.