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**ARTICLE 96**

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## **ARTICLE 96 (Supplement 10)**

### **TEXT OF ARTICLE 96**

1. The General Assembly 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 advisory opinions of the Court on legal questions arising within the scope of their activities.

### **INTRODUCTORY NOTE**

1. In general, the structure of the present study follows that of the corresponding study of this article in Repertory Supplement No. 9. The major headings of the study with their subheadings have been retained, except that some subheadings have been added or modified where necessary.

2. The advisory opinion on the accordance with international law of the unilateral declaration of independence in respect of Kosovo was requested on 8 October 2008, but an opinion was not rendered during the period under review. Therefore, this supplement only contains information concerning request for the advisory opinion.

### **I. GENERAL SURVEY**

3. During the period under review, no additional organ of the United Nations and no additional specialized agency were authorized by the General Assembly to request advisory opinions of the International Court of Justice.

4. During the period under review, two advisory opinions were requested of the International Court of Justice. As of 31 December 2009, one advisory opinion had been delivered; the second was still *pendente litis*.

5. On 8 December 2003, the General Assembly of the United Nations requested an advisory

opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>1</sup>

6. The International Court of Justice rendered its Advisory Opinion on 9 July 2004.<sup>2</sup>

7. On 8 October 2008, the General Assembly of the United Nations requested the International Court of Justice to render an advisory opinion on the accordance with international law of the unilateral declaration of independence in respect of Kosovo.<sup>3</sup>

8. As at 31 December 2009, the Court had not yet delivered its advisory opinion on the above request.

9. As of the rendering, on 8 July 1996, of the Court's advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*,<sup>4</sup> countless General Assembly resolutions, issued during the period under review, have followed-up on the opinion. As the Court stated that "there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control"<sup>5</sup>, the General Assembly and member States have renewed their commitment to the Court's findings and have informed the efforts and measures taken in order to implement the advisory opinion.

## II. ANALYTICAL SUMMARY OF PRACTICE

### A. Authorization to request advisory opinions

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<sup>1</sup> GA/RES/ES-10/14.

<sup>2</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 136.

<sup>3</sup> GA/RES/63/3.

<sup>4</sup> For information regarding the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, see Supplement no.9, volume VI of the Repertory of Practice of United Nations Organs.

<sup>5</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 267, paragraph 105 (F).

10. During the period under review no additional organ of the United Nations or specialized agency was authorized by the General Assembly to request advisory opinions of the Court.<sup>6</sup>

## **B. Requests for advisory opinions**

### **1. SCOPE OF POWER OF THE ORGANS TO REQUEST ADVISORY OPINIONS OF THE COURT**

11. For the first time since the establishment of the Court, the Emergency Special Session of the General Assembly requested an advisory opinion of the Court in accordance with Article 96, paragraph 2 of the Charter of the United Nations, in the case concerning the *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*.

12. In the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, the Court observed that Article 65, paragraph 1 of the Statute of the International Court of Justice and Article 96, paragraph 1 of the Charter of the United Nations set out the power of the General Assembly of the United Nations to request advisory opinions.

13. The Court also stated that the General Assembly did not exceed its competence while requesting the Advisory Opinion. Albeit there was a contention, by Israel, that the General Assembly acted *ultra vires* under Article 12, paragraph 1 of the Charter, given the active engagement of the Security Council with the situation in the Middle East, the Court decided that the General Assembly, in adopting the resolution seeking an advisory opinion from the Court, did not contravene the provisions of Article 12, paragraph 1 of the Charter. The Court concluded that the General Assembly did not exceed its competence by submitting that request.<sup>7</sup>

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<sup>6</sup> See the list of organs of the United Nations and specialized agencies authorized by the General Assembly to request advisory opinions of the Court as at 31 December 2009 in the Report of the International Court of Justice, 1 August 2009-31 July 2010, pp. 12-13.

<sup>7</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, pp. 148 – 150, paragraphs 24 – 28.

14. The Court also affirmed that the request for opinion adopted by the Tenth Emergency Special Session of the General Assembly, convened pursuant to resolution 377 A (V), fulfilled the essential conditions set by the aforesaid resolution and attested the regularity of General Assembly's procedure.<sup>8</sup>

## 2. PURPOSE OF THE REQUESTS

15. In the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, the Court observed that the object of the request is to “obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions.”<sup>9</sup>

## 3. EFFECT OF DISPUTES BETWEEN PARTIES

16. In the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, the Court defended that the General Assembly's request cannot be regarded as only a bilateral matter between Israel and Palestine. In that sense, the Court stated that “given the powers and responsibilities of the United Nations in questions relating to the international peace and security, it is the Court's view that the Construction of the wall must me deemed to be directly of concern to the United Nations.”<sup>10</sup>

## 4. POSITIONS OF THE STATES CONCERNED

17. In the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, the Court acknowledged that the main parties involved,

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<sup>8</sup> Ibid., pp. 150 – 152, paragraphs 29 – 35.

<sup>9</sup> Ibid., p. 159, paragraph 50.

<sup>10</sup> Ibid., pp. 158 – 159, paragraph 49.

namely Israel and Palestine, have “expressed radically divergent views”<sup>11</sup> on the matter under analysis by the Court. Nevertheless, as noted by the Court in a previous advisory opinion,<sup>12</sup> almost all advisory proceedings have been marked by differences of view on legal issues. Furthermore, the Court considered that the question under analysis was of concern to the United Nations and was much broader than a bilateral dispute. Therefore, the Court came to the conclusion that it “does not consider that to give an opinion would have the effect of circumventing the principle of consent to judicial settlement, and the Court accordingly cannot, in the exercise of its discretion, decline to give an opinion on that ground.”<sup>13</sup>

## \*\* 5. OBLIGATION TO SUBMIT LEGAL QUESTIONS TO THE COURT

### 6. DISCRETIONARY POWER OF THE COURT TO EXERCISE ITS JURISDICTION

18. In the advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, the Court analyzed the arguments made with the intent to contend that the Court should decline to exercise its jurisdiction because of the presence of specific aspects of the General Assembly’s request that “would render the exercise of the Court’s jurisdiction improper and inconsistent with the Court’s judicial function.”<sup>14</sup>

19. The Court recalled that Article 65, paragraph 1, of its Statute “should be interpreted to mean that the Court retains a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met.”<sup>15</sup> The Court defended, however, that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused”.<sup>16</sup> Therefore, the Court came to the conclusion that

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<sup>11</sup> Ibid., p. 158, paragraph 48

<sup>12</sup> Legal consequences for States of the Continued presence of South Africa in Namibia (South west Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p.24, paragraph 34.

<sup>13</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 159, paragraph 50.

<sup>14</sup> Ibid., p. 156, paragraph 43

<sup>15</sup> Ibid., p. 156, paragraph 44.

<sup>16</sup> Ibid. See also, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory

“given its responsibilities as the ‘principal judicial organ of the United Nations’<sup>17</sup>, the Court should in principle not decline to give an advisory opinion, and only “compelling reasons” should lead the Court to do so.”<sup>18</sup>

20. Continuing on the issue of its discretionary power to exercise jurisdiction, the Court stated that although Israel has not consented to the exercise of that jurisdiction and the question posed before the Court concerns a contentious matter between Israel and Palestine, “the 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.”<sup>19</sup>

21. The Court also contended that it could not regard the factor that an advisory opinion given by the Court could impede a political negotiated solution to the Israeli-Palestinian conflict and, more specifically, undermine the negotiating framework endorsed by a Security Council Resolution.<sup>20</sup> The Court found that it was not clear what influence its opinion “might have on those negotiations: participants in the present proceedings have expressed differing views in this regard.”<sup>21</sup>

22. The Court also refuted the argument that it should decline to exercise its jurisdiction because it does not have “at its disposal the requisite facts and evidence to enable it to reach its conclusions.”<sup>22</sup> The Court pointed out that it had before it “sufficient information and evidence to enable it to give the advisory opinion requested by the General Assembly. Moreover, the circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task.”<sup>23</sup>

23. Addressing the argument on the usefulness of an advisory opinion, the Court called

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Opinion, I. C. J. Reports 1950, p. 71.

<sup>17</sup> Article 92 of the Charter of the United Nations.

<sup>18</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 156, paragraph 44.

<sup>19</sup> Ibid., pp. 157 – 158, paragraphs 46 – 47; see also paragraphs 16 and 17 above.

<sup>20</sup> Security Council Resolution 1515 (2003).

<sup>21</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 160, paragraph 53.

<sup>22</sup> Ibid., pp. 160 – 162, paragraphs 55 – 57.

<sup>23</sup> Ibid., p. 162, paragraph 58.

attention to its response in the *Legality of the Threat or Use of Nuclear Weapons* opinion, stating that “it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.”<sup>24</sup> The Court also suggested that some utility may be derived from its pronouncements, observing that the General Assembly had “not yet determined all the possible consequences of its own resolution,” and that the “Court’s task would be to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly -- and the Security Council -- may then draw conclusions from the Court’s findings.”<sup>25</sup>

24. The Court thus concluded that it had jurisdiction to give an opinion on the question put to it by the General Assembly and that there was no compelling reason for it to use its discretionary power not to give that opinion.<sup>26</sup>

## 7. FORMULATION OF QUESTIONS SUBMITTED TO THE COURT

### (i) Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory

25. On 8 December 2003, at the 23<sup>rd</sup> meeting of the Resumed Tenth Emergency Special Session, the General Assembly of the United Nations adopted a resolution<sup>27</sup>, by a recorded vote of 90 in favor to 8 against<sup>28</sup> with 74 abstentions, in which it requested the International Court of Justice to urgently render an advisory opinion on the following question:

“What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly

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<sup>24</sup> Ibid., p. 163, paragraph 61, citing *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 237, paragraph 16.

<sup>25</sup> Ibid., p. 163, paragraph 62.

<sup>26</sup> Ibid., p. 164, paragraph 65.

<sup>27</sup> GA/RES/ES-10/14.

<sup>28</sup> Namely: Australia, Ethiopia, Federated States of Micronesia, Israel, Marshall Islands, Nauru, Palau, United States. General Assembly Plenary. Tenth Emergency Special Session. 23<sup>rd</sup> Meeting Press Release GA/10216.

resolutions.”

(ii) Accordance with international law of the unilateral declaration of independence in respect of Kosovo

26. In the above request for advisory opinion, the following question was formulated in a draft resolution<sup>29</sup> presented by Serbia at the Sixty-third session of the General Assembly, under the agenda item 71:

“Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”

27. On 8 October 2008 the United Nations General Assembly adopted, at the 22nd meeting of its Sixty-third Session, resolution 63/3<sup>30</sup>, by a recorded vote<sup>31</sup> of 77 in favor to 6 against<sup>32</sup> with 74 abstentions. By the Resolution, the General Assembly decided, pursuant to Article 65 of the Statute of the Court, to request the International Court of Justice to render an advisory opinion on the legality of Kosovo’s declaration of independence.

## 8. FORWARDING OF REQUESTS TO THE COURT

(i) Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory

28. On 10 December 2003, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the Tenth Emergency Special Session of the General Assembly to submit the question set forth in its resolution<sup>33</sup> adopted on 8 December 2003.

(ii) Accordance with international law of the unilateral declaration of independence in respect of Kosovo

29. In the above request for an advisory opinion, the Secretary-General of the United Nations

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<sup>29</sup> GA/63/L.2

<sup>30</sup> GA/RES/63/3

<sup>31</sup> GA/63/PV.22

<sup>32</sup> Namely: Albania, Marshall Islands, Federated States of Micronesia, Nauru, Palau, United States of America. GA/63/PV.22 p. 10

<sup>33</sup> GA/RES/ES-10/14

officially communicated to the Court, by a letter dated 9 October 2008, the decision taken by the General Assembly to submit the question for an advisory opinion and indicated that pursuant to Article 65, paragraph 2, of the Statute, all documents likely to throw light upon the question would be transmitted to the Court as soon as possible.

## 9. WRITTEN AND ORAL STATEMENTS

### (i) Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory

30. By an Order of 19 December 2003, the Court decided that the United Nations and its Member States were likely, in accordance with Article 66, paragraph 2, of the Statute, to be able to furnish information on all aspects raised by the question submitted to the Court for an advisory opinion and fixed 30 January 2004 as the time-limit within which written statements might be submitted to it on the question in accordance with Article 66, paragraph 4, of the Statute.

31. By the same Order, the Court further decided that Palestine might also submit a written statement on the question within the above time-limit. The Court decided:

“that, in light of General Assembly resolution<sup>34</sup> and the report of the Secretary-General transmitted to the Court with the request, and taking into account the fact that the General Assembly has granted Palestine a special status of observer and that the latter is co-sponsor of the draft resolution requesting the advisory opinion, Palestine may also submit to the Court a written statement on the question within the above time-limit”.<sup>35</sup>

32. By the aforesaid Order, the Court also decided, in accordance with Article 105, paragraph 4 of the Rules of Court, to hold public hearings during which oral statements and comments might be presented to it by the United Nations and its Member States, regardless of whether or not they had submitted written statements and fixed 23 February 2004 as the date for the opening of the said hearings. By the same Order, the Court decided that, for the reasons set out above, Palestine might also take part in the hearings.

33. Ruling on requests submitted subsequently by the League of Arab States and the Organization of the Islamic Conference, the Court decided, in accordance with Article 66 of its

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<sup>34</sup> GA/RES/ES-10/14.

<sup>35</sup> Report of the International Court of Justice, 1 August 2003-31 July 2004, pp. 43-44, paragraph 240.

Statute, that both international organizations were likely to be able to furnish information on the question submitted to the Court, and that consequently they might for that purpose submit written statements within the time-limit fixed by the Court in its Order of 19 December 2003 and take part in the hearings.

34. Within the time-limit fixed by the Court for that purpose, 44 States, Palestine and the Secretary-General of the United Nations<sup>36</sup> presented written submissions to the Court. The Secretary-General of the United Nations also communicated to the Court a dossier of documents likely to throw light upon the question.

35. In addition, three Organizations<sup>37</sup> also submitted written comments to the Court within the relevant time limit. The Court decided<sup>38</sup>, pursuant to Article 66 of its Statute, that the League of Arab States and the Organization of the Islamic Conference were likely to be able to furnish information on the question; and that accordingly they might submit written statements within the same time-limit fixed by the Court and participate in the oral proceedings.

36. In the same case, oral statements were made before the Court by 12 States and Palestine<sup>39</sup> and the two Organizations<sup>40</sup>, during the oral hearings held from 23 to 25 February 2004.

(ii) Accordance with international law of the unilateral declaration of independence in respect of Kosovo

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<sup>36</sup>Namely (in order of receipt by the Court): Guinea, Saudi Arabia, Egypt, Cameroon, the Russian Federation, Australia, Jordan, Kuwait, Lebanon, Canada, Syria, Switzerland, Israel, Yemen, United States of America, Morocco, Indonesia, France, Italy, the Sudan, South Africa, Germany, Japan, Norway, United Kingdom, Pakistan, Czech Republic, Greece, Ireland, Cyprus, Brazil, Namibia, Malta, Malaysia, the Netherlands, Cuba, Sweden, Spain, Belgium, Palau, Federated States of Micronesia, Marshall Islands, Senegal and the Democratic People's Republic of Korea. Report of the International Court of Justice, 1 August 2003-31 July 2004, p. 44, paragraph 244.

<sup>37</sup>Namely: League of Arab States, Organization of the Islamic Conference, Ireland (on behalf of the European Union). Report of the International Court of Justice, 1 August 2003-31 July 2004, p. 44, paragraph 244.

<sup>38</sup> Report of the International Court of Justice, 1 August 2003-31 July 2004, p. 44, paragraph 241.

<sup>39</sup>Namely: South Africa, Algeria, Saudi Arabia, Bangladesh, Belize, Cuba, Indonesia, Jordan, Madagascar, Malaysia, Senegal and the Sudan. Report of the International Court of Justice, 1 August 2003-31 July 2004, p. 44, paragraph 245.

<sup>40</sup> Namely: the League of Arab States and the Organization of the Islamic Conference. Report of the International Court of Justice, 1 August 2003-31 July 2004, p. 44, paragraph 245.

37. By an Order of 17 October 2008, the Court decided that the United Nations and its Member States were considered likely to be able to furnish information on the question submitted to the Court. It fixed 17 April 2009 as the time-limit within which written statements on the question could be presented to the Court and 17 July 2009 as the time-limit within which States and organizations having presented written statements could submit written comments on the other statements.

38. By the same order, the Court also decided that, taking into account that the unilateral declaration of independence of 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo is the subject of the question submitted to the Court for an advisory opinion, the authors of the above Declaration were considered likely to be able to furnish information on the question and were invited to make written contributions to the Court within the time-limits.

39. The Secretary-General of the United Nations, on 30 January 2009, communicated to the Court a dossier of documents, which he considered would throw light upon the question.

40. Thirty-five States<sup>41</sup> filed written statements within the time-limit fixed by the Court. The Provisional Institutions of Self-Government of Kosovo, authors of the unilateral declaration of independence, filed a written contribution within the same time-limit. The Court agreed to the filing after the expiry of the relevant time-limit of a written statement by the Bolivarian Republic of Venezuela, which submitted its statement on 24 April 2009.

41. Fourteen UN Member States<sup>42</sup> submitted written comments on the other written statements within the time-limit fixed by the Court. The authors of the unilateral declaration of independence submitted a written contribution within the same time-limit.

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<sup>41</sup> Namely (in order of receipt by the Court): Czech Republic, France, Cyprus, China, Switzerland, Romania, Albania, Austria, Egypt, Germany, Slovakia, Russian Federation, Finland, Poland, Luxembourg, Libyan Arab Jamahiriya, United Kingdom, United States of America, Serbia, Spain, Islamic Republic of Iran, Estonia, Norway, Netherlands, Slovenia, Latvia, Japan, Brazil, Ireland, Denmark, Argentina, Azerbaijan, Maldives, Sierra Leone and Bolivia. Report of the International Court of Justice, 1 August 2008-31 July 2009, p. 62 paragraph 229.

<sup>42</sup> Namely (in order of receipt by the Court): France, Norway, Cyprus, Serbia, Argentina, Germany, Netherlands, Albania, Slovenia, Switzerland, Bolivia, United Kingdom, United States of America and Spain. Report of the International Court of Justice, 1 August 2008-31 July 2009, p. 62 paragraph 230.

42. Public hearings were held from 1 to 11 December 2009. Twenty-eight States,<sup>43</sup> as well as the authors of the unilateral declaration of independence, participated in the oral proceedings before the Court.

43. As of 31 December 2009, the Court had not yet delivered its advisory opinion on the above request.

## 10. CONSIDERATION OF THE NATURE AND TYPE OF QUESTIONS SUBMITTED TO THE COURT

### (a) The Political or legal nature of the question

44. In the advisory opinion concerning *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, the Court observed that the question submitted by the General Assembly was a question of a legal character. According to the Court, the question was “directed to the legal consequence arising from a given factual situation considering the rules and principles of international law, including the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and relevant Security Council and General Assembly resolutions.”<sup>44</sup> The question submitted by the General Assembly has thus “been framed in terms of law and raise[s] problems of international law.”<sup>45</sup>

45. The Court did not refute the political character of the question posed. It did, however, affirm that the fact that a legal question also has political aspects “does not suffice to deprive it of its character as a ‘legal question’ and to ‘deprive the Court of a competence expressly conferred on it by its Statute’, and the Court cannot refuse to admit the legal character of a question which

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<sup>43</sup> Namely (in alphabetical order): Albania, Argentina, Austria, Azerbaijan, Belarus, Bolivia, Brazil, Bulgaria, Burundi, China, Croatia, Cyprus, Denmark, Finland, France, Germany, Jordan, Netherlands, Norway, Romania, Russian Federation, Saudi Arabia, Serbia, Spain, United Kingdom, United States of America, Venezuela and Viet Nam. Report of the International Court of Justice, 1 August 2009-31 July 2010, p. 49 paragraph 247.

<sup>44</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, p. 153, paragraph 37.

<sup>45</sup> *Ibid.*

invites it to discharge an essentially judicial task.”<sup>46</sup>

**(b) Important points of law**

46. In the advisory opinion concerning *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, the Court found, by fourteen votes to one<sup>47</sup>, that the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, was contrary to international law.<sup>48</sup>

47. In determining the rules and principles of international law which were relevant in accessing the legality of the measures taken by Israel, the Court first recalled Article 2, paragraph 4, of the United Nations Charter, which provides that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of' any State, or in any other manner inconsistent with the Purposes of the United Nations." The Court also evoked the 'Declaration on Principles of International Law concerning Friendly relations and Co-operation among States'<sup>49</sup>, in which the Assembly stated that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal." The Court stated that the principles as to use of force and the illegality of territorial acquisition resulting from the threat or use of force incorporated in the Charter reflected customary international law.<sup>50</sup>

48. The Court recalled that the principle of self-determination of peoples had been enshrined in the United Nations Charter and reaffirmed by the General Assembly in its resolution 2625 (XXV). Moreover, the Court referred to both the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights, which reaffirmed the right to self-determination. The Court also recalled that previous case law emphasized that "current

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<sup>46</sup> Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996 (I), p. 234, paragraph 13

<sup>47</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 201, paragraph 163 (3) A.

<sup>48</sup> Ibid.

<sup>49</sup> GA/ Res/2625 (XXV)

<sup>50</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 171, paragraphs 86 - 87.

developments in ‘international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all [such territories]’, and that the right of peoples to self-determination is today a right *erga omnes*.”<sup>51</sup>

49. In addressing the consequences of the advisory opinion for the parties, the Court opined that Israel had the obligation to make reparations for the damage caused to all the natural or legal persons concerned. The Court recalled the established jurisprudence that “the essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”<sup>52</sup>

50 The Court further observed that the obligations violated by Israel include certain obligations *erga omnes* and stated that “such obligations are by their very nature the concern of all States” and, “in view of the importance of the rights involved, all States can be held to have a legal interest in their protection.”<sup>53</sup> In the Court’s view, the obligations *erga omnes* violated by Israel were the obligation to respect the right of the Palestinian people to self-determination and certain obligations under international humanitarian law.

51. Regarding the affirmation, by Israel, that the construction of the Barrier is consistent with its inherent right to self-defense established by Article 51 of the Charter of the United Nations, and Security Council resolutions 1368 (2001) and 1373 (2001), the Court noted that the inherent right of self-defense is recognizable in the case of armed attack by one State against another State. However, the Court observed that since the attacks were not imputable to a foreign State, the situation is thus different from that contemplated by Security Council resolutions mentioned above, and therefore Israel could not invoke those resolutions or Article 51 of the Charter.<sup>54</sup>

52. The Court also considered whether Israel could rely on a state of necessity in order to preclude the wrongfulness of the construction of the wall. In this regard, the Court observed that

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<sup>51</sup> Ibid., p. 171, paragraph 88.

<sup>52</sup> Ibid., p. 198, paragraph 152.

<sup>53</sup> Ibid., p. 199, paragraph. 155.

<sup>54</sup> Ibid., p. 194, paragraph. 138

“the state of necessity is a ground recognized by customary international law that can only be invoked under certain strictly defined conditions which must be cumulatively satisfied.”<sup>55</sup> In the case before it, the Court was not convinced that the construction of the wall met those conditions.

### **(c) Interpretation of the Charter of the United Nations**

53. In the advisory opinion concerning *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, points relating to the interpretation of provisions of the Charter of the United Nations are covered in the sub section (b) above.

### **(d) Interpretation of treaties**

54. In the advisory opinion concerning *Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory*, the Court determined that the principle of self-determination was relevant in accessing the legality of the measures taken by Israel. The Court noted that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, on their Article 1, “reaffirm the right of all peoples to self-determination, and lay upon the States parties the obligation to promote the realization of that right and to respect it, in conformity with the provisions of the United Nations Charter.”<sup>56</sup>

55. Still regarding self-determination, the Court recalled that a great many rules of humanitarian law “constitute intransgressible principles of international customary law”<sup>57</sup> and observed that they incorporate obligations which are essentially of an *erga omnes* character.

56. The Court further noted the obligation of States parties to the Fourth Geneva Convention<sup>58</sup> to “ensure respect” for its provisions. Therefore, the Court established that “all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United

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<sup>55</sup> Ibid., p. 194, paragraph. 140

<sup>56</sup> Ibid., pp. 171 – 172, paragraph 88

<sup>57</sup> I.C.J. Reports 1996 (I), p. 257, paragraph 79

<sup>58</sup> Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949

Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.”<sup>59</sup>

57. On the question of the relationship between international humanitarian law and human rights law, the Court recalled that “the protection of the International Covenant on Civil and Political Rights does not cease in time of war.”<sup>60</sup> More generally, “it considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.”<sup>61</sup>

58. The Court then considered questions relating to “whether the two international Covenants and the Convention on the Rights of the Child are applicable only on the territories of the States parties thereto or whether they are also applicable outside those territories and, if so, in what circumstances.”<sup>62</sup> The Court concluded that, after an examination of the two international Covenants, in the light of the relevant *travaux préparatoires* and an analysis of the position of Israel in communications to the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, “those instruments are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”<sup>63</sup>

## \*\* 11. EFFECT OF REQUESTS FOR ADVISORY OPINIONS

## \*\* 12. PRIOR REFERENCES TO THE BINDING EFFECTS OF ADVISORY OPINIONS

## 13. EFFECT GIVEN TO ADVISORY OPINIONS OF THE COURT

59. On July 20, 2004, at the Tenth Emergency Session, the General Assembly received and acknowledged the Advisory Opinion concerning *Legal Consequences of the Construction of a*

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<sup>59</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 201, paragraph 163 (3) D.

<sup>60</sup> Ibid., p. 178, paragraph 105.

<sup>61</sup> Ibid., p.178, paragraph 106.

<sup>62</sup> Ibid., p.178, paragraph 107.

<sup>63</sup> Ibid., p.180, paragraph 111.

*Wall in the occupied Palestinian Territory*, rendered on 9 July 2004. The Assembly adopted a resolution<sup>64</sup> by a vote of 150 in favor, 6 opposed, and 10 abstentions. Through the resolution, the General Assembly demanded that Israel, the occupying Power, comply with its legal obligations as mentioned in the Advisory Opinion. The resolution also called upon all States Members of the United Nations to comply with their legal obligations as mentioned in the Advisory Opinion. Additionally, by means of the same resolution, the General Assembly:

“4. *Request[ed]* the Secretary-General to establish a register of damage caused to all natural or legal persons concerned in connection with paragraphs 152 and 153 of the advisory opinion;

5. *Decide[d]* to reconvene to assess the implementation of the present resolution, with the aim of ending the illegal situation resulting from the construction of the wall and its associated regime in the Occupied Palestinian Territory, including East Jerusalem;

6. *Call[ed] upon* both the Government of Israel and the Palestinian Authority to immediately implement their obligations under the road map, in cooperation with the Quartet, as endorsed by Security Council resolution 1515 (2003), to achieve the vision of two States living side by side in peace and security, and emphasizes that both Israel and the Palestinian Authority are under an obligation scrupulously to observe the rules of international humanitarian law;

7. *Call[ed] upon* all States parties to the Fourth Geneva Convention to ensure respect by Israel for the Convention, and invites Switzerland, in its capacity as the depositary of the Geneva Conventions, to conduct consultations and to report to the General Assembly on the matter, including with regard to the possibility of resuming the Conference of High Contracting Parties to the Fourth Geneva Convention;”<sup>65</sup>

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<sup>64</sup> GA/RES/ES-10/15.

<sup>65</sup> *Ibid.*

