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The ICJ Advisory Opinion on *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*: The Powers of the General Assembly and the Security Council in Ensuring Peace and Security

Replies and Comments

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Focus

United Nations Charter 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."

Article 14

"Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations."

On 8 December 2002, the General Assembly of the United Nations requested the International Court of Justice for an advisory opinion. Several States as well as individuals claimed that "the adoption by the General Assembly of resolution ES-10/14 was *ultra vires* as not in accordance with Article 12" and, hence, the ICJ should not examine the matter. It had indeed been contended that by requesting an opinion the General Assembly was going around the veto of one of the permanent members of the Security Council and was, thereby, acting in contravention of several provisions of the United Nations Charter.

This controversial issue was discussed at length in the recent Advisory Opinion. Although it is true that the General Assembly rarely expresses its opinion on issues relating to situations of international and security and prefers the Security Council to deal with such situations, the General Assembly is, according to article 11 of the UN Charter, allowed to manifest its own views. Moreover, under article 14 the General Assembly is entitled *inter alia* to "recommend measures for the peaceful adjustment" (ICJ, *Certain Expenses of the United Nations*, 20 July 1962, Advisory Opinion, p. 163).

Yet, the Charter also regulates the separation of "powers" between the Security Council and the General Assembly. First, according to article 24 of the UN Charter, primary responsibility regarding the maintenance of peace and security lies in the hands of the Security Council. Yet, as the International Court of Justice notes "primary" is not tantamount to "exclusive" and, hence, the General Assembly is still allowed to express its opinion, should it deem it necessary.

Second, the right of the General Assembly to give its opinion is limited by article 14 in conjunction with article 12; for, they provide that the General Assembly cannot make any recommendations on a matter that is already been dealt with by the Security Council, unless the Security Council requests it to do so. Whereas in the past it had been interpreted as a prohibition for the General Assembly to be involved in any issue already on the agenda of the Security Council, "this interpretation [of the separation of powers between the General Assembly and the Security Council] has evolved subsequently" (ICJ, *the legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion, para. 27). In particular, the ICJ recognises that the Security Council and the General Assembly have, on numerous occasions, dealt simultaneously with the same situations. Resolutions of the General Assembly were often complementary to those of the Security Council, if not parallel (e.g. the war between Iran and Iraq) inasmuch as they repeated Security Council resolutions. In some instances the resolutions of the General Assembly were of pre-emptive nature (see e.g. resolution on Southern Rhodesia). In fact, as correctly described by the ICJ, the General Assembly often takes a broader view of the situation, taking into account economic, social, and humanitarian aspects, while the Security Council focuses solely on aspects pertaining to international peace and security.

Further, article 14 may be deemed as a more accurate description of the powers with which article 10 endows the General Assembly. It re-emphasises the potentially wide jurisdiction of the General Assembly with specific reference to international peace and security. It is contended that article 14 provides the General Assembly access to a much wider range of situations relating to the international order than the Security Council inasmuch as the Security Council can only be seized in cases where the international peace and security is threatened.

Third, article 12 is another attempt to clarify the relationship between the General Assembly and the Security Council. This means that the General Assembly is allowed to act to restore peace and security, a power concurrent with that of the Security Council in article 39. Yet, it is only a recommendatory power and any coercive measures under Chapter VII require a mandatory decision of the Security Council. This interpretation is supported to a limited extent by the opinion of the International Court of Justice in the *Expenses* case.

The International Court of Justice hence "concludes that by submitting that request the General Assembly did not exceed its competence" and "did not contravene the provisions of Article 12, paragraph 1" (ICJ, *the legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion, para. 28). In effect, the ICJ reasserted a certain power in the General Assembly, that, at least, of requesting an advisory opinion on a matter that is already on the agenda of the Security Council but that is not handled the way the General Assembly would like to see it being treated.

Responsibility

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