Legal consequences of the construction of a wall in the Occupied Palestinian Territory: request for an advisory opinion

An analysis of issues concerning competence and procedure

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Introduction - the issues to be examined:
The International Court of Justice is the principal judicial organ of the United Nations. Its constitutive instrument – the Statute of the Court – was based closely on that of the Permanent Court of International Justice which functioned during the inter-war period and was loosely related to the League of Nations.

The Court enjoys two different forms of jurisdiction. On the one hand, it exercises a contentious jurisdiction in disputes between States. Contentious cases result in judgments which are binding on the parties to the case, and which cannot be appealed. There is no “higher” international court which can re-examine the validity of a judgment delivered by the International Court. Unlike national courts, however, the International Court does not have an “automatic” jurisdiction over the cases it hears. The exercise of its contentious jurisdiction depends on the consent of the States parties to the dispute that it should hear the case. This is specified in Article 36.1 of the Court’s Statute, which provides:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters especially provided for in the Charter of the United Nations or in treaties and conventions in force.

This is known as the doctrine of consensual jurisdiction.

The Court also has an advisory jurisdiction whose function is to provide legal advice to international organisations. States cannot request an advisory opinion: this power is reserved to United Nations organs and bodies which have been authorised to do so, essentially the Security Council, General Assembly, and Economic and Social Council, and most of the specialised agencies which form part of the UN family of organisations – for instance, the World Health Organisation. The Court’s competence to deliver an advisory opinion is based in Article 65.1 of its Statute, which provides:

The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.

The Court is not under an obligation to deliver an opinion which has been validly requested: it can refuse to do so on the grounds of judicial propriety.

Further, advisory opinions are not binding. As Thirlway, an authoritative commentator on the International Court, has written:

The essence of an advisory opinion is that it is advisory, not determinative: it expresses the view of the Court as to the relevant international legal principles and rules, but does not oblige any State, nor even the body that asked for the opinion, to take or refrain from any action. The distinction, clear in theory, is less so in practice: if the Court advises, for example, that a certain obligation exists, the State upon which it is said to rest has not bound itself to accept the Court’s finding, but it will be in a weak position if it seeks to argue that the considered...
opinion of the Court does not represent a correct view of the law.\(^1\)

The Court sits in the Hague, and comprises fifteen judges of different nationalities in order that, as Article 9 of its Statute requires, the Court as a whole represents “the main forms of civilisation and...the principal legal systems of the world”. In principle, a judge is not required to withdraw from hearing a contentious case if the State of which he or she is a national is a litigant party. In order to dispel any notions of inequality that could arise if one litigant State had a national sitting as a judge in a case but the other litigant did not, Article 31 of the Statute provides that the latter can appoint a judge ad hoc of its own choosing. Judges ad hoc sit only in the case for which they have been appointed. In certain restricted circumstances, a State which has a special interest in the subject-matter of a question posed for an advisory opinion may be granted permission to appoint a judge ad hoc for the proceedings.

Israel objected strenuously to the General Assembly’s adoption of the resolution which requested an advisory opinion on “the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory”. Israel claimed that this was “illegal”. Press reports indicate that Israel is considering whether it should seek permission to appoint a judge ad hoc for the proceedings. It is also to be expected that Israel will attempt to impugn the validity of the proceedings in order to persuade the International Court that it should not deliver the opinion which has been requested.

After a brief account of the genesis of the request for the advisory opinion, and an exposition of the nature and function of advisory opinions, this paper attempts to anticipate the issues that Israel might raise:

- in the light of the Court’s jurisprudence, it considers whether Israel should be granted permission to appoint a judge ad hoc, concluding that this would not be consonant with the Court’s past practice;
- it then addresses Israel’s claim that the request was “illegal”. This can only mean that the General Assembly was incompetent to make this request, that it acted beyond its powers in doing so. This argument is difficult to sustain given the scope of the Assembly’s legitimate activities and concerns, which indicates that the Assembly was acting within its powers and thus that the Court has jurisdiction to entertain the request;
- the Court has discretion whether or not to deliver a requested opinion. It must be expected that Israel will try to persuade the Court that it should exercise its discretion to reject the request. The Court’s jurisprudence has established that the Court will not refuse a request unless there are “compelling reasons” for it to do so. In the present case, Israel might argue that such “compelling reasons” exist: namely, that if the Court were to deliver the opinion would be tantamount to deciding an existing legal dispute Israel has with another State or States, thus circumventing the principle of consensual jurisdiction applicable to contentious cases because Israel has objected to these proceedings. Given the terms of the question posed by the General Assembly, this argument should fail. The question is cast in wider terms than the legality of the wall Israel is constructing as it is aimed at gaining advice for the Assembly to inform its future consideration of this issue; and
- given statements made in the General Assembly by some States when the resolution requesting the opinion was adopted, it might be argued that the Court should refuse to deliver

the opinion because it raises only political issues, or risks the politicisation of the Court. These arguments are irrelevant to the exercise of the Court’s discretion: similar arguments have been consistently rejected in the past.

It should be expected that the International Court will proceed to examine the merits of the question posed and deliver the opinion requested by the General Assembly. This paper does not consider the merits issues, but focuses solely on matters of the Court’s competence and procedure. In a sense these are logically prior issues: if the Court lacks jurisdiction, or declines to entertain the case, then regardless of the substantive worth of the arguments on the merits of the case, they are ultimately irrelevant as the Court will decline to decide them.

The request for the advisory opinion:
On 8 December 2003, the General Assembly of the United Nations adopted resolution ES-10/14\(^2\), in which it asked the International Court of Justice to give an urgent advisory opinion. The question this resolution posed to the Court was:

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 resolutions?

The General Assembly had designated this to be an urgent request. In its Order dated 19 December 2003 acknowledging receipt of the request\(^3\), and determining the procedure to be followed, the Court implemented Article 103 of its 1978 Rules of Court, as amended in 2000, which provides:

When the body authorised by or in accordance with the Charter of the United Nations to request an advisory opinion informs the Court that its request necessitates an urgent answer, or the Court finds that an early answer would be desirable, the Court shall take all necessary steps to accelerate the procedure, and it shall convene as early as possible for the purpose of proceeding to a hearing and deliberation on the request.

Accordingly, the Court fixed 30 January 2004 as the time limit for the deposit of written statements by the United Nations and its Member States on the question submitted for opinion, and 23 February 2004 as the date for the opening of oral hearings on the question. The United Nations and its Member States may participate in the oral proceedings regardless of whether or not they have submitted written proceedings.

The 19 December 2003 Order contained a procedural innovation. The Court decided “in light of General Assembly resolution A/RES/ES-10/14 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” that Palestine was permitted to submit a written statement and participate in the oral hearings.

The adoption of resolution ES-10/14:
On 27 October 2003, the General Assembly adopted resolution ES-10/13\(^4\) which provided in part:

\(^2\)Available at http://domino.un.org/UNISPAL.NSF/0/e01202e716aceefe85256df300699b75?OpenDocument
Resolution ES-10/14 is also annexed to the Secretary-General’s communication of the request for the advisory opinion to the Court, and is available on the Court’s website – www.icj-cij.org

\(^3\)Available on the Court’s website – www.icj-cij.org

\(^4\)Available at http://domino.un.org/unispal.nsf/0/6da605bd43667fe185256dce00617927?OpenDocument
reiterating its opposition to settlement activities in the Occupied Territories and to any activities involving the confiscation of land, disruption of the livelihood of protected persons and the de facto annexation of land,

1. Demands that Israel stop and reverse the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, which is in departure from the Armistice Line of 1948 and is in contradiction to relevant provisions of international law;

Operative paragraph 3 requested the Secretary-General within one month to submit a report on compliance with this demand, upon receipt of which further action should be considered within the UN system. General Assembly resolution ES-10/14 requesting the advisory opinion was adopted following the submission of the Secretary-General’s report which concluded that “Israel is not in compliance with the Assembly’s demand that it stop and reverse the construction of the wall in the Occupied Palestinian Territory”.

The preamble to resolution ES-10/14 identified various principles of international law that the General Assembly thought relevant in determining the illegality of the wall. These included the principle of self-determination; the inadmissibility of the acquisition of territory through the use of force; the provisions of 1949 Geneva Convention IV and 1977 Additional Protocol I; the 1907 Hague Regulations; and relevant Security Council and General Assembly resolutions. It concluded in the preamble that:

Israel, the occupying Power, continues to refuse to comply with international law vis-à-vis its construction of the above-mentioned wall, with all its detrimental implications and consequences.

Some States, in explaining why they abstained in voting for resolution ES-10/14, alluded to this prior determination of legality. For instance, Singapore stated that “the Assembly in October had already made the determination that the wall was in violation of the 1949 Armistice Line. Posing the question might imply that the Assembly was not quite sure of its previous decision”. While regretting that Israel had not “complied with the General Assembly’s demand to halt and reverse the construction of the barrier”, the United Kingdom thought that “the Assembly [did not need] the Court’s legal advice in order to carry out its functions” and “the advisory opinion was unlikely to change the actual situation on the ground”. Further, the United Kingdom stated that it “had abstained on the vote requesting an advisory opinion from the ICJ because it was inappropriate to take such action without the consent of both parties”. Others thought the request improper on other grounds, for instance, Uganda stated that referring the issue to the International Court “would politicize that body”, and abstained from voting on the resolution. Similarly Switzerland thought it “inappropriate to bring a

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5Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, A/ES-10/248 (24 November 2003), para.28, appended to the Secretary-General’s communication of the request for an advisory opinion to the Court, dated 8 December 2003: available at www.icj-cij.org.

subject with highly political implications before the ICJ” In explaining its negative vote, the United States stated that referring “the issue to the ICJ risked politicization of the Court and did not advance peace efforts”. Israel, not surprisingly, opposed the request from the outset, declaring to the General Assembly that the “request for an advisory opinion constituted a harmful, divisive, illegal and diversionary target, which Israel would vote against”.

The nature of advisory opinions:
Advisory opinions do not constitute binding judgments although this is not expressly stated in the United Nations Charter or the Statute of the Court, nor for that matter in was it in the Covenant of the League of Nations or Statute of the Permanent Court. The non-binding nature of advisory opinions – which has been expressly affirmed by the International Court – was understood from the inception of the Permanent Court. At the initial session of the Court in 1922, when the members of the Court were drafting its first Rules of Procedure, this led Judge Moore to denounce the advisory function as incompatible with the Court’s judicial function. He argued:

A Court of Justice, whether national or international, is essentially a judicial body, whose function is to end disputes by deciding them. The maintenance of the character, reputation and usefulness of such a Court is inextricably bound up with the obligatory force and the effective performance of its decisions or judgments.

This view did not prevail, and the Court adopted “the essential principle that advisory procedure before a Court of Justice could not differ from judicial procedure”. Thus, in the Eastern Carelia advisory opinion, delivered the following year, the Permanent Court affirmed:

The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.

Issues regarding the proper exercise of the judicial function will undoubtedly arise in the Legal consequences of the construction of a wall in the occupied Palestinian Territory proceedings, principally in the guise of the propriety of the Court replying to the request.

The facility of the Permanent Court to deliver advisory opinions was first envisaged in Article 14 of the Covenant of the League of Nations, which provided:

The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or Assembly.

Initially the Statute of the Permanent Court contained no provisions regulating its advisory procedure – “The matter, implied from Article 14 of the Covenant, was initially left to the governance of the Court”. Schematic provisions to this end formed Articles 71-74 of the Court’s initial Rules of Procedure adopted in 1922. The Rules were elaborated in the light of experience, and this process culminated in the introduction of Articles 65-68 provisions regulating advisory procedure in the revised Statute of the Court which was adopted in 1929, but which did not enter into force until 1936. By then, however, the international situation had negated the possibility of recourse to advisory procedure by the League, and no opinions were delivered by the Court under its revised Statute.

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7For instance, in the Western Sahara advisory opinion, ICJ Reps, 1975, 12 at 24, para.31, the Court stated, “The Court’s reply is only of an advisory character: as such it has no binding force”.
8The question of advisory opinions: memorandum by Mr Moore, February 18th, 1922, PCIJ, Ser.D, No.2, 383.
9See Anzilotti, PCIJ, Ser.D, No.2 (add) 184 at 189.
10Status of Eastern Carelia: reply of the Court to the request for advisory opinion, PCIJ, Ser.B, No.5, 7 at 29. Judge Moore presumably concurred in this view as he is not identified as one of the judges who did not share the views of the majority in this case.
With the reconstruction of international institutions following World War II, the United Nations decided to replace the Permanent Court with the International Court, providing in Article 92 of the UN Charter that:

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

The provision in the UN Charter providing for advisory opinions differed from Article 14 of the Covenant. Article 96 extended the competence to request an opinion to organs other than the primary political organs, providing:

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 authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Paragraph 1 differs from Article 14 of the Covenant in that it refers to “an advisory opinion on any legal question” as opposed to “an advisory opinion upon any dispute or question”. It should be expected that the effect and possible implications of this change will feature in the *Legal consequences of the construction of a wall in the occupied Palestinian Territory proceedings*.

In the jurisprudence of the Permanent Court, a clear distinction was drawn between “disputes” and “questions”. The latter involved the request for an opinion “to obtain authoritative guidance on a question of a legal nature arising during the activities of the Council or the Assembly of the League of Nations”. An opinion on a “dispute”, on the other hand, bore upon a legal dispute actually pending between two or more States. Most advisory opinions delivered by the Permanent Court involved disputes.

Oda claims that, at the Dumbarton Oaks conference on international organisation which was held following World War II, the majority of delegates were inclined to confine the International Court’s advisory function to legal questions, rather than legal disputes which could be referred to the Court by the States involved as contentious cases with a view to obtain a binding judgment. Accordingly, he argues that the reference to “any dispute” as an object of the advisory function contained in Article 14 of the League Covenant was not retained in Article 96 of the UN Charter. He concludes that this differentiates the advisory function of the International Court from that of the Permanent Court.

**Judges ad hoc in advisory proceedings:**

The submission of inter-State disputes to the advisory competence of the Permanent Court caused it, in 1927, to amend Article 71 of its Rules of Procedure to provide for the application of Article 31 of the Statute to advisory opinion requests which placed before the Court “a question relating to an existing dispute between two or more States or members of the League of Nations”. Recognising that the Statute did not mention its advisory competence, but left its regulation entirely to the Court, in explaining the need for this Rule change, it was noted that:

The Court, in the exercise of this power, deliberately and advisedly assimilated its advisory procedure to its contentious procedure; and the results have abundantly justified its action...In reality, where there are in fact contending parties, the difference between contentious cases and advisory cases is only nominal.

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12Rosenne 1997 280.
13Former ICJ Judge Oda claims that nineteen out of twentyseven opinions delivered by the Permanent Court bore upon disputes – see Oda S, *The International Court of Justice viewed from the bench* (1976-1993), 244 Recueil des cours 9 (1993-VII) at 91.
14Oda 1993 93-94.
15PCIJ Ser.E, No.4, 72 at 76: a proposal for a similar amendment had been defeated the previous
Article 31 of the Statute has remained essentially unchanged in its successive versions. It provides for the appointment of judges ad hoc. Article 31 of the current Statute provides, in part:

1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.
2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as a judge...
3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.
4...
5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court.
6...

The rationale for judges ad hoc is to maintain equality between the parties in the composition of the Bench. It also reflects long-standing practice in international arbitration where it is normal for the litigant States to appoint nationals as arbiters.16

Despite the deletion of any reference to the notion of a “dispute” in Article 96 of the UN Charter, the Court's Rules of Procedure retained provisions which addressed the procedure to be followed in advisory opinion requests which bore upon inter-State disputes, including the possibility of appointing a judge ad hoc. Article 102 of the current (1978, as amended in 2000) Rules provides:

1. In the exercise of its advisory functions under Article 65 of the Statute, the Court shall apply, in addition to the provisions of Article 96 of the Charter and Chapter IV of the Statute, the provisions of the present Part of the Rules.
2. The Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable. For this purpose, it shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States.
3. When an advisory opinion is requested upon a legal question actually pending between two or more States, Article 31 of the Statute shall apply, as also the provisions of these Rules concerning the application of that Article.

Earlier versions of the Rules of the International Court contained provisions substantively identical to 1978 Rule 102.2-3; namely 1946 Rules 82.1 and 83, and 1972 Rules 87.1 and 89. These application of these Rules occurred in, respectively, in the Nambia (1971) and Western Sahara (1975) advisory opinions.

If a State requests permission to appoint a judge ad hoc in advisory proceedings, determination of this request becomes a matter of priority because it concerns the composition of the year, see PCIJ, Ser.D, No.2 (add) 184 et seq. Article 68 of the amended Statute of the Permanent Court, and that of the Statute of the present Court, allows for the assimilation of advisory to contentious procedure, providing:

In the exercise of its advisory functions the Court shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

16See, for instance, Rosenne 1997 1123 et seq; and specifically on equality as the reason for the introduction of judges ad hoc into advisory proceedings by the Permanent Court, see PCIJ, Ser.E, No.4, 75-76. There is a voluminous literature on judges ad hoc; the most extensive (but now dated) examination being Lachaume JF, Le juge «ad hoc», 70 Revue générale de droit international public 265 (1968). On judges ad hoc in advisory proceedings, see Jiménez de Aréchaga E, Judges ad hoc in advisory proceedings 31 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 679 (1971); and Mathy D, Un juge ad hoc en procédure consultative devant la Cour internationale de Justice, 12 Revue belge de droit international 528 (1976).
Court.\textsuperscript{17} It must be settled with finality before the opening of the oral proceedings by Order of the Court. In the Namibia proceedings, the Court refused to allow South Africa to appoint a judge \textit{ad hoc}, whereas in the Western Sahara proceedings, it allowed Morocco to do so, but denied Mauritania’s request.\textsuperscript{18} This precludes a definitive determination of whether the proceedings involve a pending legal dispute between two or more States. The request for the appointment of a judge \textit{ad hoc}, as it is a preliminary matter, can only be decided on the basis of a \textit{prima facie} appreciation of the facts and the law in issue:

\textit{to assert that the question of the judge \textit{ad hoc} could not be validly settled until the Court had been able to analyse substantive issues is tantamount to suggesting that the composition of the Court could be left in suspense, and thus the validity of its proceedings left in doubt, until an advanced stage in the case.}\textsuperscript{19}

During the Namibia proceedings, South Africa had argued, to determine its request for a judge \textit{ad hoc}, that the final clause of 1946 Rule 82.1 required the Court to determine as a preliminary matter whether the request concerned a legal dispute actually pending between two or more States. This was identical to the second sentence of 1978 Rule 102.2, and provided in its French text:

\textit{à cet effet, elle recherche avant tout si la demande d’avis consultatif a trait ou non à une question juridique actuellement pendante entre deux ou plusieurs États.}

The Court ruled that South Africa had placed undue stress on the words “avant tout” and commented:

\textit{It is difficult to conceive that an Article providing general guidelines in the relatively unschematic context of advisory proceedings should prescribe a rigid sequence in the action of the Court. This is confirmed by the practice of the Court, which in no previous advisory proceedings has found it necessary to make an independent preliminary determination of this question or of its own competence, even when specifically requested to do so.}\textsuperscript{20}

Further, 1946 Rule 82.1 required the Court to examine the nature of the request for the advisory opinion in order to determine the extent to which the proceedings should be assimilated to contentious proceedings. This did not determine whether the Court should accede to a request for permission to appoint a judge \textit{ad hoc}, as that fell under 1946 Rule 83. The provisions employed different tests: the appointment of a judge \textit{ad hoc} was dependent on:

\textit{a more restricted hypothesis: that the advisory opinion is requested \textit{upon} legal question actually pending and not that it \textit{relates} to such a question.}\textsuperscript{21}

1978 Rule 102.2-3 employ precisely the same terms: accordingly, entitlement to a judge \textit{ad hoc} in the \textit{Legal consequences of the construction of a wall in the occupied Palestinian Territory} proceedings is dependent on whether the request presents a pending inter-State dispute to the Court, and not that it is simply concerned with one.

\textit{Leaving Palestine’s procedural status to one side for the moment, the immediate issue to be addressed is whether Israel would be entitled to nominate a judge \textit{ad hoc} should it request one. This depends on the nature of the case. The core of the question posed for advisory opinion is:}

\begin{quote}
\textit{Namibia advisory opinion, ICJ Reps, 1971, 25 para.36; Western Sahara advisory opinion, ICJ Reps, 1975, 17-18, para.13.}
\textit{Namibia: Order of 29 January 1971, ICJ Reps, 1971, 12; Western Sahara: Order of 22 May 1975, ICJ Reps, 1975, 6.}
\textit{Namibia advisory opinion, ICJ Reps, 1971, 25 para.36: see also Western Sahara advisory opinion, ICJ Reps, 1975, 18 para.13.}
\textit{Namibia advisory opinion, ICJ Reps, 1971, 26 para.38.}
\textit{Namibia advisory opinion, ICJ Reps, 1971, 26 para.38.}
What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory...

On the face of it, this does not appear to place a pending dispute between two or more States before the Court for decision, but seems to be geared more towards gaining advice for the General Assembly which could inform its future action. Analysis of the precise nature of the request is, however, best reserved for the discussion (infra) of the Court’s competence to answer the question posed and the propriety of its doing so.

In the instant proceedings, the two entities primarily concerned with the construction of the wall are Israel and Palestine, but Palestine is not a State. Even if it were assumed jurisdictional titles existed, it is difficult to identify any State that would have locus standi to bring a contentious case against Israel impugning the legality of the construction of the wall. There is no State with a special and direct interest in the entirety of this issue, as opposed to constituent components such as possible breach of multilateral treaty provisions sufficient to seise the Court on its own account. If we consider the grounds identified by the General Assembly in resolution ES-10/14 as justifying its conclusion that the wall is unlawful, States could invoke some, but not all, of these in contentious proceedings. For instance, given the claim that the construction of the wall violates the provisions of Geneva Convention IV, States parties could rely on their obligation under common Article 1 “to respect and ensure respect for the present Convention in all circumstances”. As the authoritative ICRC commentary states:

in the event of a Power failing to fulfil its obligations, the other Contracting Parties...may, and should, endeavour to bring it back into an attitude of respect for the Convention.\textsuperscript{22}

Such remedial action surely could include the filing of a contentious case complaining of breach of the Convention. On the other hand, the General Assembly also invoked the principle of self-determination. Even although this is generally accepted to be an obligation owed to the international community as a whole, it is doubtful whether a State would have standing to complain of another’s breach of this principle if it had not been directly affected by this alleged delict.\textsuperscript{23} As Rosenne counsels:

the applicant State must be able to show some direct concern in the outcome of the case, it must itself be a real and not merely a theoretical party to the dispute, even if that concern cannot neatly be reduced to precise categories of protection of the rights or of the interests of that State.\textsuperscript{24}

Only Palestine possesses this interest, but it is not a State. It cannot thus bring a contentious case before the Court because Article 34 of the Statute restricts standing to States. Accordingly, on this purely formal basis, the proceedings do not involve “a legal question actually pending between two or more States”.

It matters not that States have condemned the construction of the wall. As the Court observed in the \textit{Namibia advisory opinion}, that it was required to rule on legal issues which were contested between South Africa and the UN in order to answer the question posed did not entail that the proceedings concerned a pending dispute nor required the application of 1946 Rules 82 and 83:


\textsuperscript{23}See, for instance, Scobbie I, \textit{The invocation of responsibility for the breach of ‘obligations under peremptory norms of general international law’}, 13 European Journal of International Law 1201 (2002).

\textsuperscript{24}Rosenne 1997 1213.
Differences of views among States on legal issues have existed in practically every advisory proceeding; if all were agreed, the need to resort to the Court for advice would not arise.\textsuperscript{25}

Furthermore, on the terms of the question posed, the request for an opinion does not bear primarily upon the legality of the construction of the wall. To all intents and purposes, the General Assembly has decided that it is illegal, and it seeks advice on the consequences of that determination. Undoubtedly the validity of this decision will disputed during the proceedings, but that can only be one aspect of the proceedings: the question posed has a wider compass. Accordingly, given the identity of the terms of 1946 Rule 83 and 1978 Rule 102.3, the Court's observation in para.38 of the Namibia advisory opinion applies: even if it is assumed that the question posed “relates” to a legal question actually pending between two or more States, it is not “requested upon” that dispute. The conditions for the appointment of a judge \textit{ad hoc} set out in the Rules of Court by Israel are accordingly not fulfilled.

Finally, it could be argued that the Court should exercise its discretion under Article 68 of the Statute to apply the Statutory provisions regulating contentious procedure “to the extent to which it recognizes them to be applicable”, and thus apply Article 31 in Israel’s favour because its interests could be specially affected by the proceedings. The Court rejected this argument in Namibia,\textsuperscript{26} reaffirming the stance taken by the Permanent Court in the Danzig legislative decrees advisory opinion: Order of 31 October 1935. In that case, the Permanent Court refused a request from the Danzig Senate, which was represented before the Court, to appoint a judge \textit{ad hoc} on the basis that the request for an opinion did not concern a pending dispute. It ruled that, as the appointment of a judge \textit{ad hoc} was an exceptional measure, this “cannot be given a wider application than is provided for by the Rules”.\textsuperscript{27} In both cases, the Court ruled that it could not exercise discretion in this matter, but was confined by the terms of the governing Rules. There appears to be no reason why the Court should depart from this position in the \textit{Legal consequences of the construction of a wall in the occupied Palestinian Territory} proceedings.

### Issues of competence:

The Court’s advisory competence is governed by Article 65.1 of its Statute, which provides:

> The Court may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.

This is discretionary. The Court “may” give an advisory opinion, but it is not bound to do so. In the debates before the General Assembly, Israel claimed that the “request for an advisory opinion constituted a harmful, divisive, illegal and diversionary target, which Israel would vote against”. In determining whether it should answer a request, the Court must first consider whether it is competent to hear the case before considering whether it should decline to deliver an opinion on other grounds. In the \textit{Legality of the use by a State of nuclear weapons in armed conflict} advisory opinion, which had

\textsuperscript{25}Namibia advisory opinion, ICJ Reps, 1971, 24 para.34.

\textsuperscript{26}Namibia advisory opinion, ICJ Reps, 1971, 26-27, para.39.

\textsuperscript{27}Danzig legislative decrees advisory opinion: Order of 31 October 1935, PCIJ, Ser.A/B, No.65 (annex), 69 at 71.
been requested by the World Health Assembly, the Court observed:

various arguments have been put forward for the purpose of persuading the Court to use the discretionary power it possesses under Article 65, paragraph 1, of the Statute, to decline to give the opinion sought. The Court can however only exercise this discretionary power if it has first established that it has jurisdiction in the case in question; if the Court lacks jurisdiction, the question of exercising its discretionary power does not arise.\(^{28}\)

Accordingly, the first of the Israeli objections that should be addressed is its claim that the request for the opinion is "illegal". The only intelligible construction that can be given to this claim is that the General Assembly somehow lacked competence to make the request. There are two possible arguments that call for examination in this connection: that the General Assembly acted \textit{ultra vires} in making the request, arrogating powers that it did not have; or, by analogy with the Court's contentious jurisdiction, that the request was incompetent without Israeli consent. As we shall see, the latter is not relevant to establishing the competence of the Court, but can be a factor in deciding whether it should exercise its discretion and decline to answer the question posed.

The power of United Nation's organs to request an advisory opinion is governed by Article 96 of the Charter, which provides:

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 specialised agencies, which may at any time be so authorised by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

Article 96.1 apparently gives an unrestricted power to the General Assembly to request an advisory opinion, provided this places a "legal question" before the Court. The wide extent of the General Assembly's power was acknowledged in the \textit{Western Sahara advisory opinion}:

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\(^{28}\)Advisory opinion of 8 July 1996, para.14, available on www.icj-cij.org
there is nothing in the Charter or the Statute to limit either the competence of the General Assembly to request an Advisory Opinion, or the competence of the Court to give one, to legal questions relating to existing rights or obligations. There have been instances of Advisory Opinions which did not concern existing rights nor an actually pending dispute (e.g., Designation of the Workers’ Delegate for the Netherlands at the Third Session of the International Labour Conference, Advisory Opinion, 1922, PCIJ, Series B, No.1).29

The Assembly’s competence under Article 96.1 must be contrasted to that of specialised agencies and other UN organs authorised to request advisory opinions by virtue of Article 96.2 of the Charter. As the Court underlined in the Cumarswamy advisory opinion, this expressly restricts the competence of those agencies and organs to posing questions arising “within the scope of their activities”.30

In the Legality of the use by a State of nuclear weapons in armed conflict advisory opinion, the Court laid down the test for deciding whether a question arose within the scope of an organ’s activities. It ruled:

The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them. The Permanent Court of International Justice referred to this basic principle in the following terms:

“As the European Commission is not a State, but an international institution with a special purpose, it only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of that purpose, but it has power to exercise those functions to their full extent, in so far as the Statute does not impose restrictions on it.” (Jurisdiction of the European Commission of the Danube, Advisory Opinion, P.C.I.J., Series B, No. 14, p. 64.)

The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments.31

Accordingly, to determine the legal questions that fall within the scope of the General Assembly’s legitimate activity, reference must be made to the UN Charter, Article 10 of which provides, in part:

The General Assembly may discuss any questions or any matters falling within the scope of the present Charter....

It cannot be doubted that the General Assembly is competent to deal with issues concerning Palestine. As the Court indicated in, for instance, the Legality of the use of a State of nuclear weapons in armed conflict advisory opinion, reference may be made to organisational practice as an interpretative canon to determine the parameters of an international institution’s competence.32 The General Assembly has involved itself in the Israel/Palestine situation since the outset. If nothing else, the General Assembly set out the timetable for the termination of the British Mandate over the territory in resolution 181(II)(29 November 1947), which also envisaged two separate States and an international regime for Jerusalem.

Even if the General Assembly’s competence were not so clearly established, policy arguments militate in favour of comprehending the instant request for an advisory opinion as falling

29 Western Sahara advisory opinion, ICJ Reps, 1975, 19 para.18.
30 Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights advisory opinion, 29 April 1999, para.27 (available on www.icj-cij.org).
31 Legality of the use by a State of nuclear weapons in armed conflict advisory opinion, para.25.
32 Legality of the use of a State of nuclear weapons in armed conflict advisory opinion, para.19.
with the General Assembly’s competence:

in light of the general encouragement in the Charter for the peaceful settlement of disputes, and in particular for the judicial settlement of international disputes, ambiguities in texts relating to the peaceful settlement of disputes should not be interpreted in a manner that would unnecessarily diminish or constrain provisions that would provide for such means of settlement.  

Even if, however, the question posed falls within the scope of the General Assembly’s legitimate activities under the Charter, in order to be admissible, the question must be a “legal question”. This is a threshold requirement: if the question is not a “legal question”, then “the Court has no discretion in the matter; it must decline to give the opinion requested”.  

The definition of a “legal question” is clear in the Court’s advisory jurisprudence. These are questions that “have been framed in terms of law and raise problems of international law”. There need not be questions of “pure” law. That a question also necessitates the Court to determine factual issues in order to deliver an answer is irrelevant to its classification as a “legal question”:

In the view of the Court, the contingency that there may be factual issues underlying the question posed does not alter it character as a ‘legal question’ as envisaged in Article 96 of the Charter. The reference in this provision to legal questions cannot be interpreted as opposing legal to factual issues. Normally, to enable a court to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues.

In the *Legal consequences of the construction of a wall in the occupied Palestinian Territory* proceedings, it cannot be doubted that the question posed is a “legal question” within the meaning of the Court’s settled jurisprudence. This is clear from the very terms of the question which asks for an indication of “the legal consequences arising from the construction of the wall...considering the rules


34 Certain expenses of the United Nations advisory opinion, ICJ Reps 1962 155; reaffirmed Cumaraswamy advisory opinion, para.28.

35 Western Sahara advisory opinion, ICJ Reps, 1975, 18 para.15.

36 Namibia advisory opinion, ICJ Reps, 1971, 27: reaffirmed Western Sahara advisory opinion, ICJ Reps, 1975, 19 para.16.
and principles of international law’. Accordingly, the Court is competent to deliver the opinion requested by the General Assembly.

The Court’s discretion - issues of propriety:

i. the notion of judicial propriety in advisory opinions:

Even if the Court is competent to entertain a given request for an advisory opinion, because Article 65 is discretionary, it may nonetheless refuse to answer the question posed. In the Curamaswamy advisory opinion, the Court observed that the permissive character of Article 65:

\[
gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the request.\]

This exercise of this discretion is a matter of propriety, of maintaining the integrity of the judicial function. This doctrine was first enunciated in the Eastern Carelia advisory opinion when the Permanent Court refused to reply to a request for an opinion sought by the Council of the League of Nations. As noted above, in that case the Permanent Court ruled:

\[
The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.\]

This doctrine has been adopted and expressly re-affirmed by the International Court on a number of occasions, for instance in the Mortished advisory opinion, where the Court observed:

\[
it would have been a compelling reason, making it inappropriate for the Court to entertain a request, [if] its judicial role would be endangered or discredited.\]

In a modified form, the doctrine of propriety is also applicable in contentious cases between States.\[^{40}\]

In explaining its abstention from voting on GA resolution ES-10/14, the United Kingdom asserted that “the advisory opinion was unlikely to change the actual situation on the ground”. This could be interpreted as an allusion to a consideration of propriety employed in contentious cases, that the Court cannot deliver a binding judgment in a case which is moot and thus lacks object. This doctrine was first enunciated in the Northern Cameroons case where the Court ruled:

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The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court’s judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function.\]

\[^{37}\] Curamaswamy advisory opinion (29 April 1999), para.28: reaffirming Interpretation of peace treaties with Bulgaria, Hungary and Romania advisory opinion: first phase, ICJ Reps, 1950, 72.

\[^{38}\] Eastern Carelia advisory opinion, PCIJ, Ser.B, No.5 (1923), 29.

\[^{39}\] Application for review of Judgement No.273 of the United Nations Administrative Tribunal (Mortished) advisory opinion, ICJ Reps, 1982, 347 para.44 – see also 347 para.44; and also Certain expenses of the United Nations advisory opinion, ICJ Reps, 1962, 155, and Western Sahara advisory opinion, ICJ Reps, 1975, 21 para.23.

\[^{40}\] See, for instance, Northern Camerons, where the Court ruled (ICJ Reps, 1963, 29):

\[
even in the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the judicial function which the Court, as a court of justice, can never ignore...The Court itself, and not the parties, must be the guardian of its judicial character.\]

\[^{41}\] Northern Camerons, ICJ Reps, 1963, 34.
This specific aspect of judicial propriety has no application in advisory proceedings, as the Court indicated in *Western Sahara*:

> to assert that an Advisory Opinion deals with a legal question within the meaning of the Statute only when it pronounces directly upon the rights and obligations of the States or parties concerned, or upon the conditions which, if fulfilled, would result in the coming into existence, modification or termination of such a right or obligation, would be to take too restrictive a view of the Court’s advisory function.

The Court conceded that usually an advisory opinion did bear on concrete rights and obligations, but that “the Court may also be requested to give its opinion on questions of law which do not call for any pronouncement of that kind”.\(^{42}\) In the *Legality of the threat or use of nuclear weapons advisory opinion*, the Court explained the rationale for this position. In rejecting claims that it should refuse to deliver an opinion because there existed no specific dispute on the subject matter of the question posed, it observed:

> In order to respond to this argument, it is necessary to distinguish between requirements governing contentious procedure and those applicable to advisory opinions. The purpose of the advisory function is not to settle – at least directly – disputes between States, but to offer legal advice to the organs and institutions requesting the opinion (cf. *Interpretation of Peace Treaties* ICJ Reports 1950, p.71). The fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested.

> Moreover, it is the clear position of the Court that to contend that it should not deal with a question couched in abstract terms is ‘a mere affirmation devoid of any justification’, and that ‘the Court may give an advisory opinion on any legal question, abstract or otherwise’.\(^{43}\)

This has been relied upon by participants in advisory proceedings themselves. For instance, in the *Mazilu* proceedings, the United States affirmed that Article 96 of the UN Charter did not require:

> the existence of a dispute as a prerequisite to a request for an advisory opinion. Article 92...of the Charter simply authorises requests to the Court for advisory opinions on legal questions; Article 65, paragraph 1 of the Statute of the Court gives the Court jurisdiction to render such opinions. As a result, the Court has jurisdiction to render the question requested by ECOSOC pursuant to Article 96 of the Charter whether or not a dispute exists.\(^{44}\)

**ii. the exercise of judicial propriety in advisory proceedings:**

The International Court has continually held, and most recently reaffirmed in *Cumaraswamy*, that as the principal judicial organ of the United Nations, 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”, and has stressed that “only ‘compelling reasons’ should lead it to refuse to give a requested advisory opinion”.\(^{45}\) As the Secretary-General observed during the *Mazilu* proceedings:

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\(^{42}\) *Western Sahara advisory opinion*, ICJ Reps, 1975, 20 para.19, see also 29 para.48 et seq.

\(^{43}\) *Legality of the threat or use of nuclear weapons advisory opinion* (8 July 1996), para.15.

\(^{44}\) *Mazilu* Pleadings, Additional written comments of the Government of the United States, 224: see also the oral statement of Mr Fleischhauer on behalf of the United Nations of 4 October 1989, 238 para.22.

\(^{45}\) *Cumaraswamy advisory opinion* (29 April 1999), para 29. The Court cited as authority is support of these propositions, *Interpretation of Peace Treaties: first phase advisory opinion*, ICJ Reps, 1950, 71; *Certain expenses advisory opinion*, ICJ Reps, 1982, 155; *Mazilu advisory opinion*, ICJ Reps, 1989, 190-191 para.37; and *Legality of the threat or use of nuclear weapons advisory opinion* (8 July 1996), para.14.
Suffice it to say, this Court has never found, in considering any request for an advisory opinion, reasons sufficiently compelling to cause it to refuse to respond.  

From the statements made in the General Assembly, two possible considerations of propriety may be discerned which some might argue should cause the Court to refuse to entertain the question posed in the Legal consequences of the construction of a wall in the occupied Palestinian Territory proceedings. These are the observation made by the United Kingdom that it was “inappropriate” to request an advisory opinion “without the consent of both parties”; and the view expressed, for instance by Switzerland, that it was “inappropriate to bring a subject with highly political implications before the ICJ”. This latter objection encompasses Israel’s contention that the request was “harmful, divisive...and diversionary”.

iii. the question of consent in advisory proceedings:
In contentious cases between States which are aimed at achieving binding decisions on a given dispute before the International Court, the parties’ consent to jurisdiction is necessary. The parties must agree that the Court is competent to hear the case. Some, for instance Oda, argue that in advisory opinions involving a dispute actually pending between States, the disputant States’ consent is necessary for an advisory opinion to be rendered citing, as authority, the ruling in the Eastern Carelia advisory opinion that:

It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or arbitration, or to any other kind of pacific settlement.  

This claim ignores the fact that the Permanent Court expressly refused to rule on this issue in Eastern Carelia. It stated:

There has been some discussion as to whether questions for an advisory opinion, if they relate to matters which form the subject of a pending dispute between nations, should be put to the Court without the consent of the parties. It is unnecessary in the present case to deal with this topic.  

In Eastern Carelia, the Court refused to deliver the opinion requested because the League Council was incompetent to request it: as Russia was not a member of the League, it had not accepted obligations arising under the Covenant for the pacific settlement of disputes. These included not simply the submission of the request by the Council, but its competence to entertain the dispute in the first place. Russia had “clearly declared that it accepts no intervention by the League of Nations in the dispute with Finland”. Accordingly, the Council had no authority to act. That Eastern Carelia hinged on the competence of the League Council, and not the disputant States’ consent is demonstrated by the Interpretation of Article 3, paragraph 2 of the Treaty of Lausanne advisory opinion. In that case Turkey, which was not a League member, had consented to placing a frontier dispute with Britain on the agenda of the League Council. A dispute arose over the nature of the determination to be taken by the Council, and the procedure that should be followed. The Council decided to request an advisory opinion, but Turkey objected to this because the questions posed were “of a distinctly political character and, in the Turkish Government’s opinion, cannot form the subject of a legal interpretation”, and refused to take part in the proceedings. Nevertheless, the Court proceeded to deliver the opinion requested. This interpretation of Eastern Carelia...
Carelia has also been maintained by the International Court, \textsuperscript{52} which ruled in \textit{Western Sahara} that Spain, as a UN member, had accepted the provisions of both the UN Charter and the Statute of the Court and thus:

has thereby in general given its consent to the exercise by the Court of its advisory jurisdiction. It has not objected, and could not validly object, to the General Assembly’s exercise of its powers to deal with the decolonization of a Non-Self-Governing Territory and to seek an opinion on questions relevant to the exercise of these powers. \textsuperscript{53}

Accordingly, the doctrine of consensual jurisdiction is, in principle, not applicable to the Court’s advisory jurisdiction but:

the consent of an interested State [to an advisory opinion request] continues to be relevant, not for the Court’s competence, but for the appreciation of the propriety of giving an opinion. \textsuperscript{54}

In some circumstances, therefore, the lack of an interested State’s consent may make giving an advisory opinion incompatible with the Court’s judicial character:

An instance of this 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 dispute to be submitted to judicial settlement without its consent.

If this situation arose, the Court’s discretion under Article 65.1 of the Statute “would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction”. \textsuperscript{55} In \textit{Western Sahara}, the Court ruled that Spain’s objection to its jurisdiction was irrelevant: although the case concerned a pending dispute, it “arose during the proceedings of the General Assembly and in relation to matters with which it was dealing. It did not arise independently in bilateral relations”. \textsuperscript{56} Further, the request had wider import than settling the dispute, as the object of the General Assembly was not to place the dispute before the Court for settlement, but to obtain an opinion which the Assembly thought would assist it in the proper exercise of its functions. \textsuperscript{57} In both \textit{Namibia} and \textit{Western Sahara}, the Court laid stress on preambular paragraphs in the requesting resolutions which expressly stated that the opinion was sought to guide the requesting organ in its further consideration of the status of these territories. \textsuperscript{58} Such a paragraph is absent from GA resolution ES-10/14. This need not be fatal to the request in the instant proceedings. In the \textit{Legality of the threat or use of nuclear weapons advisory opinion}, the Court dismissed the relevance of a clear indication by the General Assembly of the purposes why it sought the opinion, ruling:

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 the usefulness of an opinion in the light of its own needs.

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\textsuperscript{52}See \textit{Namibia advisory opinion}, ICJ Reps, 1971, 23-24 para.31; \textit{Western Sahara advisory opinion}, ICJ Reps, 1975, 24 para.30; and \textit{Legality of the threat or use of nuclear weapons advisory opinion} (8 July 1996), para.14. See also \textit{Interpretation of Peace Treaties: first phase advisory opinion}, ICJ Reps, 1950, 71, which was expressly affirmed in, for instance, \textit{Western Sahara advisory opinion}, ICJ Reps, 1975, 24 para.31; and \textit{Mazilu advisory opinion}, ICJ Reps, 1989, 199 para.31.

\textsuperscript{53}\textit{Western Sahara advisory opinion}, ICJ Reps, 1975, 24 para.31; see also \textit{Namibia advisory opinion}, ICJ Reps, 1971, 23 para.31.

\textsuperscript{54}\textit{Western Sahara advisory opinion}, ICJ Reps, 1975, 25 para.32.


\textsuperscript{56}\textit{Western Sahara advisory opinion}, ICJ Reps, 1975, 25 para.34.

\textsuperscript{57}See \textit{Western Sahara advisory opinion}, ICJ Reps, 1975, 25-27, paras.34-42.

\textsuperscript{58}\textit{Namibia advisory opinion}, ICJ Reps, 1971, 24 para.32; \textit{Western Sahara advisory opinion}, ICJ Reps, 1975, 27 para.40.
Equally, once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution.\(^{59}\)

The question posed in the *Legal consequences of the construction of a wall in the occupied Palestinian Territory* proceedings do not place a pending dispute before the Court for decision in a manner that seeks to circumvent the doctrine of consensual jurisdiction. As noted above, the terms of the request are such that no State could have brought the entirety of the legal issues it enumerates before the Court in contentious proceedings against Israel. Further, because it is not a State, Palestine has no standing in contentious proceedings as Article 34.1 of the Court’s Statute provides “Only States may be parties in cases before the Court”. Moreover, the request records the General Assembly’s opinion that the wall breaches international law, and seeks an indication of the legal consequences of its construction. It accordingly has a wider import than the determination of the legality of the wall, and appears to have the object of gaining advice for future action by the Assembly. As the Court observed in the *Fasla advisory opinion*:

> [t]he existence, in the background, of a dispute the parties to which may be affected as a consequence of the Court’s opinion, does not change the advisory nature of the Court’s task, which is to answer the questions put to it.\(^{60}\)

**iv. the political nature of the request:**

Some States objected to the request for the opinion because it bears on “a subject with highly political implications” and risks “politicization of the Court”. This is not an issue which implicates the Court’s jurisdiction:

> the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.\(^{61}\)

Such considerations have never been seen as a “compelling reason” which would cause the Court to decline to exercise its competence on grounds of propriety. It has been a prominent feature of the Court’s jurisprudence that the possible political ramifications of an advisory opinion do not compromise its judicial character and thus involve no impropriety. The issue was first dealt with in the *Conditions of admission advisory opinion* where the Court noted that it had been claimed that the question posed was political, and thus fell outside its jurisdiction. It ruled that it could not:

> attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task...It is not concerned with the motives that may have inspired this request.\(^{62}\)

This position was most recently reaffirmed in unequivocal terms in the Court’s 1996 advisory opinions on the legality of nuclear weapons. It stated:

> The fact that this question also has political aspects, as, in the nature of things, is the case

\(^{59}\) *Legality of the threat or use of nuclear weapons advisory opinion* (8 July 1996), para.16.


\(^{61}\) *Legality of the use by a State of nuclear weapons in armed conflict advisory opinion* (8 July 1996), para.17.

\(^{62}\) *Conditions of admission advisory opinion*, ICJ Reps, 1948, 61: see also *Certain expenses advisory opinion*, ICJ Reps, 1962, 155.
with so many questions which arise in international life, does not suffice to deprive it of its
classical as a "legal question" and to "deprive the Court of a competence expressly
collected on it by its Statute" (Application for Review of Judgement No. 158 of the United
Whatever its political aspects, the Court cannot refuse to admit the legal character of a
question which invites it to discharge an essentially judicial task, namely, an assessment of
the legality of the possible conduct of States with regard to the obligations imposed upon
them by international law (cf. Conditions of Admission of a State to Membership in the United
Nations (Article 4 of Charter), Advisory Opinion, I.C.J. Reports 1948, pp. 61-62; Competence
of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion,
I.C.J. Reports 1950, pp. 6-7; Certain Expenses of the United Nations (Article 17, paragraph 2,
Furthermore, as the Court said in the Opinion it gave in 1980 concerning the
Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt:

‘Indeed, in situations in which political considerations are prominent it may be
particularly necessary for an international organization to obtain an advisory opinion
from the Court as to the legal principles applicable with respect to the matter under
debate...’ (I.C.J. Reports 1980, p. 87, para. 33.)

Accordingly, it is not the request for the opinion in the instant proceedings that is “diversionary”, but
rather the claims of those States that the political implications of the request should cause the Court
to refuse to entertain the case. Such a claim contradicts the settled jurisprudence of the Court and,
accordingly, is irrelevant as an objection to the Court’s exercise of its competence in these
proceedings.

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63Legality of the use by a State of nuclear weapons in armed conflict advisory opinion (8 July 1996),
para.16: in almost identical terms, see Legality of the threat or use of nuclear weapons in armed