INTERNATIONAL COURT OF JUSTICE

LEGAL CONSEQUENCES ARISING FROM THE POLICIES AND PRACTICES OF ISRAEL IN THE OCCUPIED PALESTINIAN TERRITORY, INCLUDING EAST JERUSALEM

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN STATEMENT OF THE KINGDOM OF THE NETHERLANDS

25 JULY 2023

1. Introduction

1.1 In Resolution 77/247, adopted on 30 December 2022, the General Assembly of the United Nations decided, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice (the "ICJ", the "Court") to render an advisory opinion pursuant to Article 65 of the Statute of the Court, on the following questions:

Considering the rules and principles of international law, including the Charter of the United Nations, international humanitarian law, international human rights law, relevant resolutions of the Security Council, the General Assembly and the Human Rights Council, and the advisory opinion of the Court of 9 July 2004:

(a) What are the legal consequences arising from the ongoing violation by Israel of the right of the Palestinian people to self-determination, from its prolonged occupation, settlement and annexation of the Palestinian territory occupied since 1967, including measures aimed at altering the demographic composition, character and status of the Holy City of Jerusalem, and from its adoption of related discriminatory legislation and measures?;
(b) How do the policies and practices of Israel referred to in paragraph (a) above affect the legal status of the occupation, and what are the legal consequences that arise for all States and the United Nations from this status?

1.2 In its Order of 3 February 2023, the Court designated 25 July 2023 as the time limit within which written statements on the questions may be presented to it, by the United Nations and States entitled to appear before the Court, in accordance with Article 66, paragraph 2, of the Court's Statute.

1.3 As the Kingdom of the Netherlands is a Member State of the United Nations and by virtue of Article 92 of the Charter of the United Nations ("UN Charter", "Charter") also a Party to the Statute of the Court, it wishes to avail itself of the opportunity afforded by the Court's Order of 3 February 2023 to make a written statement on the present request by the General Assembly for an advisory opinion of the Court.

1.4 For the purposes of the present advisory proceedings, the Kingdom of the Netherlands leaves it to the discretion of the Court to satisfy itself that it has advisory jurisdiction and that it may exercise this jurisdiction with respect to the present request, in accordance with Article 65, paragraph 1, of the Statute of the Court and Article 102 of the Rules of Court.

1.5 The Kingdom of the Netherlands considers that "the object of the request before the Court is to obtain from the Court an opinion which the General Assembly deems of assistance to it for the proper exercise of its functions".[1] Accordingly, the request should be regarded in "a much broader frame of reference than a bilateral dispute".[2] It is with such broader frame of reference in mind that the Kingdom of the Netherlands seeks to assist the Court in answering the questions contained in the request through

[1] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, *I.C.J. Reports* 2004 (hereafter '*Advisory Opinion on the Construction of a Wall')*, para. 50.
[2] *Ibid*.

the identification of the applicable international law and the presentation of the legal opinion of the Kingdom of the Netherlands on the status and interpretation of that law.

2. The right of self-determination of peoples in occupied territory

2.1 According to the Kingdom of the Netherlands, the right of self-determination of peoples is a permanent, continuing, universal and inalienable right with a peremptory character.[3] The principle of self-determination of peoples is enshrined in Articles 1 and 55 of the United Nations Charter. General Assembly Resolution 1514 (XV) (1960) states that

> [a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2.2 The right has been reaffirmed by the General Assembly in Resolution 2625 (XXV) (1970), pursuant to which "[e]very State has the duty to refrain from any forcible action which deprives peoples referred to [in that resolution] […] of their right to self-determination". In addition, Article 1 common to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights reaffirms the right of all peoples to self-determination, and lay upon the States Parties the obligation to respect the right and to promote the realization of it, in conformity with the provisions of the United Nations Charter. The International Court of Justice has acknowledged self-determination as a right of peoples in the *Namibia Advisory Opinion*,[4] the *Western Sahara Advisory Opinion*,[5] the *East Timor* case,[6] the *Wall Advisory Opinion*[7] and the *Advisory Opinion on the Separation of the Chagos Archipelago*.[8] In the *East Timor* case, the Court observed that the right of peoples to self-determination "is today a right *erga omnes*".[9] The status of the right of self-determination as a right under customary international law is thus beyond reproach.

2.3 As has been observed by the Kingdom of the Netherlands, the right of self-determination is applicable in the colonial and in the post-colonial context.[10] However, this does not mean that the right is only applicable to peoples residing in a 'colonial' territory, such as a Trust Territory or Non-self-governing Territory, and to peoples living within the boundaries of an independent State. The right is equally applicable to peoples "under foreign or alien occupation".

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[3] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, Written Statement of the Kingdom of the Netherlands of 27 February 2018 (hereafter 'Written Statement of the Kingdom of the Netherlands with respect to *Legal Consequences of the Separation of the Chagos Archipelago')*, paras. 1.5, 3.9-3.10.

[4] *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 (hereafter '*Legal Consequences for States of the Continued Presence of South Africa in Namibia')*, paras. 52-53.

[5] *Western Sahara*, Advisory Opinion, *I.C.J. Reports* 1975 (hereafter '*Western Sahara'*), para. 162.

[6] *East Timor (Portugal* v. *Australia)*, Judgment, *I.C.J. Reports* 1995 (hereafter '*East Timor')*, para. 29.

[7] *Advisory Opinion on the Construction of a Wall*, *supra* note 1, para. 88.

[8] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, *I.C.J. Reports* 2019 *(hereafter 'Advisory Opinion on the Separation of the Chagos Archipelago')*, paras. 144-162.

[9] *East Timor*, *supra* note 6, para. 29.

[10] Written Statement of the Netherlands with respect to *Legal Consequences of the Separation of the Chagos Archipelago*, *supra* note 3, paras. 2.1-2.7.

2.4 After the General Assembly expressed its deep concern at "the continuation of acts or threats of foreign military intervention and occupation that are threatening to suppress, or have already suppressed, the right to self-determination of an increasing number of sovereign peoples and nations",[11] the Assembly reaffirmed that

> the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights.[12]

2.5 Equally, in its Millennium Declaration, the Members of the General Assembly rededicated themselves to respect

> the right to self-determination of peoples which remain under colonial domination and foreign occupation.[13]

2.6 Accordingly, the right of self-determination is a truly universal and continuing right. It applies to peoples under colonial domination, peoples residing in occupied territory, and peoples living in independent States.

2.7 As a result, a State that occupies territory is under an obligation to respect and promote the right of self-determination of peoples residing in that occupied territory. The obligation to respect and promote the right of self-determination means that, on the one hand, the occupying State shall refrain from measures that impede the exercise of the right of self-determination of the people concerned both during the occupation and after the occupation has ended, and, on the other hand, that the occupying State shall take measures aimed at creating the conditions under which the people concerned is able to freely and genuinely express its will in regard of its future political status.[14]

2.8 As the Kingdom of the Netherlands has observed earlier, under international law a distinction must be made between situations in which the right of self-determination is "exercised in a manner that preserves international boundaries (internal self-determination) or in a manner that involves a change of international boundaries (external self-determination)".[15] In the context of colonial domination or foreign occupation, the right of self-determination can be realized through independence, association or integration. In this regard, the General Assembly reaffirmed

> the legitimacy of the struggle of peoples for independence, territorial integrity, national unity and liberation from colonial domination, apartheid and foreign occupation by all available means, including armed struggle.[16]

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[11] UN Doc. A/RES/51/84, 28 February 1997, Preamble, para. 3.
[12] *Id*., Operative, para. 1.
[13] UN Doc. A/RES/55/2, 18 September 2000, Section I, para. 4.
[14] UN Doc. A/RES/2625 (XXV), 1970, Principle V; Articles 1 of the 1966 Covenants; *Western Sahara*, *supra* note 5, paras. 55 and 59.
[15] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo,* Advisory Opinion, Written Statement of the Kingdom of the Netherlands, 17 April 2009 (hereafter 'Written Statement of the Kingdom of the Netherlands with respect to *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo')*, para. 3.5.
[16] UN Doc. A/RES/45/130, 14 December 1990. See also UN Doc. A/Res/2625 (XXV), 1970, principle V; UN Doc A/RES/2621 (XXV), 1970, para. 2; UN Doc A/RES/3314 (XXIX), 1974 ('Definition of Aggression'), Article 7.

2.9 If a struggle by a people for the implementation of its right of self-determination in the context of colonial domination or foreign occupation is accompanied by the use of armed force by such a people, this use of armed force must be in accordance with international law.

2.10 It is submitted that the obligation of the occupying State to respect and promote the right of self-determination of the people residing in the occupied territory is not only owed *vis-à-vis* these people, but also *vis-à-vis* the international community as a whole. This obligation is an obligation *erga omnes*.[17]

2.11 Because as the Court has noted, the right of self-determination is also a right *erga omnes*, the people residing in the occupied territory are not only entitled to the respect and promotion of their right of self-determination *vis-à-vis* the occupying State, but also *vis-à-vis* all other States and international organizations and, in fact, the international community as a whole.[18] In turn, the members of the international community are under a corresponding obligation to respect the right of self-determination of people residing in the occupied territory.[19] It is submitted that, given the Court's statements in the *Barcelona Traction* case[20] and the *Advisory Opinion on the Construction of a Wall*,[21] and because of the fundamental character of the right of self-determination under international law, the corresponding obligation on the part of the members of the international community must be deemed to have an *erga omnes* character as well.

3. The UN Charter and the law regulating the use of force by States (*jus ad bellum*)

3.1 The UN Charter contains the prohibition on the use of armed force by States in Article 2, paragraph 4. The Court confirmed that the principles as to the use of force incorporated in the Charter reflect customary international law.[22] As the International Law Commission (ILC) noted in 1966, the "law of the Charter [of the United Nations] concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens".[23] Consequently, the ILC included the prohibition of aggression in its 2020 non-exhaustive list of rules of *jus cogens*.[24] The Kingdom of the Netherlands is also of the view that the prohibition of the use of force is a rule of *jus cogens*,[25] that applies *erga omnes*. One of the established exceptions to the prohibition on the use of armed force is that of the inherent right of individual or collective self-defence if an armed attack

[17] Written Statement of the Kingdom of the Netherlands with respect to *Legal Consequences of the Separation of the Chagos Archipelago*, *supra* note 3, paras. 4.1-4.4.
[18] *East Timor* case, *supra* note 6, para. 29.
[19] *Id*., para. 4.5.
[20] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain),* Judgment, *I.C.J. Reports* 1970 (hereafter '*Barcelona Traction* case'), paras. 33-34
[21] *Advisory Opinion on the Construction of a Wall*, *supra* note 1, para. 155.
[22] *Id*., para. 87.
[23] Paragraph (1) of the commentary to draft article 50 of the draft articles on the law of treaties, *Yearbook of the International Law Commission,* 1966, Vol. II, UN Doc. A/6309/Rev.1, Part II, p. 247.
[24] Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries, adopted by the International Law Commission at its sixty-third session, 2022, UN Doc. A/77/10, commentary to Conclusion 23, p. 86.
[25] Request for advice from the Minister of Foreign Affairs to the Advisory Committee on Issues of Public International Law on the legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression, August 2022.

against a State occurs, as codified in Article 51 of the UN Charter. The occupation of foreign territory can be legitimate in the exercise of the right of self-defence in response to an armed attack, provided that the use of force is exercised in accordance with the conditions attached to this right.

3.2 The conditions attached to the right of self-defence apply as long as there is an occurring or imminent armed attack. The substantive customary conditions are necessity and proportionality. Furthermore, a procedural condition is contained in Article 51, which provides that "[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security".

3.3 The Court noted that proportionality and necessity are "inherent in the very concept of self-defence".[26] As the Court noted:

> The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America): there is a "specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law" (I. C. J. Reports 1986, p. 94, para. 176). This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.[27]

3.4 If the placement of a territory under the control of an armed force is the result of a military operation in the exercise of the right of self-defence, necessity requires an assessment whether the occupation (and continuation thereof) is necessary to repel the armed attack or that alternative courses of action are available. This inherently supposes also a temporal element of immediacy, that dictates that if the right of self-defence is not exercised relatively promptly, it may imply that exercising the right of self-defence was apparently unnecessary.[28]

3.5 Furthermore, with regard to proportionality, the question is whether the (continued) occupation is proportionate in relation to the armed attack, both in qualitative and quantitative terms. If that is not the case, the occupation may be considered to violate the prohibition of the use of force.

3.6 It is the view of the Kingdom of the Netherlands that the right of self-defence also applies in reaction to an armed attack by a non-state actor.[29] This is illustrated, for example, by the UN Security Council's adoption of Resolutions 1368 and 1373 after the 11 September 2001 attacks, in which the Security

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[26] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, *I.C.J. Reports* 1996 (hereafter '*Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*'), para. 40;
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. *United States of America)*, Merits, Judgment, *I.C.J. Reports* 1986 (hereafter '*Nicaragua* v. *United States of America'*), para. 194.
[27] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, para. 41.
[28] See, for example, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, supra* note 26, para. 40; *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, Judgment, *I.C.J. Reports* 2003, paras. 76-77*; Nicaragua* v. *United States of America, supra* note 26, para. 237.
[29] Government Response of the Kingdom of the Netherlands to Advisory Report No. 23 on Armed Drones by the Advisory Committee on Issues of Public International Law ("CAVV"), 27 September 2013.

Council reconfirmed the right to self-defence in response to those attacks. The deployment of Dutch troops against Al-Qaida and the Taliban in Afghanistan and around the Arabian peninsula after the 11 September attacks as well as the deployment of Dutch troops against the non-state armed group Da'esh in Syria in collective self-defence of Iraq were based on such a right.[30] In exercising this right, the occupying State must fully respect international law, in particular human rights and international humanitarian law.

3.7 An occupation which fulfils the requirements of the inherent right of self-defence, in particular the occurrence of an (imminent) armed attack, necessity and proportionality, may be considered as lawful under *jus ad bellum*. An occupation which does not fulfil, or no longer fulfils, these requirements may lose its legal basis and, hence, violate the *jus cogens* prohibition of the use of force.

3.8 Occupation is an inherently temporary use of force, because if it were to be permanent, it would qualify as annexation. As the Security Council emphasized on 22 November 1967 in its unanimously adopted Resolution 242 (1967), the acquisition of territory by war is inadmissible.[31] The Court acknowledged the customary status of the illegality of territorial acquisition resulting from the threat or use of force.[32]

4. International humanitarian law (*jus in bello*), including the law of occupation

4.1 International humanitarian law ("IHL"), or *jus in bello*, regulates situations of armed conflict, including occupation. According to the Court, "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity'" that they are "to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law".[33] In the Court's view, "these rules incorporate obligations which are essentially of an *erga omnes* character".[34]

4.2 The Kingdom of the Netherlands submits that, while IHL is applicable in situations of foreign occupation, IHL does not contain rules for determining whether an occupation is lawful or unlawful as such. Rather, irrespective of its (il)legality, IHL regulates situations of occupation once such a situation has arisen in fact.

4.3 As noted by the Court, "under customary international law […] territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to

[30] Letter of the Minister of Foreign Affairs to Parliament, 10 March 2005, Parliamentary Paper 2 27 925, No. 166; Letter of the Minister of Foreign Affairs to Parliament, 26 June 2015, Parliamentary Paper 27 925, No. 543; Letter dated 10 February 2016 from the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations addressed to the President of the Security Council, 10 February 2016, UN Doc. S/2016/132.
[31] UN Doc. S/RES/242, 22 November 1967.
[32] *Advisory Opinion on the Construction of a Wall*, *supra* note 1, para. 87
[33] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *supra* note 26, para. 79 (internal citations omitted).
[34] *Advisory Opinion on the Construction of a Wall*, *supra* note 1, para. 157.

the territory where such authority has been established and can be exercised",[35] as reflected in Article 42 of the Hague Regulations of 1907.[36] Inherent in occupation is its temporary nature. Under the Hague Regulations, the occupying power shall be regarded only as administrator and usufructuary.[37]

4.4 After the Second World War, the Fourth Geneva Convention[38] further developed the law of occupation, by significantly enhancing the protection of civilians in situations of occupation. The Fourth Geneva Convention applies "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[39] As noted by the Court, the intention of the drafters of the Fourth Geneva Convention was "to protect civilians who find themselves, in whatever way, in the hands of the occupying Power."[40] Furthermore, "the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war, regardless of the status of the occupied territories".[41]

4.5 Once an occupation has factually occurred, the occupying power is obliged to act in accordance with the law of occupation. The occupying power has to respect and protect the civilians in the occupied territory, who are regarded as protected persons.[42] Protected persons are, *inter alia*, entitled, in all circumstances, to respect for their persons and shall at all times be treated humanely. Private property is to be respected. At the same time, such measures of control may be taken by the occupying power in regard to protected persons as may be necessary as a result of the war.[43]

4.6 No sovereignty can be established over occupied territory and occupied territory may not be annexed. In this regard, an important provision under the law of occupation is that the occupying power "shall not deport or transfer parts of its own civilian population into the territory it occupies".[44] Under international criminal law, such transfers, directly or indirectly, by the occupying power, constitute a war crime, as reflected in the Rome Statute of the International Criminal Court.[45] It is also prohibited to deport protected persons from the occupied territory.[46]

4.7 As noted before, the IHL rules on occupation do not provide for a determination of the legality or illegality of an occupation, even if breaches of the rules are serious in nature. At the same time, as previously noted, an occupation in breach of other rules of international law may be considered unlawful.

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[35] *Id*., para. 78.
[36] Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907.
[37] *Id*., Article 55.
[38] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (hereafter 'Fourth Geneva Convention').
[39] *Id*., Article 2.
[40] Advisory Opinion on the Construction of a Wall, *supra* note 1, para. 95.
[41] *Ibid*.
[42] Fourth Geneva Convention, *supra* note 35, Article 4.
[43] *Id*., Article 27.
[44] *Id*., Article 49.
[45] Rome Statute of the International Criminal Court, 17 July 1998, Article 8.2.b.viii.
[46] *Ibid*.

4.8 The Kingdom of the Netherlands notes that all High Contracting Parties to the Geneva Conventions are under an obligation to ensure respect for the Geneva Conventions, with reference to Article 1 common to the Geneva Conventions.[47] As noted by the Court, "every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with".[48]

5. International human rights law

5.1 In relation to international human rights law, the Kingdom of the Netherlands would first note that that body of law continues to apply during situations of armed conflict, including occupation.

5.2 In the *Case Concerning Armed Activities on the Territory of the Congo (*DRC *v*. Uganda), the Court first referred to the *Advisory Opinion on the Construction of a Wall*, considering 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. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[49]

5.3 It added that:

> It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable "in respect of acts done by a State in the exercise of its jurisdiction outside its own territory", particularly in occupied territories.[50]

5.4 The International Law Commission has equally concluded that human rights treaties continue to apply during armed conflict, in its 2011 *Draft articles on the effects of armed conflicts on treaties*.[51]

5.5 It follows that a State which acts as occupying power for the purposes of IHL exercises jurisdiction over everyone within the occupied territory for the purposes of international human rights law. As a result, the occupying power is bound to respect, protect and fulfil the human rights of all those within the occupied territory.

5.6 The obligations owed by States under rules of universally applicable customary international human rights law are of an *erga omnes* character. This Court has held in the *Barcelona Traction* case that *erga*

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[47] According to Article 1 common to the Geneva Conventions, "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".
[48] *Advisory Opinion on the Construction of a Wall*, *supra* note 1, para. 158.
[49] *Id*., para. 106.
[50] *Id*., paras. 107-113.
[51] Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (UN Doc. A/66/10, para. 100); *Yearbook of the International Law Commission, 2011*, Vol. II, Part Two, Articles 6-7 and Annex, under (f).

omnes obligations "derive, for example, in contemporary international law, from […] the principles and rules concerning the basic rights of the human person".[52] According to the Court, this includes the prohibitions of genocide, slavery and racial discrimination,[53] as well as the prohibition of torture.[54] Human rights courts and treaty bodies have concluded similarly with respect to the treaties whose compliance they oversee.[55]

5.7 Certain rules of international human rights law can moreover be characterised as peremptory norms of international law. According to the International Law Commission, this includes the prohibition of genocide,[56] the prohibition of torture,[57] the prohibition of slavery, and the prohibition of racial discrimination and apartheid.[58]

6. The legal consequences for all States and international organisations of a serious breach of a peremptory norm (*jus cogens*)

6.1 Both questions before the Court concern the legal consequences of ongoing violations of rules of international law. Whereas the first question is not specific with respect to the subject of the legal consequences, the second question focuses on the legal consequences for all States and the United Nations. According to the Kingdom of the Netherlands, several of the rules concerned are peremptory norms of international law (see Sections 2 to 4). The Kingdom of the Netherlands is also of the view that all peremptory norms are applicable *erga omnes*.[59] Without prejudice to the legal consequences of the State responsible for an internationally wrongful act, as reflected in the Articles on the Responsibility of States for Internationally Wrongful Acts (the "ARSIWA"),[60] this Section addresses the additional legal consequences for all States and international organisations in the event of a "serious breach" of a peremptory norm.

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[52] *Barcelona Traction* case, *supra* note 20, para. 34.
[53] *Ibid*.
[54] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, Judgment, I.C.J. Reports 2012 (hereafter '*Belgium* v. *Senegal*'), para. 68.
[55] *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Human Rights Committee 29 March 2004, CCPR/C/21/Rev.1/Add. 13, para. 2; *Austria* v. *Italy*, European Commission of Human Rights 11 January 1961, Appl. No. 788/60, p. 19; *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75)* (Advisory Opinion) Inter-American Court of Human Rights Series A No 2 (24 September 1982), para. 29.
[56] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, *I.C.J. Reports* 2007, para. 161.
[57] *Belgium* v. *Senegal*, *supra* note 54, para. 99.
[58] Annex under (f) and (e), Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), Adopted by the International Law Commission at its seventy-third session, in 2022, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (UN Doc. A/77/10, para. 43). The report will appear in *Yearbook of the International Law Commission*, 2022, Vol. II, Part Two.
[59] See Written Statement of the Kingdom of the Netherlands with respect to *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, *I.C.J.* Reports 2010, para. 3.2; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *supra* note 8, para. 1.5.
[60] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the work of its fifty-third session, 23 April - 1 June and 2 July - 10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No.10, UN Doc. A/56/10 (hereafter 'ARSIWA').

6.2 The rules specifying the legal consequences for the international community as a whole when a serious breach of a peremptory norm occurs are reflected in Articles 40, 41, and 48 of the ARSIWA[61], for States, and in Articles 41, 42 and 49 of the Draft Articles on the Responsibility of International Organizations (the "DARIO"),[62] for States and international organisations. In the view of the Kingdom of the Netherlands, the rules laid down in these provisions of the ARSIWA and the DARIO reflect customary international law and, accordingly, bind the international community as a whole.

6.3 These legal consequences may be divided in two categories: substantive consequences, reflected in Articles 40 and 41 of the ARSIWA and Articles 41 and 42 of the Dario; and procedural consequences, reflected in Articles 48 of the ARSIWA and Article 49 of the DARIO. As Articles 41 and 42 of the DARIO are closely modelled on Articles 40 and 41 of the ARSIWA,[63] the present Statement will be limited to the relevant provisions of the ARSIWA. However, the Statement is equally applicable, *mutatis mutandis*, in case of situations governed by the DARIO.

6.4 Article 40 of the ARSIWA defines a serious breach as a gross or systematic failure by the responsible State to fulfil its obligation under a peremptory norm. Article 41 of the ARSIWA subsequently stipulates the particular substantive consequences of such a breach, not only for the responsible State but for the international community as a whole, including that State. These are as follows:

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40;
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

6.5 Thus, in case of a qualified breach (serious) of a qualified norm (peremptory), qualified and additional substantive legal consequences arise. These apply in addition to the legal consequences arising for the responsible State. As the Commentary to this provision explains,

> a serious breach in the sense of article 40 gives rise to an obligation, on behalf of the responsible State, to cease the wrongful act, to continue performance and, if appropriate, to give guarantees and assurances of non-repetition. By the same token, it entails a duty to make reparation in conformity with the rules set out in chapter II of this Part. The incidence of these obligations will no doubt be affected by the gravity of the breach in question, but this is allowed for in the actual language of the relevant articles.[64]

6.6 While, therefore, the regular obligations that arise upon the commission of an internationally wrongful act rest on the responsible State, all States (including the responsible State) are obliged to comply with the obligations stipulated in Article 41 of the ARSIWA.

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[61] ARSIWA, *supra* note 60, Articles 40 and 41.
[62] Draft Articles on the Responsibility of International Organizations (hereafter 'DARIO'), Report of the International Law Commission on the work of its sixty-third session, 26 April - 3 June and 4 July – 12 August 2001, Official Records of the General Assembly, Sixty-sixth session, Supplement No.10, UN Doc. A/66/10, Articles 41, 42 and 49.
[63] ARSIWA, *supra* note 60, Part Three, Chapter III, Commentary to Article 41, paragraph 1, and Commentary to Article 42, para. 1.
[64] *Id.*, *supra* note 60, Commentary to Article 41, para. 13.

6.7 The Court has, on multiple occasions, pronounced on the legal consequences of serious breaches of norms affecting the international community as a whole. In its 1970 decision in the *Barcelona Traction* case, the Court established that obligations owed towards the international community as a whole "are the concern of all States [and that], [i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*".[65] This was followed, in 1971, by the Court's pronouncement, in the *Namibia Advisory Opinion,* on the obligations for all States of the international community in the face of a breach of the right to self-determination. The Court specified that

> States of the United Nations are, for the reasons given in paragraph 115 above, under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia. They are also under obligation to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia.[66]

6.8 The Court further confirmed these obligations in the *Advisory Opinion on the Construction of a Wall*, and the *Advisory Opinion on the Separation of the Chagos Archipelago*. In the former, the Court stated that

> 159. Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.
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> 160. Finally, the Court is of the view that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.[67]

6.9 In its *Advisory Opinion on the Separation of the Chagos Archipelago,* the Court considered that

> while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect.[68]

6.10 It also found that "all Member States must co-operate with the United Nations to complete the decolonization of Mauritius".[69] Thus, the obligations reflected in Article 41 of the ARSIWA correspond closely to the Court's jurisprudence on legal consequences of serious breaches of *jus cogens* norms: the

[65] *Barcelona Traction* case, *supra* note 20, para. 33.
[66] *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, *supra* note 4, para. 119.
[67] *Advisory Opinion on the Construction of a Wall*, *supra* note 1, paras. 159-160.
[68] *Advisory Opinion on the Separation of the Chagos Archipelago*, *supra* note 8, para. 150.
[69] *Id*., para. 152.

Court also identified the obligation of non-recognition, the prohibition to render aid and assistance, and the obligation to cooperate to bring the consequences of the serious breach of a peremptory norm to an end. The binding nature of the rules reflected in Article 41 of the ARSIWA was furthermore confirmed by the Court in *Jurisdictional Immunities*.[70]

6.11 The Kingdom of the Netherlands considers that the obligations reflected in Article 41 of the ARSIWA are binding, not merely hortatory. Thus, States are bound to cooperate to bring the situation to an end, must not recognise the situation resulting from the serious breach of a peremptory norm, and are prohibited from rendering aid and assistance in maintaining it. While the specific implementation of each of these three obligations will depend on the relevant situation, in the view of the Kingdom of the Netherlands, the following may apply in general.[71]

6.12 First, the obligation to cooperate to bring to an end will in most cases, and particularly in cases concerning self-determination and decolonisation, be implemented most effectively through the United Nations. As reflected above, in paragraphs 6.9 and 6.10, the practice of the Court, in its advisory opinions to the General Assembly that related to issues of decolonisation, has been to direct the Members States of the United Nations to cooperate with the United Nations. This follows from the scope of these advisory opinions, which were requested by the General Assembly and meant to assist the latter in its functioning. However, should cooperation in the context of the United Nations fail to materialise, or should the United Nations be unable to take appropriate action, States are not relieved from their obligation to cooperate to bring the consequences of the breach to an end. In that case, they are obliged to seek cooperation through regional or bilateral fora.

6.13 Second, the obligation not to recognise as lawful the situation brought about through the serious breach of a peremptory norm must take into account the exceptions to that rule formulated by the Court in the *Namibia Advisory Opinion.* As the Court specified,

> In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.[72]

6.14 Third, Article 41, paragraph 2, prohibits States to render aid or assistance to the maintenance of the unlawful situation, as a result of a serious breach of an internationally wrongful act. Aid or assistance to the commission of that wrongful act itself is prohibited under Article 16 of the ARSIWA, and Articles 14 and 58 of the DARIO. In both instances, the rendering of unlawful aid and assistance

[70] *Jurisdictional Immunities of the State (Germany* v. *Italy; Greece intervening)*, Judgment, *ICJ Reports* 2012, para. 93.
[71] See also Advisory Committee on Public International Law, *Advice no. 41 Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression*, available at https://www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2022/11/17/legal-consequences-of-a-serious-breach-of-a-peremptory-norm.
[72] *Advisory Opinion on the Continued Presence of South Africa in Namibia*, *supra* note 4, para. 125.

does not give rise to international responsibility of the aiding of assisting State for the underlying unlawful situation or internationally wrongful act, but only for its unlawful aid or assistance.

6.15 Fourth, the obligation not to render aid or assistance includes an obligation not to undermine measures, including sanctions, taken by other States in their endeavour to bring to an end the serious breach of a peremptory norm, in particular when the State undermining those measures does so knowing that its conduct contributes to the maintenance of the unlawful situation.

6.16 Fifth, and finally, the Kingdom of the Netherlands submits that a serious breach of a peremptory norm entitles States other than the injured State to take a countermeasure against the responsible State. The right of non-injured States to take countermeasures is thus also a legal consequence of a serious breach of a peremptory norm. The taking of a countermeasures by a non-injured State must be in accordance with the rules on countermeasures as reflected in Articles 49 to 53 of the ARSIWA, including the condition that the countermeasure be proportionate to the injury suffered and the gravity of the internationally wrongful act and the rights in question (Article 51), and that the countermeasure be reversible (Articles 49, paragraphs 2 and 3, and 53).[73]

6.17 As to the procedural consequences of a serious breach of a peremptory norms, the ARSIWA, in Article 48, and the DARIO, in Article 49, give legal standing (*jus standi*) to non-injured States and international organisations respectively to invoke the responsibility of a State or international organisation responsible for breaching a norm that is applicable *erga omnes*. These provisions also entitle such non-injured States and international organisations to claim cessation of the internationally wrongful act (Articles 48, paragraph 2(a), ARSIWA and 49, paragraph 4(a), DARIO), and performance of the obligation to make reparation (Articles 48, paragraph(2(b), ARSIWA and 49, paragraph 4(b), DARIO). A claim concerning performance of the obligation to make reparation is restricted in the sense that it must be in the interest of the injured State or international organisation or of the beneficiaries of the obligation breached. Such beneficiaries may include individuals and peoples.[74] As may be recalled, the Kingdom of the Netherlands considers that all peremptory norms are applicable *erga omnes*. Therefore, the procedural legal consequence of a serious breach of a peremptory norm is that all States and international organisations have legal standing to invoke responsibility for this breach and claim cessation and, subject to the restrictions provided in Articles 48, paragraph 2(b), ARSIWA and 49, paragraph 4(b), DARIO, the performance of the obligation of reparation.

[73] For the relevant rules in the DARIO, see *supra* note 62, Articles 51 to 56.
[74] ARSIWA, *supra* note 57, Commentary to Article 33, paras. 3 and 4.

Respectfully,

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