The Wall. A Breach of Israel’s *Erga Omnes* Obligations: Consequences on Third Parties

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*This work identifies the construction of the wall/fence in the Occupied Palestinian Territories (hereafter OPTs) as a breach of Israel’s obligations to comply with the Palestinian *erga omnes* right to self-determination. It results in an accumulation of violations under international humanitarian and human rights law which interfere with the exercise of their *erga omnes* right. Because of the special character of the breach, the international wrongful acts flowing from Israel’s action engage its responsibility and involve third parties. States are under the obligation not to further the violations and to deter them. Individual and collective positive actions may take place through international organizations or political entities, and also involve financial measures hindering the state’s commercial competitiveness. Nevertheless, third party action calls for extreme prudence. ‘Secondary wall infrastructure’ may become permanent and further Israeli discriminatory strategy while causing violations of principles of international law that the ICJ aims at defending in its Opinion.*

INTRODUCTION

Since the beginning of the second and ongoing *intifada* in September 2000, violence and human rights violations on the part of both parties have reached a level unprecedented in the 36 years of Israel’s occupation of the Palestinian territories. Regardless of its duration, occupation “gives rise to a myriad of human, legal and political problems.” Resulting from a great number of government-made decisions aiming at preventing the infiltration of Palestinians into Israel, the cabinet in June 2002 consented to the construction of a “security fence.” Allegedly aiming at preventing terrorists acts emanating from within the West Bank, it separates a large portion of the

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3 Separate Opinion of Judge Elaraby

4 For a list of the decisions taken by Israel and leading to the separation-barrier plan, see B’Tselem, *Behind the Barrier: Human Rights Violations as a Result of Israel’s Separation Barrier*, (March 2003).

5 According to Israeli authorities, “the Security Fence is a central component in Israel’s response to the wave of Palestinian terrorism. It is a defensive measure, designed to block the passage of terrorists,
occupied West Bank from Israel proper, running from the north to the south of the West Bank, and around Jerusalem. The General Assembly requested the International court of Justice to render an advisory opinion concerning the legal consequences arising from the construction of the wall. The Court acknowledged the previously declared illegality of the wall, which would not have been illegal if it had been built on Israeli territory. Its illegality derives from its geographical placement and the resulting harm inflicted upon Palestinian people as a whole. In the Advisory Opinion on Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory of 9 July 2004, some ambiguities in the question posed to the Court remain flagrant. The General Assembly did not specify whether it meant consequences for all States, for international organizations, or for the two parties alone. The question to be answered is the following: how is the construction of the wall a breach of the obligations incumbent upon the state and which special character imposes further action by third parties? This analysis will deal with the identification of the breach by Israel of the erga omnes obligations incumbent upon it. We will then consider the legal consequences of Israel’s violations on third parties — that is international organizations and other States, deriving from IHL and HR law, and due to the erga omnes character of the breach. In chapter one

I will consider the construction and location of the wall as part of a broader Israeli isolation and discriminatory policy. I will then assess its effects on the exercise of the Palestinian right to self-determination under the two legal frameworks. The second chapter will provide a legal and critical discussion of the erga omnes character of the violation identified in chapter one, and of the resulting obligations on third parties, taking into consideration some influential factors.

IDENTIFYING ISRAELI BREACH OF ITS OBLIGATIONS

General discussion of the wall

*The act: the construction of the wall*

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6 Herb Keinan, *Cabinet Okays ‘Security Concept,’* Jerusalem Post (JM. Post), June 24, 2002, at 1
8 In accordance with Article 96 of the UN Charter, “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal questions” And did so at its Tenth Emergency Special Session on 8 December 2003 adopting resolution ES-10/13 which “demanded Israel to stop and reverse construction of the wall [...] in contradiction to relevant provisions of international law” See Wall Opinion, para. 1
9 Pursuant to Article 65 of the Statute of the Court
10 The exact question asked 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?” See Wall Opinion, para. 1
11 See General Assembly resolution ES-10/13 which “demanded Israel to stop and reverse construction of the wall [...] in contradiction to relevant provisions of international law”
13 We will refer to it hereinafter as the ‘Wall Opinion’
The wall built by Israel is not being constructed on the 1948 armistice line; about 90% of its route is on Palestinian territory inside the West Bank. At the time of writing of the opinion it was running for more than 650 kilometers, with an average width of 60 to 80 meters. The centerpiece is the wall itself but consists of chain-link fencing in most parts. Moreover, on the basis of that route, 975 square kilometers or 16.6% of the West Bank lie between the Green Line and the wall, the area being home to 237,000 Palestinians.

Since the beginning of the project, and as it appeared necessary in the building process considering the chosen route, Palestinian homes and infrastructure were demolished, lands, orchards and olive groves were rendered unusable, and “over 100,000 civilian non-combatants have been rendered homeless and hapless.” An estimated 100,000 dunums of the West Bank’s most fertile land was confiscated and destroyed only during the first phase of the project. The construction then directly led to encirclement of Palestinian towns and villages, homes to 160,000 Palestinian Arabs, cutting off communities and families from each other, separating farmers from their land and Palestinians from their places of work, education and health care facilities and other essential services.

Beyond the act: general Israeli strategy

At the time of writing the ICJ did acknowledge some references made of Israel’s planned construction of the wall “following the Jordan Valley along the mountain rage to the West.” It is now safe to assume, almost four years later and considering the recent changes in the route of the wall that this policy of external closure is indeed being implemented. Its length has increased considerably when defining more and more accurately the borders of the isolated area. The first modification, as shown by the map below, concerns the incorporation in the Israeli side of the two settlements of Nili and Naaleh. The second and most interesting modification for this analysis is a new section added in the Dead Sea and encircling the West Bank a little more; it deprives Palestinians...
of a surface of 71 Km$^2$ for no obvious strategic reason. It is nevertheless important to consider it a perpetuation of the Israeli isolation policy to cut off the OPTs from the rest of the world. Clearly further advancements gradually encircle the whole of the territory, aiming at separating the West Bank from Jordan in the same way Gaza is separated from Egypt, and creating a “perfect ghetto”.\textsuperscript{25}

For security reasons the government of Israel has for long considered “plans to halt infiltration into Israel from the central and northern West Bank”\textsuperscript{26}. As the project was then taken to further steps, the route of the fence became clearer; the works planned\textsuperscript{27} with its associated regime resembled the creation of a “fait accompli” likely to provoke permanent modifications on the ground.\textsuperscript{28} This appears even more plausible considering the rapid advancements and the continuation of construction regardless of the consequences. The project, part of a general discriminatory policy, integrates Israeli settlements and their means of access, and could only be efficient if the construction was not hindered by third parties concerns. Consequently a considerable part of the works had already been completed less than two years after the cabinet’s decision.\textsuperscript{29} This also

\begin{footnotesize}
\textsuperscript{26} Wall Opinion, para. 80
\textsuperscript{27} Or already completed at the time of the Opinion
\textsuperscript{28} Wall Opinion, para 121
\textsuperscript{29} At the time of the Opinion Phase A and B were nearly completed, Phase C having begun as early as of 25, January 2004. Wall Opinion, para 81
\end{footnotesize}
The wall: a breach of Israel’s obligations under I HL and HR law

Now that we have identified the construction of the wall as part of a broader Israeli policy, we shall now consider how this conduct constitutes a breach of its international legal obligations to respect Palestinian rights. The applicability in the OPT of the 3rd and 4th areas of international law — humanitarian and human rights law — is unquestionable. Since the Palestinian territory between the former eastern border of Palestine under the British Mandate and the armistice line is occupied by Israel, humanitarian law therefore does apply. With respect to human rights law, the Court considered applicable to the OPTs the ICCPR, the ICESCR and the CROC.

The Wall and International Humanitarian Law

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30 This “violates the rule of proper administration and hampering informed public debate on a project on the long term.” B’Tselem, (2003).
33 It is interesting to consider that “the Court lacked many relevant facts bearing on Israel’s construction of the wall because Israel failed to present them”, and then argued that the Court should decline to hear the case for the same reason. See Declaration of Judge Buergenthal, para. 10
35 See Art 42 of the Hague Regulations
36 Although Israel is not a party to the Fourth Hague Convention of 1907 to which The Hague Regulations are annexed, the Court considers its provisions part of customary international law. Also, having ratified GC IV in 1951, both Israel and Jordan were parties to the Convention when the conflict broke out. The Israeli Supreme Court recently reaffirmed the applicability of both instruments in its Beit Sourik Judgment of 30 May 2004. Wall Opinion, para. 89, 91, 100 and Beit Sourik Village Council v. Israel (June 30, 2004), para. 23
37 “In respect of acts done by a State in the exercise of its jurisdiction outside its own territory” Wall Opinion, para. 112
38 Since the territories have been subject to Israeli territorial jurisdiction as the occupying power for over 37 years. Wall Opinion, para. 112
39 Since this one applies to “each child within their jurisdiction”. Wall Opinion, para 112
It is most significant to consider the Court’s assumptions concerning Palestinian rights as a central argument in the Wall Opinion. The principle is enshrined in the UN Charter and reaffirmed in resolution 2625. Its treatment of Palestine as a state entity clearly shows the existence of a Palestinian people as an entity entitled to apply the self-determination principle. Recalling that the focus of the request revolves around the law of belligerent occupation, it is essential to note that the wall is being built on Palestinian land for most of its route, and that its construction constitutes a de facto annexation of land contrary to international rules and principles. Clearly it considerably “interferes with the territorial sovereignty and consequently with the right of the Palestinians to self-determination”. Also, as a direct consequence of its geographical placement as discussed earlier, the wall effectively fragments the territory over which the Palestinian people are entitled to exercise the right of self-determination.

Clearly, the route chosen by Israeli authorities also implied the destruction or requisition of Palestinian property for reasons other than the absolute necessity imposed by military operations. It therefore contravenes articles 53 of GC IV that provides that “destruction by the occupying power of real or personal property [...] is prohibited”.

When reaffirming the applicability of the Fourth Geneva Convention in resolution 446 of 1979, the Security Council focused on the absence of the “legal validity” of the Israeli settlements that it then declared a “flagrant violation” of the Convention since the beginning of the conduct of the policy in 1977. According to the Fourth Geneva Convention, “the Occupying Power shall not deport or transfer part of its own civilian population into the territory it occupies”. The Settlements are ipso facto in violation of international rules and principles. For this analysis it is most relevant to consider the

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40 The existence of the “Palestinian people is no longer an issue” and has also been recognized by Israel when Yitzhak Rabin stated that “the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people”. It is also important to note that the Israeli — Palestinian agreements refer to the “legitimate rights” of the Palestinian people. Wall Opinion, para. 118.

41 “Every State has the duty to refrain from any forcible action which deprives peoples referred to [...] of their right to self-determination”. Security Council Resolution 2625 of 27 October 1970

42 Palestine was also allowed to take part in the hearings and was able to co-sponsor the draft resolution requesting the advisory opinion, and was then allowed by the Court to submit a written statement within the given time-limit. Wall Opinion, para. 4 - 5

43 As condemned by resolution 242 and 2625, and as stated by the Court in the Nicaragua v. United States of America Case. Wall Opinion, para 74, 87, 117, res 242 and 2625, ICJ Judgment of 26 November 1984.

44 Wall Opinion, para. 115

45 Wall Opinion, para. 132

46 This one provides that private property must be respected and may not be confiscated.

47 Security Council Resolution 446 of 22 March 1979


50 Wall Opinion, para. 120

51 It was also reiterated in Art 85(3a) of the Additional Protocol of June 8 1977

52 Declaration of Judge Buergenthal, para. 9
wall as a measure taken by the occupying power to plan and organize the transfer of parts of the Israeli population to the occupied territory. This practice is also forbidden by the same article.

The route of the wall clearly allows the perpetuation of the already declared illegal policy, and serves to encompass the great majority of Israeli settlements. Some 54 Israeli settlements in the West Bank and 12 in East Jerusalem, amounting to 80% of the Israeli settlers, or some 320,000 individuals, are located in the “Closed Area”. Not only do settlers greatly benefit from Israel’s discriminatory policy, but the reinforcement of settlements also considerably changes the demographic composition of the West Bank. Since this leads to the departure of Palestinian populations from certain areas, the Palestinian ability to exercise self-determination clearly “has been materially affected by the combination of the wall and the change in population.”

The Wall and International Human Rights Law

As we have established earlier, the route of the wall may lead to a total isolation of the West Bank from both Israel and Jordan. The policy of external closure imposed upon West Bank residents is also accompanied by a policy of internal closure, largely enhanced by the route chosen. It becomes most important to consider the associated effects from the construction of the wall, which lead to the creation of a “Closed Area” as a means to enforce a general discriminatory policy. Residents of the area must not remain in it, nor can non-residents enter it. It imposes restrictions on freedom of movement of Palestinian Arabs that can only access the area through gates, opened “infrequently and for short periods,” in violation of Art. 13 (1) of the Universal Declaration of Human Rights, and Art. 12 paragraph 1 of the ICCPR. The consequences of the route of the wall are even more disastrous when certain enclaves are

53 As shown by the maps of the wall and considering that the most recent changes in the route of the wall concern the integration of the settlements of Nili and Naaleh in the Israeli side, Israel’s policy appears more current than ever.
54 Wall Opinion, para. 119
55 Wall Opinion, para 112
57 Israel made available “statistics indicating the enjoyment of the rights enshrined in the [ICESCR] by Israeli settlers in the occupied territories” when “the Palestinian population within the same jurisdictional areas were excluded from [...] the protection of the Covenant”. Wall Opinion, para. 112
58 Susan C. Breau, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International & Comparative Law Quarterly, 2005
59 It is established in the part of the West Bank lying between the Green Line and the Wall
60 Israeli citizens on the other hand are allowed to immigrate in, move freely to, from, and within the Closed Area without a permit. Wall Opinion, para. 85
61 Wall Opinion, para. 85
62 It provides that “everyone has the right to freedom of movement and residence within the borders of each State”
63 This one provides that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”
subject to more extreme restrictions on the freedom of movement of residents. Therefore, as a consequence of the wall and of its associated regime, a significant number of Palestinian Arabs have had no other choice but to leave the area, even though the first generation of human rights guarantees them the right to choose their residence.

Stemming from the destruction and requisition of Palestinian land, the vast amount of property that West Bank residents are deprived of consists of the most fertile agricultural land, fruit and olive trees, wells, and hothouses upon which tens of thousands of Palestinian Arabs rely for their survival. In the region that Postel described as “the most concentrated region of [water] scarcity in the world,” and where 25% of the whole West Bank population is employed in farming, Palestinian access to the most essential means of survival, such as water, is considerably hindered by construction of the wall that cuts Palestinian Arabs from the most important water wells of the region. West Bank residents must mainly rely on rain water and water tankers. These tankers are often unable to reach the populations in need due to the limited freedom of movement and internal closures. Furthermore, the construction of the wall resulted in the separation of “30 localities from health services, 22 from schools, 8 from primary sources of water and 3 from electricity networks.” Impeding the freedom of movement results in a decline in production and employment; according to some sources, unemployment has risen to over 50% and more than half of the Palestinian population now lives considerably below the poverty line. By hindering the right to work the wall hits the economic foundations of the Palestinian society and thwarts changes for the durable development of a functional Palestinian State while simultaneously violating a large number of human rights provisions.

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64 According to Special Rapporteur, “Qalqiliya, a city of 40,000, is completely surrounded by the Wall and residents can only enter through a single military checkpoint open from 7 a.m to 7 p.m.” Wall Opinion, para. 133
65 Wall opinion, para. 133
66 The restrictions of freedom of movement are similar with respect to Palestinian access to holy places, hindered by the route of the wall in violation of the provisions contained in the 181 resolution, the 1949 Armistice agreement, and the more recent Art 9 paragraph 1 of the 1994 Peace Treaty between Israel and Jordan. Wall Opinion, para. 129
67 Wall Opinion, para. 133
70 Wall Opinion, para 133.
74 It is worth noticing the common direction taken by both human rights and humanitarian law with respect to unemployment. The right to “gain his living by work” is put forward in Art 6 and 7 of the ICESCR, and Art 52 of GC IV forbids “all measures aiming at creating employment or at restricting the opportunities offered to workers in the occupied territory”.
75 Right to protection (and assistance accorded to family and to children and young persons) under Art 10 of the ICESCR, right to adequate standard of living, including adequate food, clothing and housing and to be “free of hunger” (Art 11), Right to health (Art 12), Right to education (Art 13 and 14) The Croc contains similar provisions in Articles 16, 24, 27, 28. Wall Opinion, para. 131, 133.
Human rights violations go hand in hand with the humanitarian violations assessed above, and highlight the absence of respect for some provisions of the law of occupation. Today’s illegal annexation of land is based on previous crucial and illegal Israeli practices such as the 1967 acquisition of territory by war, and the perpetuation of these violations clearly amount to impeding Palestinian exercise to self-determination. According to Judge Al-Khasawneh, “what prevents this right of self-determination from being fulfilled is Israel’s prolonged military occupation with its policy of creating faits accomplis on the ground.”76 The construction of the wall therefore involves serious breaches of Israel’s obligations incumbent upon it under both humanitarian and human rights law77 to respect Palestinian entitlement to the liberation principle. The international wrongful acts stemming from Israel’s action78 engages its responsibility79, but also involves third parties because of the special character of the breaches.

LEGAL / CRITICAL DISCUSSION OF ERGA OMNES OBLIGATIONS FOR 3RD PARTIES

Since the beginning of its construction the wall has been the subject of great controversy and has prompted intense protests on the part of the Palestinian Authority and many states around the world.80 Considering the issue of general concern and a “threat to international peace and security”81 and also witnessing the inefficiency of the SC82, many UN Member States thus pushed for the GA to address this matter. The nature of the opinion issued by the ICJ at the behest of the GA and of its advisory character does not preclude binding legal consequences on third parties; in fact the Wall Opinion is a “declarative law destined to all subjects of international law.”83 Based upon the findings of the previous discussion of the violations of its international obligations, we will now consider the erga omnes character of Israel’s breaches, and the resulting legal consequences of the international wrongful acts flowing from Israel’s act84, for third parties, deriving from IHL.

The erga omnes character of Israel’s violations

*Palestinian self-determination as erga omnes obligation*

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76 Separate Opinion of Judge Al-Khasawneh, para. 9
77 Wall Opinion, para. 137
78 Wall Opinion, para. 154
79 Wall Opinion, para 147
81 Wall Opinion, para. 17
82 In October 2003 the US vetoed a draft SC resolution condemning the wall as illegal. The ‘Quartet’ (representatives of US, EU, Russia, and the UN) then obtained Security Council approval for their ‘Performance-based Road Map to a permanent Two-State Solution’ although it said nothing about the wall. Neither did res 1515. See SC Res 1515 (Nov. 19, 2003), Wall opinion, para. 22, 30, 31, Amnesty International, (2004)
83 UN Meeting on Question of Palestine Discusses Responsibility of Government in Upholding International Law, GA/PAL/981, 10 March 2005
84 Wall Opinion, para. 154
Different from regular rules, the *erga omnes* rule creates obligations which the ICJ has previously recognized in many instances. The legal consequences of these obligations “are due to the normative character of a rule [rather than] to its binding character.” Since “states may have a general interest [...] in the maintenance of an international regime adopted for the common benefit of the international society,” *erga omnes* obligations pertain to the enforcement of rules of international law which violation “is deemed to be an offense against all members of the international community.” Subscribing to a rather broad view, recalling that it declared the right of peoples to self-determination to be an *erga omnes* right in the East Timor case, and that “every state has the duty to promote [it]”, the Court’s biggest concern appears to be the use of the wall as a means to perpetuate a policy in flagrant violation of Israel’s duty to respect Palestinian rights. Since the necessary protection of human rights for the exercise of the liberation principle is not ensured, and many provisions of humanitarian law have been violated, the Court declared some of the obligations violated by Israel to be of *erga omnes* character. The failure to respect the Palestinian right to self-determination and some obligations incumbent upon the Jewish State under international humanitarian law are part of “a great many rules [...] so fundamental to the respect of the human person and ‘elementary considerations of humanity, [...] that are to be observed by all States whether or not they have ratified the conventions.” In the *Barcelona Traction* case, the Court indicated that by their very nature, such obligations are the concern of all states, and that they can “be held to have a

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89 The Court does not mention jus *cogens norms* in the Opinion, and considered as a whole that the obligations *erga omnes* “do impose substantive obligations on third states.” See Iain Scobie, *Unchart(er)ed waters?: consequences of the advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory for the responsibility of the UN for Palestine*, European Journal of International Law, 2005
90 The Court based its judgment upon its jurisprudence (see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ. Reports 1971, para. 52-53 and Western Sahara, Advisory Opinion, ICJ. Reports 1975, paras. 54-59), and described as “irreproachable” Portugal’s assertion that “the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character”. See Wall opinion, para. 156, Judgment of 30 June 1995 of the case concerning East Timor, para. 29.
91 Security Council Resolution 2625 of 27 October 1970
92 Wall opinion, para. 155
93 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons of 8 July 1996
94 This eventually led to the writing of the new Article 48 on state responsibility of the ICL, according to which states can invoke responsibility from the violation of an obligation *erga omnes* although they have suffered no injury. Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, The American Journal of International Law, Vol. 96, No. 4. (Oct., 2002)
legal interest in their protection." The construction of the wall in occupied Palestinian territory thus has legal consequences for the State of Israel, clearly enumerated in detail, but also for other States and the United Nations.

The resulting obligations on third parties

The obligation of every State party to the Fourth Geneva Convention to ensure compliance by Israel of international humanitarian law flows from the Court’s interpretation of humanitarian rules and insistence using the language “to respect and to ensure respect for the present Convention in all circumstances.” The deliberate language used in Common Art 1 can be seen as a “conventional precursor to the erga omnes principle enunciated in Barcelona Traction.” Common Article 1 may indeed reflect customary law; it grants the High Contracting Parties a ‘legal entitlement’ to demand respect and observance for the Convention. It is the common interest “in compliance with humanitarian treaty rules [that is being] recognized and translated into a legal mechanism.”

Given the special character of the obligations violated, the Court set out two negative obligations. In conformity with Art. 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, it took the view that States are under an obligation not to recognize the illegal situation arising from the construction of the wall, and not to render aid or assistance in maintaining that situation it created. Considering the positive obligations, it becomes the responsibility of third parties to ensure Israel’s compliance with humanitarian law and to see that “any impediment resulting from the construction of the wall to the exercise [...] of self-determination is brought to an end” through lawful means. Such obligation clearly lacks specification, and “leaves much to be desired in the way of fulfilling this judicial imperative.”

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95 Judgment of 5 February 1970 concerning The Barcelona Traction, Light and Power Company, Limited. para. 33. It is relevant to note that the passage on obligations erga omnes attracted the support of all judges. For more, see Maurizio Ragazzi, (2000), p 11
96 Wall Opinion, para 145, 149-153
97 In his Separate Opinion, Judge Kooijmans admitted some similarities with Art 41 of the International Law Commission’s Articles on State Responsibility which provides that “States shall co-operate to bring to an end any serious breach [of obligations arising under a peremptory norm of general international law], not recognize [...] nor render aid or assistance in maintaining that situation”.
98 Wall Opinion, para 144
99 Wall Opinion, para 158, 159
100 This is a notable development of international law that led to the emergence of an opinio juris which did not exist at the time of writing of the Geneva Conventions. Juan Manuel Gomez-Robledo L’ Avis de la C.I.J sur les Conséquences Juridiques de l’Edification d’un Mur dans le Territoire Palestinien Occupe: Timidité ou Prudence? Revue de Droit International Public, Tome 109, 2005
102 Ibid.
104 Wall Opinion, para. 159
105 Wall Opinion, para. 146, 158-159
of the Draft Articles on Responsibility of States for Internationally wrongful Acts\textsuperscript{108}, this obligation imposed upon third parties continues to apply as long as Israel persists in occupying the territory in violation with humanitarian law, and refuses to bring to an end the unlawful act of construction of the separation barrier greatly interfering with the Palestinian right to self-determination.\textsuperscript{109} If it has become a duty to promote and to respect for third parties, as laid out in common art 1 or ICCPR and ICESCR\textsuperscript{110}, State practice on common Art 1 remains insufficient and “not rich enough to determine the upper limits of how a State may ‘ensure respect’ for the Fourth Geneva Convention.”\textsuperscript{111} Although there is no mechanism for the full application of the Geneva Conventions or Additional Protocols I and II\textsuperscript{112}, it does not mean that residents of the West Bank are fully deprived of their rights; it is arguable that they would have been entitled to even fewer rights in the absence of the Geneva Conventions.\textsuperscript{113}

**Some factors explaining the ruling of the Court**

*Special relationship between UN and Palestine*

The previous acknowledgements by the Court concerning the rights of the Palestinian people as a whole, the breadth of the question asked to it and its ramifications raise the interesting issue of the special relationship between the UN and Palestine. The origin of this question is found in the Mandate and Partition Resolution, and has been manifested by the adoption of a large number of UN resolutions.\textsuperscript{114} Before the Wall Opinion, “no organ had ever requested the International Court of Justice to clarify the complex legal aspects of the matter under its purview.”\textsuperscript{115} The breadth of the question asked to the Court and the unknown nature of the legal scope of its consequences can be understood mostly when considering the “United Nations’ historical and legal responsibility towards Palestine.”\textsuperscript{116} Since it is the first time that the Court has been consulted by a UN organ with respect to Palestine, and that the UN has a clear responsibility towards the establishment of a Palestinian State, it appears normal that an Advisory Opinion of far reaching consequences was to be expected.\textsuperscript{117}

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\textsuperscript{107} It provides that “the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation”.

\textsuperscript{108} Although the text only concerns state entities, the Court’s consideration of the Palestinian people as a whole, the special relationship between the UN and Palestine as discussed earlier and common sense, call for its application on moral grounds.

\textsuperscript{109} Victor Kattan, (2004/2005)

\textsuperscript{110} Wall Opinion, para. 88

\textsuperscript{111} Marco Sassoli & Antoine A Bouvier, Hoes does Law Protect in War? International Committee of the Red Cross, (Geneva, 1999), p. 231.

\textsuperscript{112} The meetings of High Contracting Parties created in accordance with Art 7 of API and the International Fact-Finding Commission created in accordance of Art 90 of the same text have proven useful to facilitate the implementation of the Conventions. Juan Manuel Gomez-Robledo (2005)

\textsuperscript{113} And according to a panellist at the UN Meeting on Question of Palestine.

\textsuperscript{114} Wall Opinion, para. 49.

\textsuperscript{115} Separate Opinion of Judge Elaraby

\textsuperscript{116} Separate Opinion of Judge Elaraby

\textsuperscript{117} Juan Manuel Gomez-Robledo nevertheless deplores that such fundamental norms of humanitarian law have not yet been raised to a status of *jus cogens*. See Juan Manuel Gomez-Robledo (2005)
Third parties reaction v. construction speed & info crisis

As we have already discussed, Israel’s refusal to share the necessary information and its concern for fast construction gives away part of its general policy. If its purpose is a permanent modification on the ground, it is safe to assume the goal of this strategy was to leave limited time and knowledge for third parties to assess its consequences and react to its construction. Considering Israel’s speedy and cautious construction policy, common sense dictates that the carefully planned obstacles to Palestinian self-determination should impose an obligation on third parties to reestablish the previous equilibrium.

The future of the Wall Opinion

The UN and the Wall Opinion

Since the Court’s reply to the request of the General Assembly is only of advisory character with no binding force, and that Israel continues to build the wall regardless of the Court’s Advisory Opinion, Palestinians seem entirely deprived of legal protection. Clearly the High Contracting Parties are only guided by the necessity to co-operate with the United Nations. As a primary role of international law to is “to provide all international actors, including States, with guidance as to agreed standards of behavior”, this is a “healthy development for central organs [which] may be in a better position to recommend or authorize individual or joint action by States against the delinquent State.” Also, it is undeniable that there has been a relatively good practice of implementation of humanitarian law by the Security Council in the last decade. Considering the special relationship between the UN and Palestine, and given that for the first time the United Nations were provided with “a judicial determination of essential aspects for the purpose of reaching a negotiated settlement between the two conflicting parties”, the United Nations were also under a clear moral obligation to “contain and resolve [the] dispute”, as well as “promot[e] and develop international law.” Inaction on the part of the international organization

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118 Factsheet: Canada and the ICJ Decision on the Wall, Canada for Justice and Peace in the Middle East, December 2005.
119 In accordance with Art 89 of API.
120 Richard A. Falk, (2005)
122 Juan Manuel Gomez-Robledo, (2005), and Antonio Cassese, (2005), p 264-5
123 Juan Manuel Gomez-Robledo, (2005)
124 Involving “parallel or shared responsibilities” between the two organs, The Court called for the General Assembly and Security Council to redouble efforts to bring the conflict to an end since it poses “a threat to international peace and security”, and “consider what further actions is required to being to an end the illegal situation” emanating from the construction of wall. Wall Opinion, para 160, Separate Opinion of Judge Kooijmans, para. 38
would constitute an internationally wrongful act and thus entail its international responsibility.\textsuperscript{126}

The resulting General Assembly resolution of 20 July 2004 acknowledged the Court’s Advisory Opinion, and tasked member states to comply with their legal obligations as stated in the Opinion.\textsuperscript{127} This resolution was adopted by 150 States and 25 members of the European Union.\textsuperscript{128} In the absence of coercive means at the disposal of the General Assembly to implement its resolutions, and given that members are liable for the obligations incumbent upon their organizations\textsuperscript{129}, it is also conceivable to see States making unilateral decisions.\textsuperscript{130} Clearly the Advisory Opinion concerns Members States of the European Community which are also Members of the United Nations.\textsuperscript{131} It has also been clearly established in both the Senator Lines and Eurocontrol cases that States cannot “evade their international obligations by hiding behind the independent personality of an international organizations of which they are members.”\textsuperscript{132}

\textit{The EU and the Wall Opinion}

Therefore, resulting from the Court’s findings, a number of panelists\textsuperscript{133} have discussed the responsibility of governments and intergovernmental organizations in protecting these “super-rules”\textsuperscript{134} of customary international law. If it appears in the text that the obligation of states to deter the violations caused by the wall is unquestionable, it remains unclear what the means of deterrence should be. Taking the view that States, international organizations and most specifically financial institutions must refrain from contributing to the breaches of international law, it is essential to begin by cutting off the funds used for the construction. It was argued that the free trade system of the European Union, since it does not restrict materials exported to Israel, provided considerable

\begin{footnotesize}
\begin{enumerate}
\item[127] It also recalled that “both Israel and the Palestinian Authority are under an obligation scrupulously to observe the rules of international humanitarian law.”
\item[130] After having openly criticized the project, The United States canceled U.S.$289.5 million in loan guarantees to Israel. This amount was meant to reflect a portion of the construction of the wall. See Steven R. Weisman, \textit{U.S. Rescinds Part of Loan Guarantees to Israel}, N.Y. Times, Nov. 26, 2003, at A12, as stated in ICJ Advisory Opinion on Israeli Security Fence, \textit{The American Journal of International Law}, Vol. 98, No. 2. (April 2004)
\item[131] Victor Kattan, (2004/2005
\item[132] As acknowledged by General Advocate Tesauro, and as stated in Iain Scobbie, (2005); See also Decision of 4 July 2000 on the case concerning \textit{Senator Lines v Member States of the European Community}.
\item[133] During the United Nations Geneva International Meeting on the Question of Palestine of 9 March 2005
\item[134] The existence of these ‘super rules’ and their consequent ‘collective guarantees’ at a certain moment of the development of the international community is the logical consequence of the importance given to these rules, and also corresponds to the evolution of human rights law. Juan Manuel Gomez-Robledo, (2005)
\end{enumerate}
\end{footnotesize}
benefits to Israel when importing construction materials used for the expansion of the wall. According to the jurisprudence of the European Court of Justice, the obligations violated are binding upon the European Community; it is necessary to take positive and collective action.\(^{135}\) Efforts must then be made to urge the EU, “a far bigger trading and commercial partner than the US”\(^{136}\), to implement the necessary legal actions.\(^{137}\) As a relevant actor with respect to the present analysis\(^{138}\), it has the same obligations States do, to bring to an end Israel’s violations, and should first refrain from continuing granting Israeli preferential access to the common market.\(^{139}\) The example must be made of the 9 CEE members taking measures against Iran on 22 April 1980\(^{140}\), and the coercive measures taken in 1982 in relation to the Falklands/Malvinas conflict.\(^{141}\) At the domestic level it is most important to consider the public opinion as a potential driving force which can play “an important role in putting pressure on respective States to act in accordance with international law”.\(^{142}\)

**General remarks regarding international aid**

Careful consideration of appropriate behavior to be adopted by the international donor and aid community operating in the OPT is crucial, and the obligations on third parties caused by the *erga omnes* character of the violations could very well lead to further breaches of IHL. “Mitigation measures” that aim at “offsetting and countering the effect [of the wall] on the Palestinian civilian population” create a so-called “secondary wall infrastructure”. These measures would be unnecessary in the absence of the wall, and could consequently include the construction of public infrastructure such as health clinics and road networks. It is arguable that supporting such construction would create permanent infrastructure on the ground, dependent on the current placement of the wall, and in violation of the principles of IHL the opinion aims at defending.\(^{143}\) This would undoubtedly reinforce the possible permanent status of the wall as a new border, when clearly furthering the Israeli discriminatory policy.\(^{144}\)

**CONCLUSION**

\(^{136}\) Ian Williams, *Israel up against the wall*, Asian Times, Jul 14, 2004
\(^{137}\) UN Meeting on Question of Palestine
\(^{138}\) In the *Costa v. ENEL* case, the European Court of Justice acknowledged that the transfer of the sovereign powers from the Member States to the European Community came with the responsibility resulting from the *erga omnes* character of some international humanitarian rules. Judgment of the European Court of Justice, *Flaminio Costa v ENEL*, of 15 July 1964, para. 157
\(^{139}\) Victor Kattan, (2004/2005)
\(^{140}\) Although the CEE was Iran’s strongest commercial partner in 1978 (providing 43% of its importations and absorbing 36% of its exportations), and was the CEE’s second largest oil supplier (17%), the 9 members had agreed on embargo measures directly aiming at conflict resolution possibilities. The measures were very similar to the ones adopted by the Security Council on 13 January 1980, and that the Soviet Union had vetoed. Read Revue Générale de Droit International Public, 1980, 2, p 884
\(^{141}\) The EC suspended the import of goods from Argentina for its attack on the island. See Antonio Cassese, (2005), p 264
\(^{142}\) As stated in UN Meeting on Question of Palestine and according to Professor Georges Abi-Saab.
\(^{143}\) Ardi Imseis, (2005), p. 117
\(^{144}\) *Ibid.*
Adding to the doubtful moral character of the general policy behind the construction of the wall as discussed in the first chapter, its placement, consequences on the ground and purpose vis-à-vis settlers led the Court to consider that its construction and ramifications did impede the *erga omnes* right of peoples to self-determination. Not only does it seriously “reduce the size of the self-determination unit within which that right is to be exercised”\(^{145}\), but is also an “expression in loco” of Israel’s settlement policy.\(^{146}\) The consequent *de facto* annexation of a significant portion of the West Bank is an incentive that allows the perpetuation of Israel’s ‘drop by drop’ policy of settlement. The illegality of the wall, as well as the suffering of many Palestinians living in that Territory\(^{147}\) is indisputable. Clearly the ruling constitutes a powerful reminder that the question of Palestine, in all its aspects, is subject to international law\(^{148}\). That the harm done to West Bank residents amounts to a breach of Israel’s obligation to respect the *erga omnes* right of a people entitled to exercise self-determination is unquestionable.\(^{149}\) In the Wall Opinion, self-determination is the major obligation *erga omnes* imposing responsibilities on third parties\(^{150}\). Not only has it been declared an *erga omnes* right, it has also become a duty for other States to promote, and for the UN to implement. Some humanitarian provisions also place third parties under the obligation to ensure the reestablishment of the previous equilibrium. As the very character of the violation makes it of general interest for the international community, we are now moving towards a system in which states “have the right to hold other states accountable for breaching obligations owed to the international community as a whole.”\(^{151}\) A careful and considerate implementation of the decision, whether it implies individual or joint measures, must be based on the guidance provided by the United Nations organs. Member States of the EU and the UN must bear in mind that they must refrain from aiding the Israeli State as a violator of central tenants of international law; this does not only mean cutting off the funds used for the construction of the wall. As it has been agreed that many measures, on the long term, may work against the benefit of the victim state in violation of some provisions of IHL, it is crucial to leave the United Nations organs the role of carefully assessing the possible acts of deterrence and their legal consequences on the short and long term.

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\(^{146}\) Geoffroy R. Watson, (2005).

\(^{147}\) Separate Opinion of Judge Buergenthal, para. 2

\(^{148}\) UN Meeting on Question of Palestine Discusses Responsibility of Government in Upholding International Law, GA/PAL/981, 10 March 2005

\(^{149}\) Geoffroy R. Watson, (2005).

\(^{150}\) Iain Scobie, (2005)

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