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*Some Comments Concerning the Advisory Opinion of the International Court of Justice  
on the Construction of a Wall in the Occupied Palestinian Territory:  
The Performance of the European Union*

by

Carmela Pérez Bernárdez

February 1, 2005

**Abstract**

On December 8th, 2003, the United Nations General Assembly adopted a resolution to submit the question concerning the legality of Israel's construction of a wall in the Occupied Palestinian Territory to the International Court of Justice for an advisory opinion. The Court accepted, and thus entered into the Israeli-Palestinian conflict - one of the most far-reaching, difficult, and delicate disputes that the international community has faced. The purpose of this paper is two-fold. First, it analyzes the most relevant issues in the Wall case related to jurisdiction and merits. Second, it considers the position of the European Union in terms of the Middle East conflict, and specifically, concerning this advisory opinion.

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**SOME COMMENTS ABOUT THE INTERNATIONAL COURT OF  
JUSTICE ADVISORY OPINION ON THE CONSTRUCTION OF A  
WALL IN THE OCCUPIED PALESTINIAN TERRITORY: THE  
EUROPEAN UNION PERFORMANCE**

**By**

**Carmela Pérez Bernárdez<sup>1</sup>**

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## **I. INTRODUCTION**

The United Nations General Assembly adopted a resolution to submit the question for an advisory opinion to the International Court of Justice on December 8<sup>th</sup>, 2003. This was the 24<sup>th</sup> time the United Nations' highest legal body implemented the advisory procedure. Due to this new resolution, the International Court of Justice (ICJ) decided to deal with one aspect of the Israeli-Palestinian conflict, one of the broadest, most difficult and delicate disputes that

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the international community has faced. This conflict has poisoned international relations in the Middle East and elsewhere.<sup>2</sup>

The continuing breaches of international humanitarian law, as well as of different rules and principles of international law by both sides –Palestinian and Israeli- pose a threat to international peace and security. The Security Council has the main responsibility to address the threats caused by these breaches<sup>3</sup>. However, the Security Council has failed in its duty, given the negative vote by a permanent member, the United States of America. Thus, the General Assembly, pursuant to resolution 377 A (V) entitled “Uniting for Peace”, decided to consider the matter. Finally, resolution ES-10/14 was adopted seeking an advisory opinion from the Court related to the construction of a “wall” by Israel in the Occupied Palestinian Territory, which departs from the Armistice Line (known as the *Green Line*) of 1949. The Court’s reply took seven months despite its urgent nature, and was rendered July 9<sup>th</sup>, 2004.

The purpose of this paper is two fold. First, an analysis of the most relevant issues in the *Wall case* related to jurisdiction and merits from an international legal perspective. Second, consideration of the position of the European Union in relation to the specific matter of the advisory opinion about the wall, which demonstrates the European understanding of the Israeli-Palestinian conflict.

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<sup>2</sup> Several countries, international organizations, non-governmental organizations, etc. and the media in general have shown great interest in this case. Therefore, the advisory opinion finally rendered in the *Wall case* –done in French and in English, as all ICJ decisions- has been translated by the United Nations into the Organization’s other four languages (Arabic, Chinese, Russian and Spanish). See <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> for these versions.

<sup>3</sup> See Chapter VII of the Charter of the United Nations, specially Article 39 that states that the Security Council has the competence to determine the existence of any threat to the peace, breach of the peace or act of aggression and can make recommendations or decide what measures must be taken in accordance with Articles 41 and 42 to maintain and restore international peace and security.

## II. JURISDICTION ISSUES

The International Court of Justice has been brave, legal and fair –as it always should be but sometimes is not-<sup>4</sup> in deciding that it has jurisdiction to render an opinion on the question of the wall and also that it cannot decline to exercise its jurisdiction<sup>5</sup>.

The following question was posed by the General Assembly resolution ES-10/14:

“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?”<sup>6</sup>

Although the European Union and the United States have different perspectives concerning the Israeli-Palestinian conflict, they both agreed that the request for this advisory opinion from the ICJ was “inappropriate” and that it would not facilitate the efforts of the two parties to re-launch a political dialogue. Despite this shared view from two of the four members of the *Roadmap quartet*’s the Court addressed the merits of the case, deciding that the construction of the wall in the occupied territory is illegal as it violates significant rules and

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<sup>4</sup> In some cases the ICJ, inconsistent, decides not to go to the merits, declaring that it does not have jurisdiction to adjudicate upon the dispute, in others it does not indicate clearly what are the necessary measures to be adopted for the States in their domestic legal system to prevent breaches of international law. See, respectively, for example, *Fisheries Jurisdiction* (Spain v. Canada), Judgment of December 4<sup>th</sup>, 1998, *ICJ Reports 1988* and the *Avena and other Mexican nationals case*, (Mexico v. United States of America), Judgment of March 31<sup>st</sup>, 2004, *ICJ Reports 2004*. Both in <http://www.icj-cij.org>

<sup>5</sup> Article 65, paragraph 1 of the Statute of the ICJ states that “The Court *may* give an advisory opinion (...)”, (emphasis added), which mean that it has a discretionary power to decline to give an advisory opinion. Cfr. para. 44 of the *Wall Advisory Opinion*.

<sup>6</sup> See resolution A/ES-10/14, December 8<sup>th</sup>, 2003 requesting the advisory opinion. For the advisory opinion itself, the request, written statements, oral pleadings, press releases, dossier prepared by the Secretariat of the United Nations and other the documents relevant for the case, see <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>

principles of international law, as I will explain below. This, despite the fact that the wall's (fence or barrier) purpose is to enable Israel to protect its citizens from terrorist attacks launched from the West Bank.

The Declaration and the six separate opinions of the Court's Judges, demonstrate their concern about different aspects related to jurisdiction, and also about discretion and propriety.<sup>7</sup> On the other hand, the Judges' position concerning the illegal construction is clear.

The Court examined numerous arguments raised by participants in the proceedings. I will analyze some of the more interesting issues.

## II.1 DIFFICULTIES ARISING FROM THE SPECIFIC CHARACTER OF THE ISRAELI-PALESTINIAN CONFLICT

Article 96, paragraph 1 of the Charter of the United Nations and Article 65, paragraph 1 of the Statute of the Court gives the General Assembly the right to ask the ICJ for an advisory opinion about **“any legal question”**<sup>8</sup>. Given the multidimensional aspects of the question posed to the ICJ, and its long-standing jurisprudence concerning questions related to its *legal* nature, the Court rejected

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<sup>7</sup> See, for example, Separate Opinions of Judges Higgins and Kooijmans. Judge Buergenthal voted against all the Opinion, except for paragraph (1) related to jurisdiction. This Judge, a North-American citizen, believes that the Court should have exercised its discretion and declined to render the requested advisory opinion. He maintains that his negative votes in regard to the remaining items of the *dispositif* should not be seen as reflecting his view that the *Wall case* does not raise serious questions as a matter of international law; cfr. para. 163 of the *Wall Advisory Opinion* and Declaration of Judge Buergenthal. Judge Kooijmans, national from the Netherlands, voted in favor of all paragraphs of the operative part of the Opinion with one exception subparagraph (3) (D) of the *dispositif* dealing with the legal consequences for States. The other thirteen Judges voted in favor. We have named the Judges' nationality, of course, taking into account that Article 2, paragraph 1 of the Statute of the ICJ states that “The Court shall be composed of a body of independent judges, elected regardless of their nationality, (...)”, which means that they do not represent their States. Article 3, paragraph 1 also states that “The Court shall consist of fifteen members, no two of whom may be nationals of the same state”.

<sup>8</sup> The Security Council, other organs and specialized agencies –at present 22 in number- have also this right. Except for the Security Council and the General Assembly, the others are limited to ask for advisory opinions “on legal questions arising within the scope of their activities”. Cfr. paragraph 2 of Article 96 of the Charter of the United Nations.

the view that it has no jurisdiction given the *political* nature of the question. The Court recalled that “the fact that a legal question also has political aspects”, as it made clear in the *Legality of the Threat or Use of Nuclear Weapon case*.<sup>9</sup>

Some participants in the proceedings argued about the impossibility of fair treatment of the issue, emphasizing that the question of the wall is “**part of a greater whole**”, that is, one aspect of the Israeli-Palestinian conflict. The Court was aware of this situation and said that it would take *this circumstance* carefully into account. However, some Judges continued to demonstrate concern about this issue<sup>10</sup>. The Court also considered that the plenary organ of the United Nations had chosen a question confined to the legal consequences of the construction of the wall, and “the Court would only examine other issues to the extent that they might be necessary to its consideration of the question put to it”<sup>11</sup>.

Israel contended that the Court should not exercise its jurisdiction in the present case because the request concerns a contentious matter between Palestine and Israel, and the latter has never **consented** to the settlement of this dispute by the Court. Israel understands that the question posed about the construction of the wall “is an integral part of the wider Israeli-Palestinian dispute concerning questions of terrorism, security, borders, settlements, Jerusalem and other related matters”, and both parties agreed that these issues are to be settled by negotiation, with the possibility of an agreement.<sup>12</sup> The Court does not share this view and recalled that:

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<sup>9</sup> Cfr. para. 41 of the *Wall Advisory Opinion* and para. 13 of the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996 (I), p. 234.

<sup>10</sup> See Separate Opinion of Judge Kooijmans, remarking the imbalance in the question presented by the General Assembly to the Court because of the silence on the terrorist attacks against Israeli citizens. In addition, Judge Higgins states that the Court never took “this circumstance carefully” into account. She thinks that the “history” as recounted by the Court “neither balanced nor satisfactory” and that “much more was required to avoid the huge imbalance that necessarily flows from being invited to look at only “part of a greater whole”. See Separate Opinion of Judge Higgins, para. 15-18.

<sup>11</sup> Cfr. para. 54 *in fine*.

<sup>12</sup> Cfr. para. 46-50 of the *Wall Advisory Opinion*.

“The consent of States, parties to a dispute, is the basis of the Court’s jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. (...) The Court’s Opinion is given not to the States, but to the organ which is entitled to request it”.<sup>13</sup>

Several participants in the proceedings have also raised the problem of a lack of requisite facts and evidence to enable the Court to reach its conclusion. Israel said that if the Court decided to give the requested opinion, “it would be forced to speculate about essential facts and make assumptions about arguments of law”, principally, in matters “related to the nature and scope of the security threat to which the wall is intended to respond” and also related to the impact of its construction on the Palestinians<sup>14</sup>. The Court was aware of these difficulties, particularly since Israel alone possesses much of the necessary information and has stated that has chosen not to address the merits. The main documents are the report and the dossier of the Secretary-General that includes several reports based on on-site visits by special *rapporteurs*, competent organs of the United Nations and that comprise detailed information on the route of the wall, and its humanitarian and socio-economic impact on the Palestinian population. In addition, numerous participants have submitted written statements to the Court, and Israel has presented observations concerning different matters, including its security concerns, although limited to issues of jurisdiction and judicial propriety. This is why the Court found that it had **sufficient information** to give an advisory opinion.

Some participants have put forward the argument that the Court should decline to exercise its jurisdiction in this case because such opinion would lack

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<sup>13</sup> Cfr. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, ICJ Reports 1950*, p. 71.

<sup>14</sup> Cfr. para. 55-58 of the *Wall Advisory Opinion*. Judge Owada shows, however, his concern about the sufficient material available to argue that the construction of the wall along the route chosen, was not “the only means to safeguard the interest of Israel against the peril which it has invoked as justification for the construction”; cfr. para. 30 of Separate Opinion of Judge Owada. See, also, Separate Opinion of Judge Higgins, para. 40.



any **useful purpose**, once the General Assembly declared that the construction of the wall was illegal and had determined the legal consequences. Moreover, Israel argued that principles of **good faith and “clean hands”** provide compelling reason for the Court to refuse the General Assembly’s request, bearing in mind Palestine’s responsibility for acts of violence against Israel and its population which the wall is aimed at addressing. In other words, “Palestine cannot seek from the Court a remedy for a situation resulting from its own wrongdoing”<sup>15</sup>.

The Court recalled that “advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action”<sup>16</sup>. It also stated in its Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that: “The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs”<sup>17</sup>. The Court cannot decline to answer based on ground that its opinion would lack any useful purpose. The requested opinion is to be given *to the General Assembly* and not to Palestine or to any specific State or entity.

## II. 2 THE GENERAL ASSEMBLY’S ACTION: À PROPOS OF “UNITING FOR PEACE”

The Court considered that the legality of the wall could not be regarded as only a *bilateral* matter between Palestine and Israel. The United Nations has clear powers and responsibilities in questions relating to international peace and security, as well as in the Mandate and Partition Resolution concerning Palestine<sup>18</sup>. Effectively, the General Assembly has described this situation as a

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<sup>15</sup> Cfr. para. 63-64 of the *Wall Advisory Opinion*.

<sup>16</sup> *Ibid.* para. 59-62.

<sup>17</sup> Cfr. para. 61. See, *ICJ Reports 1996 (I)*, p. 237, para. 16.

<sup>18</sup> Palestine was part of the Ottoman Empire and at the end of the First World War a “Mandate” for Palestine was entrusted to Great Britain by the League of Nations –the predecessor of the United Nations-. Article 22, paragraph 4 of the Covenant of the League of Nations provided that: “Certain communities, formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory *until such time*

“permanent responsibility towards the question of Palestine until the question is resolved in all its aspects in a satisfactory manner in accordance with international legitimacy”<sup>19</sup>. This explains why the application of the “Uniting for Peace” mechanism, is adequate in this case, as we shall see below.

In relation to this matter, Israel has alleged that the General Assembly acted *ultra vires*, that is, it exceeded the bounds of its competence under the Charter when it decided to request an advisory opinion, given the active engagement of the Security Council in the situation in the Middle East, including the Palestinian question. The ICJ states that the General Assembly, in adopting resolution ES-10/14, seeking an advisory opinion, did not act *ultra vires*. To understand its position, one must consider the interpretation of Article 12, paragraph 1, of the United Nations Charter, which states:

“While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests”.

This provision establishes the only limitation to the General Assembly action. However, in practice there has been an increasing tendency for the Assembly and the Security Council to deal in parallel with the same issue related to the maintenance of international peace and security<sup>20</sup>. This means that when Article 24 of the Charter says that the Security Council has “primary

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*as they are able to stand alone*”. The principle of non-annexation was one of the most important that applied to this Mandate. In 1947 the United Kingdom announced its intention to complete evacuation of the mandated territory that was effective May 15<sup>th</sup>, 1948. In the mean time, the General Assembly adopted the “Partition Resolution” for the establishment of two independent States, one Arab and the other Jewish, as well as the creation of a special international régime for the City of Jerusalem. As we know, the Arab population of Palestine and the Arab States rejected this plan, contending that resolution 181 (II) was unbalanced. On the other hand, Israel proclaimed its independence on the strength of the General Assembly resolution on May 14<sup>th</sup>, 1948 and armed conflict broke out between a number of Arab States and Israel. See A/Res/181 (II) November 29<sup>th</sup>, 1947. Cfr. para. 49, 70 and 71 of the *Wall Advisory Opinion*.

<sup>19</sup> See A/Res/57/107 December 3<sup>rd</sup>, 2002.

<sup>20</sup> See para. 25-28 of the *Wall Advisory Opinion*.

responsibility for the maintenance of international peace and security”, it is not saying that this competence has to be exclusive.

Another issue that has been raised in the *Wall case* related to jurisdiction refers to the fact that the present request for an advisory opinion did not fulfill the essential conditions set by resolution 377 A (V), entitled “**Uniting for Peace**”, under which the Tenth Emergency Session was convened and has continued to act in a “rolling character”. Resolution 377 A (II) states that:

“If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures (...)”.<sup>21</sup>

Effectively, the Security Council failed to adopt a resolution to condemn certain Israeli settlements in the Occupied Palestinian Territory, as a result of a negative vote by a permanent member, the United States<sup>22</sup>. That was the reason, the Chairman of the Arab Group explained, why an emergency special session of the General Assembly was first convened in April 1997, pursuant to resolution 377 A (V). This Special Session reconvened 11 times, the last being December 8<sup>th</sup>, 2003, the day the General Assembly adopted resolution ES-10/14, seeking an advisory opinion from the Court. Each time, the draft resolutions proposed to the Council, which condemned as illegal the construction of a wall by Israel in the Occupied Palestinian Territory, did not pass<sup>23</sup>, owing to the negative vote of the United States<sup>24</sup>.

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<sup>21</sup> See A/Res/377 A (V) November 3<sup>rd</sup>, 1950.

<sup>22</sup> See Article 23 of the Charter of the United Nations about the composition of the Security Council and Article 27 of the Charter about the voting system, especially, para. 3, that deals with no procedural matter.

<sup>23</sup> As far back as 1983, Noam CHOMSKY analyzed the *Fateful Triangle* relationship between the *United States of America, Israel and the Palestinians*; see, especially, pp. 441-471 about “The Road to Armageddon”, South end Press, Boston, 1983. See, also, B. RUBI,

This is why the Court maintains that the request for this advisory opinion fulfills the necessary requirements set by resolution 377 A (V).

### **II. 3 THE SUBJECTS OF INTERNATIONAL LAW INVOLVED IN THE PROCEDURE: THE CASE OF PALESTINE**

An important aspect of the procedure is the fact that the participants are entities other than States. Different types of subjects of international law took part in the written and oral proceedings. The League of Arab States and the Organization of the Islamic Conference that can be classified as ordinary international organizations; Palestine, more than a liberation movement but not yet an independent State; and the European Union, that like Palestine, is less than a State but more than an international organization.

Effectively, in the procedure, the Register notified the States that were entitled to appear before the Court of the request of an advisory opinion. Then, it decided, through its Order of December 19<sup>th</sup>, 2003, that the United Nations and its Member States were likely able to furnish information on aspects arising from the question submitted to the Court. It fixed a time limit for written statements and decided that Palestine could also submit a written statement on the question<sup>25</sup>. The Court also decided to hold public hearings during which oral pleadings and comments could be presented by the United Nations and its Member States, regardless of whether or not they had submitted written statements<sup>26</sup>.

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“Misperceptions and Perfect Understanding. The United States and the Palestinian Liberation Organization”, *The Palestinian Liberation Organization and Israel. From Armed conflict to Political Solution*, A. Sela and M. Ma’Oz, St Martin’s Press, New York, 1997, pp. 141.

<sup>24</sup> Cfr. para. 19-20 of the *Wall Advisory Opinion*.

<sup>25</sup> See Article 66 of the Statute of the International Court of Justice.

<sup>26</sup> See Article 105, paragraph 5 of the Rules of the Court.

Written statements were filed by Palestine, three international organizations –the United Nations, the League of Nations, and the Organization of the Islamic Conference- forty-four States, and the European Union (EU)<sup>27</sup>. The many States and the variety of international law subjects involved indicates the great interest that this case has for the international community. At the hearings, held from February 23<sup>rd</sup>-25<sup>th</sup>, 2004, twelve States, Palestine and two international organizations presented their oral statements<sup>28</sup>.

The Court decided to allow Palestine to participate in the proceedings given the fact that the General Assembly had granted it a special status, superior to that of observer. The ICJ calls it “a *special* status of observer”<sup>29</sup>.

Effectively, the Palestine Liberation Organization (PLO) -that in the 1960s formed and claimed to represent the people of Palestine-<sup>30</sup> was accorded an “observer status” by General Assembly resolution 3237 (XXIX) adopted November 22<sup>nd</sup>, 1974<sup>31</sup>. In 1988, the PLO was entitled to have its communications issued and circulated as official documents of the United Nations, which is a simple but relevant step towards its full participation in this Organization<sup>32</sup>. The PLO observer status was elevated in the summer of 1998 by the General Assembly to an unprecedented level, now allowing *Palestine* to

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<sup>27</sup> I would distinguish the European Union from the ordinary international organizations, as I will explain *infra*. Ireland, the EU member State that held the Presidency of the Council during that semester, present the EU written statement. It is remarkable that ten of the fifteen European Union member States at that moment decided to present written statements. Three months later, the European Union welcomed the biggest enlargement of its history. On May 4<sup>th</sup>, 2004, ten new States converted the 15 EU in a 25 EU, extending its external border to the East.

<sup>28</sup> The States were: South Africa, Algeria, Saudi Arabia, Bangladesh, Belize, Cuba, Indonesia, Jordan, Madagascar, Malaysia, Senegal and Sudan.

<sup>29</sup> See para. 4 of the *Wall Advisory Opinion*. The Court also said it adopted this decision due to other several facts, i.e., Palestine was co-sponsor of the draft resolution requesting the advisory opinion. I will examine this issue *infra*.

<sup>30</sup> See United Nations General Assembly resolution 3236, adopted November 22<sup>nd</sup>, 1974.

<sup>31</sup> One month early, the General Assembly adopted a resolution inviting the PLO to participate in its deliberations on the question of Palestine in the plenary meeting; see A/Res/3210 (XXIX) October 14<sup>th</sup>, 1974. It is curious how three days before, in the laconic resolution 3208 (XXIX) the General Assembly requested the Secretary General to invite the European Economic Community to participate in the sessions and work of the United Nations plenary organ as an observer; see, A/Res/3208 (XXIX) October 11<sup>th</sup>, 1974.

<sup>32</sup> See A/Res/43/160 A December 9<sup>th</sup>, 1988.

participate actively in the general debates within the chamber, as well as other procedural accommodations that are not given for those with observer status<sup>33</sup>. General Assembly resolution 250, entitled “Participation of *Palestine* in the Work of the United Nations”, was adopted July 13<sup>th</sup>, 1998, by an overwhelming majority: 124 votes in favor (including the 15 European Union member States at that time), 4 votes against (Israel, the United States, Micronesia, and the Marshall Islands) and 10 abstentions. This resolution includes additional rights and privileges, however, within the category of “observer”<sup>34</sup>. The “Status and Modalities of Participation of Palestine” can be exercised in the sessions and work of the General Assembly and in the international conferences related to the United Nations. These rights and privileges, as contained in the annex to resolution 250, include: the right to participate in the general debate of the General Assembly, inscription on the list of speakers, the right to reply, the right to raise points of order related to the proceedings on Palestinian and Middle East issues, the right to co-sponsor resolutions and render decisions on those subjects, and the right to be included in the Blue Book<sup>35</sup>. The Security Council has also permitted the PLO to participate in its deliberations when the debates directly involved it, contrary to the body’s rules as set out in its Provisional Rules of Procedure, (Rule 14)<sup>36</sup>.

The enhanced status granted to Palestine helps explain why its participation in the proceedings was appropriate for the United Nations and the States in general. In fact, resolution 250, just cited, includes mention of Palestine

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<sup>33</sup> After the proclamation of the State of Palestine by the Palestine National Council on November 15<sup>th</sup>, 1988, the General Assembly decided that the designation “Palestine” should be used in place of the “Palestine Liberation Organization” in the United Nations system; see A/Res/43/177 December 15<sup>th</sup>, 1988.

<sup>34</sup> S. SILVERBURG: “Diplomatic Recognition of States in *statu nascendi*: The case of Palestine”, *Palestine and International Law. Essays on Politics and Economics*, S. Silverburg (ed.), McFarland & Company, Jefferson, 2002, pp. 9-36, specially, note 52 at 31.

<sup>35</sup> See A/Res/52/250 July 13<sup>th</sup>, 1998. Cfr. N. SYBESMA-KNOL, “Palestine and the United Nations”, *Palestine and International Law. Essays on Politics and Economics*, S. Silverburg (ed.), McFarland & Company, Jefferson, 2002, pp. 271-298.

<sup>36</sup> See UN SCOR, 44<sup>th</sup> Sess., 2841<sup>st</sup> mtg., UN Doc. S/PV. 2841 (1989).

as a *full member* of the League of Arab States, the Organization of the Islamic Conference and the Movement of the Non-Aligned Countries.

### III. THE SIGNIFICANCE OF THE “WALL” IN THE ISRAELI-PALESTINIAN CONFLICT

Understanding the significance of the “wall” requires a comprehension of other issues, which aid the determination of the rules and principles of international law relevant in assessing the legality of the measures taken by Israel.

The wall –barrier or fence- is a complex construction that is not limited to a physical structure<sup>37</sup>. The idea for a wall was first proposed by the “Labor” party in Israel and finally implemented by the “Likud” party in power. The wall was intended to halt infiltration of terrorists from the central and northern West Bank, protecting Israel citizens from attacks. It was built without evacuating the settlements there, as was originally conceived. On April 14<sup>th</sup>, 2002, the Israeli Cabinet adopted the decision to begin construction of the “security fence”<sup>38</sup>. The complex has a width of 50 to 70 meters, increasing to as much as 100 meters in some places. As of January 25<sup>th</sup>, 2004 some 190 kilometres had been completed of 650 kilometres planned. However, it is not possible to understand the real meaning of the wall outside its historical context, because the main problem that makes this construction a very controversial issue concerns the route chosen and its effects on the Palestinian population, which hold a special status according to international law.

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<sup>37</sup> The ICJ has chosen to use the terminology employed by the General Assembly: the “wall”. Israel prefers the concept of “fence”, the Secretary-General uses “barrier”. The European Union prefers to refer to the “barrier”, although it employs also the term “fence” and after the Opinion was rendered changes to the “wall” term.

<sup>38</sup> This length covers Phase A and the greater part of Phase B. Phase C had begun in certain areas of the central West Bank and in Jerusalem. Phase D, planned for the southern part of the West Bank, had not yet begun. The Israeli Government has pointed that the routes are subject to modification. For example, in February 2004 an 8 kilometers section near the town of Baqa al-Sharqiya was demolished and the planned length has been slightly reduced. For details about the wall, phases of the construction, etc. see para. 80-85 of the *Wall Advisory Opinion*, and <http://www.elmundo.es/especiales/2001/07/internacional/oriente/muro.html>

As a result of the failure of the Plan of Partition established by General Assembly resolution 181 (II) on November 29<sup>th</sup>, 1947 and the outbreak of the first armed conflict between Israel and a number of Arab States, the Security Council adopted resolution 62 (1948) November 16<sup>th</sup>, 1948, deciding that “an armistice shall be established in all sectors of Palestine”, calling upon the parties to seek an agreement<sup>39</sup>. One of the armistice agreements –the one signed in Rhodes on April 3<sup>rd</sup>, 1949 between Israel and Jordan- fixed the armistice demarcation line between the Israeli and Arab forces –often called the “Green Line” owing to the colour used for it on maps- (Articles V and VI of the Rhodes Agreement). This Agreement also states that the Armistice Demarcation Lines are non-military zones (Article III, paragraph 2), and that this Demarcation Line is subject to rectification as agreed upon by the parties (Article VI, paragraph 8)-

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In the 1967 Six-Days War, Israeli forces occupied all the territories which had constituted Palestine under British Mandate (including those known as the West Bank or Cisjordania which means the left shore of the Jordan river), lying to the East of the Green Line, as well as the Gaza Strip, the Sinai Peninsula and the Golan Heights. In response, the Security Council unanimously adopted resolution 242 (1967) on November 22<sup>nd</sup>, which emphasized the principle of the inadmissibility of acquisition of territory by war or military conquest and called for the withdrawal of Israel armed forces from the occupied territories. Instead of acquiescing, Israel took different measures aimed at changing the status of the City of Jerusalem. The Security Council, in resolution 298 (1971) of September 25<sup>th</sup>, confirmed that: “all legislative and administrative actions taken by Israel to

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<sup>39</sup> See about resolution 181 (II) November 29<sup>th</sup>, 1947, Z. ABU-ZAYYAD: “Was it a missed opportunity?”, *Palestinian-Israel Journal of Politics, Economics and Culture*, Vol. 9, No. 4, 2002, p. 3.

<sup>40</sup> Cfr. para. 72 of the *Wall Advisory Opinion*. See about the existence of Israel, D. SOLAR, “El nacimiento de Israel”, *Historia 16*, Siglo XX, n° 24, pp. 73-100.



change the status of the City of Jerusalem (...) are totally invalid and cannot change that status”.<sup>41</sup>

Different “peace” treaties have been signed since 1971<sup>42</sup>. On October 1994, one was signed between Israel and Jordan, fixing the boundary without prejudice to the status of any territories that came under Israeli military government control in 1967. Also since 1993 other agreements have been adopted between Israel and the Palestine Liberation Organization imposing various obligations on each party, like the transfer to Palestinian authorities of certain powers and responsibilities to be exercised in the Occupied Palestinian Territory by its military authorities and civil administration, which have taken place only in a partial and limited way.<sup>43</sup>

Bearing in mind this situation, we note that the northernmost part of the wall barely deviates from the Green Line, nevertheless, for most of its course it falls within occupied territories. In some places the work deviates by more than 7.5 kilometers from the Green Line in order to encompass Israeli settlements - which have been declared illegal by the Security Council- and encircle Palestinian population areas of approximately 160,000. Effectively, the creation of these Palestinian enclaves has imposed significant restrictions on the freedom of movement. It is also important to point out that this construction has been accompanied by the establishment of a new administrative régime. For example, the Israeli authorities must issue identity cards for both residents or non-residents to enter or exit from the Closed Area which can only be made through official access gates, which are opened infrequently and for short periods of time.

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<sup>41</sup> Once again, the Security Council recalled this position by resolution 478 (1989) August 20<sup>th</sup>, 1980, after the adoption by Israel of the Basic Law making Jerusalem the capital of Israel.

<sup>42</sup> The Camp David Agreement in 1978, where Israel recognized for the first time the Palestinian autonomy right in Gaza and the West Bank territories; in 1991 during the Madrid Conference, both parties in the conflict recognized the principle based on *peace for territories*; in the Oslo Agreement between Israel and Palestine, signed in Washington D.C. in 1993, that provides that “the West Bank and the Gaza Strip as a single territorial unit whose integrity will be preserved during the interim period (Article IV).

<sup>43</sup> Cfr. para. 73-74 of the *Wall Advisory Opinion*.

Furthermore, the wall construction has caused the destruction or requisition of properties and lands, specifically many fruit and olive trees have been destroyed. Much of the Palestinian lands now on the Israeli side of the wall consist of fertile agricultural land and some of the most important water wells in the region necessary for subsistence. Some Palestinians will be cut off from their land, workplaces, schools, health clinics and other social services.<sup>44</sup>

The construction of the wall constitutes a serious problem because the territories situated between the Green Line and the former eastern boundary of Palestine under the Mandate -occupied in 1967 during the armed conflict- are, therefore, *occupied territories* and Israel has the status of occupying Power with relevant obligations under international customary and treaty law. If the wall route had strictly respected the Green Line, it is probable the *de facto* annexed territories would not be discussed and the construction would be understood as an implementation of the Two-States solution to the conflict.

#### IV. SOME ISSUES RELATED TO THE MERITS

Although it is not my purpose to analyse in depth the application of the rules and principles of international law relevant in this case, which is beyond the scope of this paper, I must take a look at them to understand the legal reasons why the ICJ replied to the question put to it by the General Assembly, saying that “the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territories, including in and around Jerusalem, and its associated régime, are contrary to international law”<sup>45</sup>. It will also help us to

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<sup>44</sup> *Ibid.* para. 80, 130 and 133. See the example of the city of Qalqilia, totally surrounded by the wall, with a population of 40,000. In February 2004, the International Committee of the Red Cross (ICRC) made a formal statement declaring that the route chosen for the construction of the wall is contrary to the international humanitarian law. See ICRC documents about the humanitarian impact of the West Bank barrier at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/642JTP?OpenDocument>

<sup>45</sup> Cfr. para. 163, subparagraph (3) (A) of the *Wall Advisory Opinion*.

understand the **consequences** derived from this situation. Israel must go back to the *status quo ante*<sup>46</sup>, in accordance with Article 35 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts<sup>47</sup>. These consequences are **Israel's** obligation to terminate its breaches of international law –in other words, to cease the works of construction in the Occupied Territory- to dismantle the structure therein situated and to repeal or render ineffective all legislative and regulatory acts relating to this issue, as acts of restitution. This responsibility must be complemented by a reparation for all damage caused by the construction –in the land, orchards, olive groves and other immovable property seized- which means that if the restitution proves to be materially impossible, Israel will have the obligation to compensate the persons in question for the damage suffered, for example through the payment of a sum in accordance with the applicable rules of international law. With regards to the specific issue of responsibility, the Court, by a vote of 13 to 2 states the **obligation for all States** “not to recognize the construction of the wall and not to render aid or assistance in maintaining the situation created by such a construction”. This obligation exists because of the specific nature *erga omnes* of certain obligations violated by Israel -the obligation to respect the right of the Palestinian people to self-determination and some of its obligations under international humanitarian law- where all States can be held to have a legal interest in their protection<sup>48</sup>. The *dispositif* also includes that **all State parties to the Fourth Geneva Convention** relative to the Protection of Civilian Persons in Time of War “have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention”.<sup>49</sup>

#### IV.1 THE APPLICABLE INTERNATIONAL LAW

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<sup>46</sup> Cfr. *Factory at Chorzów*, Merits, Judgment No. 13, 1928, *PCIJ, Series A, No. 17*, p. 27-48.

<sup>47</sup> Adopted by the International Law Commission at its fifty-third session, held at 2001. See this Draft Articles at [http://www.un.org/law/ilc/texts/State\\_responsibility/responsibilityfra.htm](http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm)

<sup>48</sup> See, respectively, for each of these rules, the *East Timor case*, *ICJ Reports 1995*, para. 29 and the *Legality of the Threat or Use of Nuclear Weapons case*, *ICJ Reports 1996 (I)*, para. 79.

<sup>49</sup> Cfr. para. 149-160 and 163, subparagraph (3) (B), (C) and (D) of the *Wall Advisory Opinion*.

The appropriate rules and principles of international law for this case can be found in the United Nations Charter and other treaties, in customary international law and in some relevant resolutions adopted by the General Assembly and the Security Council<sup>50</sup>. They are:

- The **principle of “no territorial acquisition resulting from the threat or use of force** shall be recognized as legal”, as customary international law is included in the General Assembly resolution 2625 (XXV) adopted on 1974 and it is a corollary of Article 2, paragraph 4 of the United Nations Charter.<sup>51</sup> The occupied territories’ status derives from that principle.

- The **principle of self-determination of peoples**, which the Court considers today a right *erga omnes*,<sup>52</sup> has been enshrined in the United Nations Charter, reaffirmed in resolution 2625 (XXV) cited above and in Article 1 common to the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, signed in New York, December 16<sup>th</sup>, 1966.

The Judges of the Court agree that the existence of a “Palestinian people” is no longer an issue. Notwithstanding this, the Court notes that the wall’s sinuous route includes within the “Closed Area” some 80 per cent of the settlers living in the occupied territories. These settlements -including those in East Jerusalem- have been established in breach of international law, as the Court has declared and the Security Council has affirmed and reaffirmed in different resolutions. Israeli policy involving settlements is clearly contrary to Article 49, paragraph 6 of the Fourth Geneva Convention that provides that: “The Occupying Power shall not deport or transfer parts of its own civilian population

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<sup>50</sup> *Ibid.* para. 86.

<sup>51</sup> Resolution 2625 (XXV) is entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States”.

<sup>52</sup> See *East Timor* (Portugal v. Australia), Judgment, *ICJ Reports* 1995, para. 29.

into the territory it occupies”, which could include measures taken in order to encourage transfer<sup>53</sup>.

This entire situation presents sufficient elements to fear that the route of the wall could *prejudge the future frontier* between Israel and Palestine, once the Two-States solution gets to implementation, as it looks like a *de facto* annexation that could become permanent. On the contrary, Israel states that the construction is a *temporary measure* in order to protect its citizens from terrorist attacks. Taking this into account, the Court declared that the wall and its associated régime “severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right”<sup>54</sup>. On this point, Judge Higgins does not agree with the way the Court applied this principle, in stating that the wall is *a serious obstacle* to self-determination. She states that the real impediment to the exercise of this right “is the apparent inability and/or unwillingness of both Israel and Palestine to move in parallel to secure the necessary conditions”<sup>55</sup>. It is difficult to reconcile how Judge Higgins, who alleged the Court’s failure to consider this matter carefully and in a balanced way as a part of a whole, cannot see this construction and its régime as a great obstacle to the exercise of the Palestinian people’s right to self-determination. We just have to look back to that “whole” to be reminded how, for example, General Assembly Partition Resolution 181 (II) was rejected by the Arab population of Palestine contending that the formula “population/land” was not proportional for both parties; which means that a small part of territory definitively counts. Coming back to the present, I believe that this *de facto* annexation is, and will continue to be, a new and great impediment to the solution of this conflict and, consequently, to the exercise of the right to self-determination.

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<sup>53</sup> Cfr. para. 119-120 of the *Wall Advisory Opinion*.

<sup>54</sup> *Ibid.* para. 121-122.

<sup>55</sup> See Separate Opinion of Judge Higgins, para. 30.

- Israel doubts the applicability of certain rules of international humanitarian law and human rights instruments in the Occupied Palestinian Territory. In regards to **international humanitarian law**, the Court reached the conclusion that the provisions of **the Hague Regulations** –prepared to revise the general laws and customs of war and annexed to the Fourth Hague Convention of 1907- have become part of customary law. Thus, the fact that Israel is not a party to this Convention is not relevant. The rules that are applicable in this case refer, for example, to the respect for private property, that it cannot be confiscated<sup>56</sup>.

- With regard to the **Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War**, adopted August 12<sup>th</sup>, 1949, Israel disputes its applicability *de iure* to the Occupied Palestinian Territory<sup>57</sup>. The Court analysed this question and recalled that interpretation of the treaties, according to customary international law –as expressed in Article 31 of the Vienna Convention on the Law of the Treaties of May 23<sup>rd</sup>, 1969- has the objective of protecting civilians who find themselves in the hands of the occupying Power. Moreover, the Court points out that the International Committee of the Red Cross (ICRC) has also expressed the “*de iure* applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem”<sup>58</sup>. The General Assembly and the Security Council in different resolutions, as well as the Supreme Court of Israel

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<sup>56</sup> Within certain limits, requisitions in kind and services for the needs of the army of occupation can be authorized

<sup>57</sup> Israel maintains this position citing “the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt”. Israel and Jordan ratified the Fourth Geneva Convention in 1951. Palestine, by declaration of June 7<sup>th</sup>, 1982, gave a unilateral undertaking to apply this Convention, that the depositary State -Switzerland, - considered valid. However, the depositary State considered that it was not in a position to decide whether the request –dated in 1989- from the Palestine Liberation Movement in the name of the State of Palestine to accede to the Fourth Geneva Convention can be identify as an instrument of accession. Once again, its controversial international legal status came out. Cfr. para. 91 of the *Wall Advisory Opinion*.

<sup>58</sup> The Convention’s *travaux préparatoires* also confirmed this interpretation. The Conference of Government Experts convened by the ICRC for the purpose of preparing the new Geneva Conventions in the aftermath of the Second World War, recommended that these conventions had to be applied to any armed conflict whether it is or not recognized as a state of war by the parties and “in cases of occupation of territories in the absence of any state of war”. Cfr. para. 90-101, specially 95 and 97 of the *Wall Advisory Opinion* and Separate Opinion of Judge Al-Khasawneh, para. 2-9. See about the issue in <http://www.icrc.org>

maintain this view<sup>59</sup>. Consequently, the Court considers that “the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties”. It takes into account that Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. Accordingly, the Court says that this “Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories”.<sup>60</sup>

Article 6 of the Fourth Geneva Convention states the provisions that must be applied throughout the entire period of the occupation, including a distinction between these provisions and those applying only during military operations at the time of the occupation. Taking into account that the military operations occurred in 1967 and ended years ago, the most important Articles of the Fourth Geneva Convention relevant in this case are the following: Article 47 reads that the protected persons who are in the occupied territory shall not be deprived of the benefits of the present Convention, “nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory”. Article 49 refers to the prohibition of transfers or deportations, with some exceptions. Article 52 prohibits measures that create unemployment or restrict the opportunities of workers in an occupied territory, in order to induce them to work for the Occupying Power. Article 53 provides that destruction of property by the latter is prohibited, “except where such destruction is rendered absolutely necessary by military operations”. Article 59 deals with relief when the population of an occupied territory is inadequately supplied, to be undertaken either by States or by impartial humanitarian organizations such as the

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<sup>59</sup> The Supreme Court of Israel judgment is dated May 30<sup>th</sup>, 2004. Cfr. para. 100 *in fine* of the *Wall Advisory Opinion*.

<sup>60</sup> *Ibid.* para. 101. Subparagraph (D) of the *dispositif* says that all States parties to the Fourth Geneva Convention “have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention”.

International Committee of the Red Cross, consisting in particular of foodstuffs, medical supplies and clothing. It also states “All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection”.

- The **international human rights conventions** are also applied to the Occupied Palestinian Territories, as the Court clearly recalled<sup>61</sup>. On the contrary, Israel, who ratified both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, denied that they are applicable in these Territories. The ICJ rejects Israel’s arguments stating, “protection offered by human rights conventions does not cease in case of armed conflict”<sup>62</sup>. The Court considers that the former Covenant “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory” and that the later Covenant does not exclude its application “to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction”<sup>63</sup>. Moreover, Article 2 of the Convention on the Rights on the Child of 20 November 1989, also, refers to its application within States Parties jurisdiction. Consequently, this Convention is applicable to the occupied territories.

As regards the **International Covenant on Civil and Political Rights**, Article 17, paragraph 1 states that: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home of correspondence, nor to unlawful attacks on his honour and reputation”. Article 12, paragraph 1, provides the right to liberty of movement and freedom to choose ones residence. In

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<sup>61</sup> See about the relationship between international humanitarian law and human rights law, M. PÉREZ GONZÁLEZ, “Derechos Humanos y Derecho Humanitario: Una apuesta por la convergencia”, *El Derecho Internacional Humanitario en una sociedad internacional en transición*, J. Pueyo Losa, J. Jorge Urbina (coord.), Cruz Roja Española, Tórculo Edicións, Santiago de Compostela, 2002, pp. 17-37.

<sup>62</sup> There is an exception included in “Article 4 of the International Covenant of Civil and Political Rights whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision”. Cfr. para. 106 of the *Wall Advisory Opinion* and Advisory Opinion of July 8<sup>th</sup>, 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Reports* 1996, para. 25.

<sup>63</sup> Cfr. para. 111-112 of the *Wall Advisory Opinion*.



relation to this matter, the Court also includes specific guarantees of access to the Christian, Jewish and Islamic Holy Places.<sup>64</sup> The relevant provisions included in the **International Covenant on Economic, Social and Cultural Rights** are, namely: the right to work (Articles 6 and 7), the protection and the assistance accorded to the family, to the children and to young people (Article 10), the right to an adequate standard of living, including food, clothing and housing, plus the right “to be free of hunger” (Article 11); the right to health (Article 12) and the right to education (Articles 13 and 14). Finally, the **United Nations Convention on the Rights of the Child** includes very similar provisions in Articles 16, 24, 27 and 28<sup>65</sup>.

Bearing in mind these rules and the effects of the wall that I analysed above, the Court declared that the route chosen and its associated régime gravely infringe several rights of Palestinians living in the territory occupied and these infringements cannot be justified by military exigencies or by requirements of national security or public order. Moreover, the specific course chosen for the wall was not necessary to attain Israel’s security objectives. Thus, it is clear why the Court declared that this construction “constitutes breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments”.<sup>66</sup>

On the other hand, Israel states that, “the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to **self-defense** and Security Council resolutions 1368 (2001) and 1373 (2001)”. These resolutions refer to the right of States to use force in self-defence against terrorist attacks, and therefore recognize the right to use *non-forcible* measures to that end<sup>67</sup>. However, the Court noted that this right of self-defence refers to the case of armed attack “by one State against another State”, and Israel does not

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<sup>64</sup> *Ibid.* para. 129.

<sup>65</sup> *Ibid.* para. 130-131.

<sup>66</sup> *Ibid.* para. 137.

<sup>67</sup> *Ibid.* para. 138.

claim that the attacks against it are imputable to a foreign State. On the contrary, the threat originates within the territory that Israel controls. The Court concludes that Article 51 has no relevance in this case<sup>68</sup>.

The Court considered that Israel cannot rely on a **state of necessity** in order to preclude the wrongfulness of the construction of the wall, as recognized in customary international law and included in Article 25 of the International Law Commission's Articles on Responsibility of States for International Wrongful Acts. Effectively, as the Article just cited states, the act being challenged must be "the only way for the State to safeguard an essential interest against a grave and imminent peril". That challenge consists in the numerous indiscriminate and deadly acts of violence against Israel's civilian population. Despite this situation, the Court states that in the light of the material before it, it is not convinced "that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction".<sup>69</sup> What the ICJ wants to make clear is that Israel, of course, has the right and *duty* to protect the life of its citizens, however, the measures Israel takes must remain in conformity with applicable international law<sup>70</sup>.

#### **IV.2 THE RAMIFICATIONS OF THE ADVISORY PROCEEDINGS**

The Court states in the last subparagraph of the *dispositif* 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

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<sup>68</sup> Once again, Judge Higgins does not agree at all with this interpretation and she states that nothing in the text of Article 51 stipulates that self-defense is available only when an armed attack is made by a State. See Separate Opinion of Judge Higgins, para. 33.

<sup>69</sup> *Ibid.* para. 140.

<sup>70</sup> The Court recalls the *Gabcikovo-Nagymaros Project case* in relation with the state of necessity, remarking its exceptional character and saying that it "can only be invoked under certain strictly defined conditions which must be cumulatively satisfied"; (Hungary/Slovakia), *ICJ Reports* 1997, para. 50.

resulting from the construction of the wall and its associated régime"<sup>71</sup>. This means that these two United Nations organs have the responsibility to think about what steps must be taken in this issue. We must not forget that the Court is responding to the question posed by the General Assembly. Now, the United Nations as a whole has to take the necessary measures to bring the Israeli-Palestinian conflict to an end, establishing a just and lasting peace in the region. We must be aware of the problems that will arise within the Security Council to adopt measures in response to this threat to international peace and security due to its limited composition and the probable United States' veto.

An *Advisory Opinion* does not have a compulsory character, different from the ICJ's function in contentious cases; nevertheless the authority and prestige of the Court attaches to its advisory opinion and when the General Assembly endorses the opinion, that decision is as if *it were sanctioned by international law*. Effectively, Israel is not obliged to act in accordance with the Court's advisory opinion; the opinion is given neither to Israel nor Palestine. Advisory opinions are non-binding decisions by nature, however, by a majority of 14 to 1, the Judges found that the wall's construction breaches international law, that is, Israel has violated various international obligations and the Court determined the legal consequences. Pressure from all the international legal subjects to bring this conflict to a conclusion must be a priority. This means that it is not only Israel, but also Palestine, that are under this obligation; both parties must scrupulously observe the rules of international law, one of the paramount purposes of which is to protect civilian life. In this respect, Palestine and its leaders must now show their strength and decision to act in accordance to an international law that clearly declares that its people have a right to self-determination<sup>72</sup>.

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<sup>71</sup> (Emphasis added). See para. 163, subparagraph (3) (E), of the *Wall Advisory Opinion*.

<sup>72</sup> The *Roadmap* peace plan and its Quartet have shown their concern about the real capacity of the Palestinian leader –Yassir Arafat- to demonstrate his determination in the fight against the extremist violence. The European Union, for example, has declared that it “urges the Palestinian Government and the Palestinian President to take immediate steps to confront individuals and groups conducting and planning terrorist attacks.” See, Statement by Marcello Spatafora,

On July 20<sup>th</sup>, 2004 –only eleven days after the ICJ issued the advisory opinion about the wall- the General Assembly in an emergency session voted overwhelmingly to demand that Israel comply with the opinion, that is, to halt construction, dismantle the portions built on Palestinian land and provide reparations to those Palestinians whose lives have been harmed by the wall. This resolution is, of course, a most vigorous consequence of the Court’s ruling<sup>73</sup>.

The most relevant issues included in this Resolution are the following:

- It called on United Nations Member States to comply with their obligations as contained in the finding by the Court.
- The text also asks the United Nations Secretary General to set up a register of all damage caused to “all the natural or legal persons” in connection with this construction.
- The General Assembly invites Switzerland, as depositary of the Geneva Conventions, to conduct consultations and report to the Assembly on the matter, including the possibility of resuming the Conference of High Contracting Parties to the Fourth Geneva Convention.
- The Resolutions calls on both parties –the Israel Government and the Palestinian Authority- to implement their obligations under the *Roadmap* peace plan sponsored by the United Nations, the European Union, the Russian Federation and the United States of America, which calls for a series of parallel and reciprocal steps

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Ambassador Permanent Representative of Italy to the United Nations on behalf of the European Union, New York, December 8<sup>th</sup>, 2003, 58<sup>th</sup> session of the United Nations General Assembly, tenth emergency special session. See the European Union written statement at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>

<sup>73</sup> We must not forget that before the General Assembly requested the Court to render an advisory opinion about the wall, this plenary organ had already declared this construction illegal.

by each party leading to two States living side by side in peace by 2005.<sup>74</sup>

It should be noted that this Resolution was adopted by the General Assembly by a vote of 150 in favor to 6 against (Israel, the United States, Australia, the Marshall Islands, Palau and the Federated States of Micronesia) and 10 abstentions.<sup>75</sup> The representative of Jordan, on behalf of the Arab Group, introduced this draft resolution on the recent advisory opinion of the ICJ. It was significant, as we will see below, how the European Union Member States voted in favor, after very intense negotiations, and decided not to abstain as had been previously agreed. This was in response to the representative of Liechtenstein who introduced a series of amendments that pointed out the right and duty of all States to take actions in conformity with international law in order to protect the life of their citizens. Once the EU considered that the resolution was more “balanced”, in the sense of recognizing implicitly that it is one of its priorities to fight against terrorism in all its forms, it voted in favor.

We will have to wait to see final repercussions of the *Wall case*. In the United Nations Security Council, the adoption of a resolution concerning this issue will be almost impossible to achieve.<sup>76</sup> In the *Roadmap*, or another political

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<sup>74</sup> See document A/ES-10/L.18/Rev.1 and Press Release GA/10248, 20/7/2004, in <http://www.un.org/News/Press/docs/2004/ga10248.doc.htm>

<sup>75</sup> The States that voted to abstain were: Cameroon, Canada, El Salvador, Nauru, Papua New Guinea, Solomon Islands, Tonga, Uganda, Uruguay and Vanuatu. Speaking in explanation of its vote, the United States representative regretted the Assembly’s rush to adopt the resolution and stated that a durable solution could only be found in a negotiated settlement. He also regretted efforts to politicize the Court as well as the Geneva Conventions, in case a conference is convened. Israel representative said that the General Assembly failed to make a relevant contribution to the cause of Middle East peace “by pandering to one viewpoint and marginalizing the scourge of terrorism”. He recalled that Israel would continue to review the route of the fence, in order to protect humanitarian law and human rights for those Palestinians, as well as the lives of Israeli citizens. Finally he said that it was outrageous to respond with such indifference and vigor to a strategy that saved lives.

<sup>76</sup> In fact, the day after the ICJ issued the advisory opinion about the wall, the Israeli Foreign Minister Silvan Shalom said that Israel had asked the United States to veto any resolution by the UN Security Council about this matter. The Israeli UN Ambassador Dan Gillerman said that this advisory opinion ignored terrorism, that is the main reason for his government to build a wall in the Palestinian territory.

context, it might be possible to demand a more balance position on the part of United States, bearing in mind the *Wall Advisory Opinion*. A minimum joint action between the United States and the European Union would energetically reinforce the “move forward simultaneously” included in the *Roadmap* plan, with the support of all the international community. The consequences of the *Wall case* will remain implicit in any action that the international community undertakes. It may sound like a weak outcome, but this mix of political and legal pressure to end the conflict is one of the basic instruments that international law has. Unfortunately, States –as the primary subjects of this legal order- do not want to lose their powers, by binding themselves to international treaties that oblige them in a compulsory way. However, these are the means that we have, and we must make an effort to use them in the best possible way.

## V. THE EUROPEAN UNION PERFORMANCE

The European Union has been officially recognized as an international subject of international law only in the Treaty establishing a Constitution for Europe, signed by the 25 Member States on October 29<sup>th</sup>, 2004<sup>77</sup>. Despite this fact, the EU has been progressively building its legal personality and many times it has been seen from the exterior as a real juridical subject in international relations. The reality, though, shows the lack of real competences of the EU in terms of a common foreign and security policy (CFSP) –the second *pillar*-, maintaining mainly intergovernmental cooperation. This cooperation is still hidden, with some positive reforms, in the Treaty establishing a Constitution for Europe. In fact, the EU (as well the European Communities) existence has been characterized by its continuous struggle to find its right and comfortable place in international relations structure – a structure that has been designed only for and to States-.

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<sup>77</sup> Article I-7, which is the most laconic Article of this Treaty establishing a Constitution for Europe, says: “The Union shall have legal personality”. See about the evolution of the European Union’s international legal personality, C. PÉREZ BERNÁRDEZ, *Las relaciones de la Unión Europea con organizaciones internacionales: Análisis jurídico de la práctica institucional*, Dirección General de Universidades, Madrid, 2003.

This is why the European Union is not a member of the United Nations (UN). The Charter of the UN -signed in San Francisco on June 26<sup>th</sup>, 1945- of course, did not consider this possibility and amendments to the Charter in this direction are going to be extremely difficult to achieve<sup>78</sup>. This is why *de facto* arrangements have been welcomed and this trend will continue. The 25 EU member States are the ones that have the status of UN Members, and consequently, the ones that have the right to vote in the different organs of the United Nations –like the General Assembly-. Nevertheless, the EU member States are in constant cooperation and coordination to find common positions.

The EU has a special status in the General Assembly<sup>79</sup>, superior to that of *observer*. The EU Member State that exercises during that semester the Presidency of the Council of the EU, in coordination with the European Commission, exercises this special status<sup>80</sup>. In practice, this representative of the Council speaks on behalf of the EU. Moreover, previous to the recent European

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<sup>78</sup> *Vid.* A/59/565, December 2<sup>nd</sup>, 2004, about this reform.

<sup>79</sup> This status was granted to the European Community. However, *de facto*, it is now the European Union –in its 2<sup>nd</sup> *pillar*- the one that exercises its limited powers. Before the “Constitution for Europe” is in forced, the European Community is still inside the European Union. Once the latter applied, the European community will disappear, becoming the only international actor. Cfr. Article 1, para. 3 of the Treaty establishing the European Union -signed in Nice February 26<sup>th</sup>, 2001, that came into force February 1<sup>st</sup>, 2003- that reads: “The Union shall be founded on the European Communities, supplemented by policies and forms of cooperation established by this Treaty”. See also Article IV-438 of the “European Constitution”.

<sup>80</sup> Both institutions, the Council and the European Commission have a different official representation in New York to the United Nations. Cfr. about the EU complex participation in the United Nations, C. PÉREZ BERNÁRDEZ, *op. cit.*, pp. 373-434. Relevant amendments in the EU external relation will apply once the “European Constitution” is implemented. For example, a European Union Minister for Foreign Affairs will unify the actual roles of the European Commissioner for External Affairs –Chris Patten- and the EU High Representative for the Common Foreign and Security Policy –Javier Solana-. Cfr. Article I-27 of the Treaty establishing a Constitution for Europe and the annex Declaration on the creation of a “European External Action Service”. Another relevant reform in the EU primary law refers to the Presidency of the Council of the EU that will rotate for longer periods –at least one year-. This Presidency of the Council of Ministers will be relevant for different formations, other than that of Foreign Affairs. Cfr. Article I-23 of the Treaty establishing a Constitution for Europe. As we have seen, during the *Wall case*, representatives from three EU member States –the ones that held the Presidency of the Council- acted on behalf the EU during different semesters –Italy, Ireland and the Netherlands-. This discontinuous activity it is not the best way to deal with complex issues.

Union enlargement (in force May 4<sup>th</sup>, 2004) the EU spoke regularly on behalf of the 10 Acceding Countries, and often, as in the *Wall case*, on behalf of the Associated Countries (Bulgaria and Romania), the Countries of the Stabilization and Association Process and potential candidates (Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Serbia and Montenegro), as well as the European Free Trade Association Countries (EFTA) Iceland and Norway (members of the European Economic Area). All of them aligned themselves behind with the EU's statement on this issue, a practice that is familiar in the General Assembly.

## V.I THE EUROPEAN UNION AND THE MIDDLE EAST CONFLICT

It has been extremely difficult for the European Union to get a consensus on the Israeli-Palestinian conflict, as its Member States have different points of view about this issue. These European countries recognize that it is harder to find a common consensus about "old" problems, where States had previously adopted a position of long-standing, than in newer ones, where the coordination dynamic has been fully exercised. Unfortunately, the Israeli-Palestinian conflict belongs to the former category.

In December 1996, the EU appointed a *Special Representative for the Middle East peace process*, with a mandate based on the EU's policy objectives regarding this regional process<sup>81</sup>. A great effort was made to coordinate the European institutions on this issue. The European Commission, the Council of the EU and the European Parliament support a minimum joint action that I will summarize as it is important to understand the EU position on the *Wall case*:

- 1) The EU recognizes Israel's right to live in peace and security within internationally accepted borders. At the same time, the EU admits the

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<sup>81</sup> Marc Otte was appointed since July 2003. The former and first EU Special Representative was Miguel Ángel Moratinos. See Joint Action 2002/965/CFSP, *JO L* 184, July 23<sup>rd</sup>, 2003 and Joint Action, *JO L* 315, December 4<sup>th</sup>, 1996.



need for the establishment of a democratic, viable and peaceful sovereign Palestinian State on the basis of the 1967 borders, with the possibility of minor adjustment through land swaps, of with Jerusalem, as a shared capital.

- 2) The EU condemns all terrorist attacks against Israeli civilians and it urges the Palestinian Authority to do everything to prevent the terrorism.
- 3) The EU continues to call on Israel to withdraw its military forces, to stop extra-judicial killings and to freeze settlement activities.

Regarding the relationship between the EU and both parties in the conflict, Israel's relationship with the EU has been very close. The European Community and its member States, on the one hand, and Israel, on the other, have concluded an Association Agreement, signed in Brussels, on November 20<sup>th</sup> 1995 and in force on June 1<sup>st</sup>, 2000, in the context of the "Euro-Mediterranean Partnership".<sup>82</sup> This Association Agreement is the basis for EU-Israeli trade relations as well as for the political dialogue between them. In fact, a tripartite technical group composed by Israel, the Palestinian Authority and the European Commission (this one, on behalf of the EU) launched in May 2003 a renewed dialogue integrated in the Euro-Mediterranean Energy Partnership, that led to an historic agreement on energy cooperation between Israel and the Palestinian Authority in December 2003.<sup>83</sup>

Nevertheless, the EU maintains a closer relationship with the Palestinian Authority. The EU contributes to sustaining the Palestinian economy and political institutions, providing an important budgetary support. This assistance seeks to help the Palestinians endure the hardships of the present situation, thus reducing the risks of an explosion of violence. The EU and its member States

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<sup>82</sup> This Partnership -established at a Conference of Ministers of Foreign Affairs held in Barcelona on November 1995- is the first attempt to create a durable and strong bonds between the shores of the Mediterranean. Its aim is to create peace, stability and development in this region, which is of vital strategic relevance for Europe.

<sup>83</sup> See, for example, [http://www.europa.eu.int/comm/external\\_relations/mepp/index.htm](http://www.europa.eu.int/comm/external_relations/mepp/index.htm)

also contribute to the “United Nations Relief and Works Agency for Palestinians Refugees in the Near East (UNRWA)<sup>84</sup>.

## **V.II THE EUROPEAN UNION AS A MEMBER OF THE ROADMAP QUARTET AND ITS POSITION ON THE WALL CASE**

The European Union is one member of the *Quartet*, responsible for the implementation of the *Roadmap peace plan*, along with the United States, the Russian Federation and the United Nations. The EU had no difficulty, in becoming a member of this group, although it showed the peculiar nature of its existence. Whereas the UN was represented by the Secretary-General, the United States by the Secretary of State, and the Russian Federation by its Foreign Minister; the EU had *three representatives*: the Danish Foreign Minister, the High Representative for the European CFSP and the European Commissioner for External Affairs<sup>85</sup>.

The EU participation in the *Roadmap*, together with the two most powerful States in the World –which are primary subjects of international law– and with the most relevant universal international organization, shows the challenge it faces to accomplish its vast goals in the external realm. In fact, the European Union’s objectives, included in Article 3, paragraph 4, of the Treaty establishing a Constitution for Europe states that:

“In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall *contribute to peace, security, (...) solidarity and mutual respect among peoples, (...), eradication of poverty and protection of human rights* and particular children’s rights, as well as to *strict observance and development of international law, including respect for the principles of the United Nations Charter*”.<sup>86</sup>

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<sup>84</sup> See, C. PÉREZ BERNÁRDEZ, *op. cit.*, pp. 434-435.

<sup>85</sup> See, Statement of the Middle East Quartet, New York City, September 17<sup>th</sup>, 2002, Document S001/02.

<sup>86</sup> (Emphasis added). See similar objectives included in the third and actual version of the Treaty of the European Union –the Treaty of Nice–, especially in Articles 11, 2 and 6.

The EU is also one of the members of the “Task Force on Palestinian Reform”, along with the other Quartet partners, Norway, Japan, the World Bank and the International Monetary Fund. Its main role is to monitor and support implementation of Palestinian civil reforms<sup>87</sup>.

It should be noted that the Quartet Performance, based on the Roadmap, which endorsed a Permanent Two-State Solution for the resolution of the Israeli-Palestinian conflict, was approved by the Security Council in resolution 1515 (2003) of November 19<sup>th</sup>, 2003<sup>88</sup>. Once again, a group –the Quartet, that is not a subject of international law- built a peace plan endorsed by a United Nations organ<sup>89</sup>. The problem was that neither the “Roadmap” nor resolution 1515 (2003) contained any specific provision concerning the construction of the wall.

Thus, on December 8<sup>th</sup>, only a few days later, after the adoption of resolution 1515 (2003), the Tenth Emergency Special Session of the General Assembly again resumed its work, following a new request by the Chairman of the Arab Group. During that meeting, resolution ES-10/14 requesting the Advisory Opinion to the International Court of Justice was adopted.<sup>90</sup> Given that the Security Council did not agree to condemn the construction of the wall, the United Nations member States decided to act<sup>91</sup>.

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<sup>87</sup> Cfr. Statement of the Task Force on Palestinian Reform, August 22<sup>nd</sup>-23<sup>rd</sup>, 2002, Paris, Document S0151/02.

<sup>88</sup> This Resolution: “Call(ed) on the parties to fulfil their obligations under the Roadmap in cooperation with the Quartet and to achieve the vision of the two States living side by side in peace and security”. See S/RES/1515 (2003), November 19<sup>th</sup>, 2003 and the three steps plan in the letter presented on May 7<sup>th</sup>, 2003 to the Security Council President from United Nations Secretary General, Kofi Annan, S/2003/259.

<sup>89</sup> A similar thing happened when a Security Council Resolution endorsed the “Contact Group” solution for the Kosovo conflict in 1999.

<sup>90</sup> Cfr. para. 22-23 of the *Wall Advisory Opinion*.

<sup>91</sup> Cfr. about “the United States policy toward the Arab-Israeli conflict”, A. B. PRADOS, *The Palestinians. Current issues and historical background*, Nova, New York, 2003, especially pp. 122-131; C. MARK, “Palestinians and Middle East Peace: Issued for the United States”, *op. cit.*, pp. 1-21; R. H. CURTISS: *Stealth PACs: How Israel’s American Lobby seeks to control U.S. Middle East Policy*, Washington D.C., 1990.

The European Union did not agree on the request for an Advisory Opinion from the ICJ about the construction of the wall. It considered the request to be an “inappropriate” measure, as “it will not help the efforts of the two parties to re-launch a political dialogue”. This is why the European Union abstained on resolution ES-10/14<sup>92</sup>. This position was expressed in a written statement, number 34, presented by Ireland, on behalf the European Union<sup>93</sup>, and in the statements presented by its member States<sup>94</sup>. No consensus was reached in order to submit a single EU position to the Court. After discussion, including at the General Affairs and External Relations Council on January 26<sup>th</sup>, 2004, it was agreed that there would be a Presidency submission on behalf of the EU, and that individual member States might make national submissions based on established EU positions. Effectively, Minister Dick Roche, on behalf of the Council of Ministers at the European Parliament, explained that the EU decision to abstain on the vote was taken “after intense consultations and that was based on the conviction of many Member States that transferring the matter of the Wall to a legal forum would do nothing to advance the political process necessary for peace”. However, he explained that the abstention did not in any way signify that the EU agrees with the legal character of the wall.<sup>95</sup> Once he presented the EU position, a group of Members of the European Parliament complained about it, as they believed that an advisory opinion from the ICJ would be an appropriate measure in order to bring some legal “light” to the conflict.

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<sup>92</sup> This resolution was adopted by 90 votes to 8, with 74 abstentions –the 15 European Union member States decided to abstain in the vote-.

<sup>93</sup> This is Ireland holding the Presidency of the Council of the European Union –from January to June 2004-. The following semester the Presidency was for the Netherlands. The written statement, presented in January 30<sup>th</sup>, 2004 and signed by Minister of Foreign Affairs of Ireland –Brian Cowen-, enclosed the texts of the declarations made by the Presidency of the Council of the European Union at the General Assembly of the United Nations after the adoption of Resolutions A/Res/ES-10/14 and A/Res/10/13. These declarations were presented by the Ambassador Permanent Representative of Italy to the United Nations on behalf of the EU, New York, December 8<sup>th</sup>, 2003. During that semester the Presidency was held by Italy. Cfr. <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>

<sup>94</sup> See the complementary written statement presented by the different EU member States, as Spain, supporting the European Union position about this issue. *Ibid.*

<sup>95</sup> See Statement by Minister Roche at the European Parliament, on behalf of the Council of Ministers, on the EU position on the hearing at the ICJ on the Israeli wall, February 11<sup>th</sup>, 2004, [http://www.ue2004.ie/templates/news.asp?sNavlocator=66&list\\_id=240](http://www.ue2004.ie/templates/news.asp?sNavlocator=66&list_id=240)

The positions of the European Union and the United States were in agreement in that they did not want a United Nations' Court opinion about this issue. In spite of this, it is important to point out that the European Union –and the Acceding States- presented a draft resolution on this matter. Resolution ES/13-13 was approved by the General Assembly on October 21<sup>st</sup>, 2003 demanding “Israel to stop and reverse the construction of the wall inside the occupied Palestinian Territory, including in and around Jerusalem, which is in departure of the armistice line of 1949 and is in contradiction to the relevant provisions of international law”<sup>96</sup>. To sum up, the EU agreed on the illegal nature of the construction, although they did not want the case in the ICJ.

Once the Court declared the wall and its associated régime were contrary to international law, the European Union decided to vote in favor of the General Assembly resolution on the Advisory Opinion “in the spirit of consensus”, as the representative of the Netherlands, speaking on behalf of the EU said<sup>97</sup>. The EU support for this resolution was very important, as it was the *Wall case* aftermath, and it clearly demanded that Israel comply with the ICJ's advisory opinion. The European Union stated its “opposition to the route of the barrier, but would not conceal its disagreement with some of the elements of the advisory opinion”. In this sense, the “European Union supported Israel's right to act in *self-defence*”. A self-defence that “strictly” is not possible taking into account the Court's ruling. The representative of the Netherlands, speaking on behalf of the EU, also reaffirmed its deep conviction that the *Roadmap* remained the basis for a

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<sup>96</sup> This was the European Union position since the preliminary measures to build the wall were adopted by Israel. At the meeting of the European Council at Copenhagen, on December 12<sup>th</sup> and 13<sup>th</sup>, 2002, the Heads of State and Government of the European Union stated, “The European Council urges the Government of Israel to reverse its settlement policy and (...) calls for an end to further land confiscation for the construction of the so-called security fence”. Again, at Thessalonica on June 19<sup>th</sup> and 20<sup>th</sup>, 2003, the European Council maintained the same position, stressing that this fence, “threaten to render the Two-State solution physically impossible to implement”. See, the Written Statement presented by Spain. The European Parliament, reinforcing this trend, declared that the wall in construction is contrary to international law. See, Document A5-0351/2003, Emilio Menéndez del Valle, voted October 23<sup>rd</sup>, 2003 and adopted by 343 in favor to 19 against and 57 abstentions.

<sup>97</sup> See in this working paper -IV.2- about the content of this resolution.

peaceful settlement<sup>98</sup>. In fact, the day after the announcement of the ICJ's advisory opinion about the *Wall case*, the European Union High Representative for the CFSP made some comments recalling the consistent position of the EU, "as a Union committed to upholding and developing international law". He stated that "Israel has a legitimate right to *self-defence* in the face of terrorist attacks", and at the same time he condemned this construction, stating that "the wall not only results in confiscation of Palestinian land and causes untold humanitarian and economic hardship, but also could prejudge future negotiations and hinder a just political solution to the conflict". Finally, he repeated that the "EU will remain engaged in the search for a settlement, together with its Quartet partners" and that the solution to the conflict will only be achieved through negotiations between the parties<sup>99</sup>.

As we can see, the EU position tries to maintain equilibrium in the Israeli-Palestinian conflict. If the EU achieved a stronger external legal personality, this balance could help to solve the conflict.

## VI. FINAL CONSIDERATIONS

The Israeli-Palestinian conflict is not merely bilateral. Thus, a fair solution must be a priority for the international community, taking into consideration all the possibilities that could lead to an end to the dispute, trying to find a global consensus, and pressuring both parties to end it. To this aim, the United States and a strong European Union –as joint mediators- must cooperate with the parties involved. The responsibility of the United Nations in questions related to the international peace, in this case manifested through the adoption of many Security Council and General Assembly resolutions, and by the creation of

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<sup>98</sup> See the explanation of the EU voting position regarding the General Assembly resolution on the Advisory Opinion in Press Release GA/10248, 20/7/2004, <http://www.un.org/News/Press/docs/2004/ga10248.doc.htm>

<sup>99</sup> Cfr. Document S0189/04, Brussels, July 9<sup>th</sup>, 2004. See, also, the statement of the Minister of Foreign Affairs, Bernard Bot, speaking as President of the Council of the EU, Joint press statement, July 12<sup>th</sup>, 2004.

various subsidiary bodies established to assist in the realization of the inalienable rights of the Palestinian people, contributed to the “Court’s view that the construction of the wall must be deemed to be directly of concern to the United Nations”<sup>100</sup>.

Specific acts, such as the construction of a wall in the Occupied Palestinian territory can have a negative influence on the conflict, regardless of Israel’s justification of it. That is why the United Nations plenary organ, the General Assembly and the only one where all the countries of the World have one single and equal vote in the adoption of resolutions, has used its power to ask for an advisory opinion at the Court.

The Court, concluding that it has jurisdiction, and that there is no compelling reason for it to use its discretionary power not to give the advisory opinion on the question put to it by the General Assembly, has taken one important step in this context. It has declared the illegal nature of the wall built in the occupied territories. It is true that the advisory opinion rendered in this issue is not binding on the parties. However, we must not forget that the ICJ, with headquarters in The Hague *Peace Palais* -or Vredespalace-, has been the United Nations’ highest judicial international body since 1946 and its main function is to “decide in accordance with international law”.<sup>101</sup> The Court’s opinion will have an impact on the settlement of the conflict.

I do not share the European Union’s “fear” that the request from the ICJ was “inappropriate” and harmful for the dialogue between the parties. The Court shed light on this relevant issue. The European Union member States, who are also United Nations members, have the right and the duty to work together in and outside the European institutions to contribute to peace and security, in strict

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<sup>100</sup> Cfr. para. 49 of the *Wall Advisory Opinion*.

<sup>101</sup> See Article 38, paragraph 1 of the Statute of the ICJ.

observance and development of international law, including respect for the principles of the United Nations Charter –Article 3, paragraph 4 of the Treaty establishing a Constitution for Europe *dixit*-.

The consequences of this advisory opinion will be fundamental to any solution. Palestinians have interpreted the ICJ decision about the wall as a victory. But now, they have an enormous responsibility to show the world that they are going to do their part, adopting all necessary measures to control terrorism. Both Israel and Palestine must start to move in parallel directions, according to the phases of the *Roadmap* peace plan.

On the other hand, I have found it extremely curious how some authors, noting that the partition solution has not worked out, have suggested the potential application of a supranational legal structure and political process to the Arab-Israeli conflict, inspired by the experiences of European Community and the European Union, that offer a model that is distinct from both the federal and the confederate ones.<sup>102</sup> Nevertheless, these attractive ideas have been rejected by the great majority of specialists before the Two-States solution has been exhausted. Thus we must welcome initiatives from Israeli and Palestinian civil societies, that have the power to stop the circle of violence through understanding, and are a necessary complement to “formal” negotiations<sup>103</sup>. I think that the “integration model” would only be possible, once the Palestinian State is a reality. The hate and pain must heal first and then, maybe, Israel, Palestine and other neighboring States will decide to transfer some limited powers to new economic institutions and other chosen fields.

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<sup>102</sup> Professor Joseph Weiler quotes, as an indispensable source, the work of professor D. ELAZAR in two main books edited in 1979: *Federalism and Political Integration*, 1979 and *Self Rule/Shared Rule*. See J. WEILER, “Israel and the Creation of a Palestinian State: The Art of the Impossible and the Possible”, *op. cit.*, pp. 55-159, specially p. 104 and note 16 at 133.

<sup>103</sup> The “Geneva Initiative” for peace in the Middle East, promoted simultaneously by Israelis and Palestinians, has led to a very intensive, healthy and timely debate on both sides about the many issues related to the current conflict.



It is remarkable how different specialists on the issue from both sides – Israeli and Palestinian- maintain that it is crystal clear that the only solution for this conflict is a Two-States solution. The problem is *how* to enforce this plan<sup>104</sup>, how the parties themselves can manage to move in together to secure the necessary conditions, at the same time, for Israel to withdraw from Arab occupied territory and for Palestine to provide the conditions to allow Israel to feel secure in so doing. This is –or unfortunately was- the *Roadmap's* goal that the Quartet remains committed to implement: “the vision of two States, Israel and an independent, viable and democratic Palestine, living side by side in peace and security”, as affirmed by Security Council resolution 1397, adopted March 12<sup>th</sup>, 2002<sup>105</sup>.

I totally agree and so, I would like to end with these final words included in the separate opinion of Judge Koroma, where he states that:

“(…), the Court has performed its role as the supreme arbiter of international legality and safeguard against illegal acts. It is now up to the General Assembly in discharging its responsibilities under the Charter to treat this Advisory Opinion with the respect and seriousness it deserves, not with a view to making recriminations but to utilizing these findings in such a way as to bring about a just and peaceful solution to the Israeli-Palestinian conflict, a conflict which has not only lasted for far too long but has caused enormous suffering to those directly involved and poisoned international relations in general”.

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<sup>104</sup> V.g., Emanuel Adler -Professor of Israeli Studies, University of Toronto-, Saeb Erekat - Minister responsible for Negotiations of the Palestinian National Authority-, Uzi Arad –Director of the Institute of Politics and Strategic, Herzliya’s Interdisciplinary Center, Israel-, Avi Gil - former Secretary General of Israel’s Ministry of Foreign Affairs- and Mohamed Dahlan – former Minister of Security of the Palestinian National Authority-. The last four were participants in the Seminar “Israel-Palestina: Del desencuentro al Diálogo. Nuevas iniciativas de paz. La contribución europea”, directed by Miguel Ángel Moratinos, Real Instituto Elcano de Estudios Internacionales y Estratégicos, Círculo de Bellas Artes, Madrid, 21 January 2004.

<sup>105</sup> See Statement of the Middle East Quartet, New York, July 16<sup>th</sup>, 2002, S0137/02.