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The Compliance by the European Union of its International Obligations in connection with the Construction by Israel of the Wall in Occupied Palestinian Territory

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In its Advisory Opinion rendered in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹ (hereafter « the Advisory Opinion »), the International Court of Justice arrived at clear conclusions with respect to the illegality of the construction by Israel of the "Wall" in the occupied Palestinian territory and the associated regime. In fact, the Wall was found to be in violation of international humanitarian law, of different instruments regarding human rights, as well as of the principle of peoples' right to self-determination. The Court drew a series of legal conclusions regarding both the State of Israel and third Parties. Israel is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, to dismantle forthwith the structure therein situated, and to make reparation for all damage caused by the construction of the wall.

With respect to third party States and the United Nations, the Court concluded that they were under the following obligations:

- "All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction;
- All States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 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;
- The United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion".

¹ I.C.J., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004) (<http://www.icj-cij.org>)

As can be noted, the implementation by States of the Advisory Opinion is essentially based on *obligations* identified by the International Court of Justice².

Following the rendering of the Advisory Opinion, the General Assembly adopted, with a large majority³, a resolution by which it “*acknowledges* the advisory opinion of the International Court of Justice of 9 July 2004”.⁴ Furthermore, the General Assembly, “calls on all States Members of the United Nations, to *comply with their legal obligations* as mentioned in the advisory opinion”.⁵ This element of the resolution is fundamental, as it indicates that States which voted in favour – including the EU Members States, acknowledge to be bound by the obligations attributed to them in the Advisory Opinion.⁶

The Opinion of the ICJ and United Nations General Assembly resolution ES10/15 thus, as a legal consequence of Israel's unlawful construction of the wall in the Occupied Palestinian Territory, stipulate the following international obligations for States Members of the European Union:

- the obligation not to recognize the illegal situation resulting from the construction of the wall;
- the obligation not to render aid or assistance in maintaining the situation created by such construction;
- the obligation to ensure compliance by Israel with international humanitarian law as embodied in the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949;
- the obligation to ensure an end to restrictions on the exercise by the Palestinian people of its right to self-determination resulting from the construction of the wall;
- the obligation to consider, within the United Nations, what further action is required to bring to an end the illegal situation resulting from the construction of the wall.

While the first two obligations constitute a duty to refrain (an obligation not to act), the last three

² See R. O’Keefe, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary*, 37 BELGIAN REV. INT’L L. (R.B.D.I.), 142-146 (2004); V. Lowe, *The significance of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Legal Analysis*, in *Implementing the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory — The role of Governments, intergovernmental organizations and civil society*, Geneva, 8 and 9 march 2005, (<http://domino.un.org/UNISPAL.NSF/frontpage5!OpenPage>), 22-24; P. Weckel, *Chronique de jurisprudence internationale*, 108 R.G.D.I.P. 1035 (2004).

³ 150 against 6 (US, Israel, Australia, Palau, Micronesia, Marshall Islands), with 10 abstentions.

⁴ Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, including in and around East Jerusalem, U.N.G.A. Res. A/RES/ES-10/15 (20 July 2005).

⁵ Emphasis added.

⁶ See P. Bekker, « The ICJ's Advisory Opinion regarding Israel's West Bank Barrier and the Primacy of International Law », in *Implementing the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory — The role of Governments, intergovernmental organizations and civil society*, *op. cit.*, 64-70 ; M. Hmoud, *The significance of the Advisory Opinion rendered by the ICJ on the legal consequences of the construction of a Wall in the Occupied Palestinian Territory*, in *Implementing the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory — The role of Governments, intergovernmental organizations and civil society*, *op. cit.*, 53-60.

imply that States must actively "ensure" compliance by Israel with international law. Later in this report, we shall consider fulfilment of these obligations by, respectively, the EU and its Member States.

I. The compliance by the European Union with its obligations to refrain resulting from the illegal character of the construction of the wall in Occupied Palestinian Territory

As has already been indicated, the EU and its Member States have a duty to refrain consisting of two distinct obligations: not to recognize the illegal situation resulting from the construction of the wall (A); and not to render aid or assistance in maintaining this situation (B).

A. The compliance by the European Union and its Members States with their obligation not to recognize the illegal situation resulting from the construction of the wall

The unlawfulness of the wall construction implies that States accord no legal effect to the situation arising from its construction. This obligation arises from the fact that, as the ICJ observed, "the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council" and that the building of the wall "thus severely impedes the exercise by the Palestinian people of its right to self-determination"⁷ as it breaches humanitarian international law and the International Covenant on Civil and Political Rights⁸. According to the International Law Commission, this obligation "not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition"⁹.

Any consideration of compliance with this obligation requires an analysis of the positions adopted by the EU and its Member States vis-à-vis the construction of the wall by Israel. In this respect, no declarations or acts by the EU and its Member States appear to reflect any legal recognition of the illegal situation resulting from construction of the wall. As already mentioned, the EU Member States voted in favour of United Nations General Assembly resolution ES10/15, which takes note of the Opinion of the ICJ, and have since, within the EU, adopted several declarations reaffirming the unlawfulness of the construction of the wall by Israel.

Thus, the Council of the European Union, during the summit held in Brussels in June 2005, stated:

"The European Council, while recognising the right of Israel to protect its citizens from attacks, remains concerned by the continuing construction of the separation barrier in the occupied Palestinian territory, including in and around East Jerusalem, *which is contrary to the relevant provisions of international law*. [...]"

The European Council reiterates the importance it attaches to compliance with international law by the parties. In particular, *no party should undertake unilateral measures or prejudge questions relating to final status. The European Union will not recognise any change to the 1967 borders other than those negotiated between the parties*. A just, lasting and comprehensive settlement of the conflict

⁷ Advisory opinion, § 122.

⁸ Advisory opinion, § 137.

⁹ International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, 114.

must be based on United Nations Security Council Resolutions 242, 338 and 1515, the terms of reference of the Madrid Conference and the principle of land-for-peace.¹⁰

In the same way, Foreign Affairs Council's conclusions of 8 december 2009 has reiterated that "settlements, the separation barrier where built on occupied land, demolition of homes and evictions are illegal under international law, constitute an obstacle to peace and threaten to make a two-state solution impossible"¹¹.

Accordingly, we may conclude that the EU and its Member States have fulfilled their obligation not to recognize and validate the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory.

B. The compliance by the European Union and its Members States with their obligation not to render aid or assistance in maintaining the illegal situation resulting from the construction of the wall

Since the construction of the wall by Israel gives rise to an illegal situation, third States may not render any aid or assistance in maintaining this situation. This obligation "deals with conduct "after the fact" which assists the responsible State in maintaining a situation" which is maintained in violation of international law¹². This would, for example, be the case if States rendered financial aid or technical assistance to Israel in connection with work on construction of the wall. To our knowledge, no aid of this sort is provided to Israel by the EU or its Member States; hence, they may be considered to be in compliance with their international obligations in this regard.

II. The compliance by the European Union and its Members States with the obligation to ensure compliance by Israel with international law

The second set of obligations relates to the duty of States to ensure the compliance by Israel with international humanitarian law and the right to self-determination. The Opinion of the ICJ stresses that these obligations must be fulfilled by States, whether individually or collectively, *inter alia*, within the United Nations.

The obligation to require compliance with international humanitarian law originates from common article 1 of the Geneva Conventions¹³, that provides that "the High Contracting Parties

¹⁰ Council of the European Union, Presidency Conclusions, Brussels (16 and 17 June 2005), Annex IV, Declaration on the Middle East Peace Process, 10255/05, (http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/85349.pdf). See also Council of the European Union, External Relations, Conclusions, Brussels (25 April 2005), 8036/05, (http://www.europa.eu.int/comm/external_relations/gac/date/2005/04_250405_er.pdf#mepp).

¹¹ Council conclusions on the Middle East Peace Process, 2985th Foreign Affairs Council meeting, Brussels, 8 December 2009

¹² International Law Commission, *op. cit.*, 115

¹³ See Advisory Opinion, § 158. See also I.C.J., Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits), *I.C.J. Reports* 1986, § 220 ; L. Boisson de Chazournes & L. Condorelli, *Quelques remarques à propos de l'obligation des Etats de "respecter et faire respecter" le droit international humanitaire "en toutes circonstances"*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET* 17-35 (1984); L. Boisson de Chazournes & L. Condorelli, *Common Article 1*

undertake to respect and to ensure respect for the present Convention in all circumstances". According to the *Commentary* to the Conventions of Geneva, "in the event of a Power failing to fulfil its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavour to bring it back to an attitude of respect for the Convention".¹⁴ This implies that States "should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally".¹⁵

The obligation to guard over the implementation of the Palestinian people's right to self-determination derives, according to the Court, from its *erga omnes* character, and from the principle set forth by the General Assembly Resolution 2625 (XXV), according to which "every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples".¹⁶

The difficulty of to implement this two obligations lies in the fact that they constitute obligations of means, consisting in using a due diligence to obtain the compliance with the relevant international obligation. Measures that can be adopted to induce a State to comply with its obligations are not defined and depend on the means available to States in the particular circumstances of each case.¹⁷ So, if the Court indicates in its Advisory Opinion that "the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime", it does not determine the nature of such "further action".¹⁸

Regarding the obligation to ensure respect for humanitarian law, the measures that could contribute to its implementation referred to by the authors are varied with respect to their coercive impact, and go from public condemnations to countermeasures, passing by retaliatory measures (interruption of diplomatic relations, not renewing benefits, ...) or even bringing the matter to the Security Council.¹⁹ In addition there are several measures inherent to international humanitarian law, such as the convening of a Conference of the High Contracting Parties, the constitution of an international fact-finding Commission or the repression of grave breaches of humanitarian law.²⁰ As far as the implementation of the right to self-determination of the Palestinian people is concerned, the obligation is limited, according to the text of the aforementioned Resolution 2625, to a "duty to promote" this right "through joint and separate action".

of the Geneva Conventions revisited : Protecting collective Interests, 837 *I.R.R.C.* 67-89 (2000); N. Levrat, *Les conséquences de l'engagement pris par les Hautes Parties contractantes de "faire respecter" les Conventions humanitaires*, in *IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW* 267-269 (F. Kalshoven & Y. Sandoz, eds. 1989); E. DAVID, *PRINCIPES DE DROIT DES CONFLITS ARMÉS* (3rd ed.) 562-569 (2002).

¹⁴ J. Pictet (ed.), *LES CONVENTIONS DE GENEVE DU 12 AOUT 1949, COMMENTAIRE (VOL. IV)* 21 (1956).

¹⁵ *Ibid* (emphasis added).

¹⁶ Advisory Opinion, para. 156. See M. Chemiller-Gendreau, « Responsibility of Governments and intergovernmental organizations in upholding international law » in *Implementing the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory — The role of Governments, intergovernmental organizations and civil society*, *op. cit.*, 71.

¹⁷ See N. Levrat, *op. cit.*, 275-281.

¹⁸ See P. Weckel, *op. cit.*, 1036.

¹⁹ See U. Palwankar, *Mesures auxquelles peuvent recourir les Etats pour remplir leur obligation de faire respecter le droit international humanitaire*, 805 *I.R.R.C.* 11-27 (1994); L. Boisson de Chazournes & L. Condorelli, *op. cit.*, 76-84.

²⁰ See L. Boisson de Chazournes & L. Condorelli, *op. cit.*, 77 ; N. Levrat, *op. cit.*, 281-293.

It must be concluded that the exact impact of the obligation to act imposed on States by the Advisory Opinion remains very vague as to the precise measures that need to be adopted in order to comply.²¹ It is therefore far from easy to establish the minimum expected of States in order to comply with their obligation to "ensure" respect for humanitarian law or to "promote" the right to self-determination. However, since these are genuine *obligations*, we may consider that States are required, while respecting international law, to take any reasonable measures which may effectively encourage the State concerned to comply with international law. Furthermore, States are required to refrain from acts which would run counter to the objective of encouraging respect for humanitarian law and the right to self-determination.

Israel has not, until now, put an end to the construction of the wall, which has been ongoing since 2004. This means that the measures taken so far have proved ineffective. In the following paragraphs, we will first examine the actions effectively carried out by the EU and its Member States in order to comply with the obligations imposed on them by the Advisory Opinion (1). Subsequently, we will briefly set out the other measures available to the EU to ensure respect by Israel of its international obligations (2). Finally, we shall consider whether the EU and its Member States have adopted measures likely to run counter to the objective of ensuring compliance by Israel with international humanitarian law and the right to self-determination of the Palestinian people (3). Combining these three elements will allow us to evaluate how the EU and its Member States have fulfilled their obligations in ensuring Israel's compliance with humanitarian law and promotion of the right to self-determination.

1. Actions taken by the EU and its Member States to ensure compliance by Israel with international law in connection with the building of the wall

The first measure to be taken by EU States was the vote in favour of United Nations General Assembly resolution ES 10/15 of 20 July 2004. This resolution provides two specific measures: the demand addressed to the Secretary-General to create a registry of the damages suffered by the Palestinian people, and the invitation to Switzerland, in its quality of depositary of the Geneva Conventions, to report on the means to ensure the compliance with humanitarian law in this case.

The Registry has been created in December 2006 by resolution ES-10/17, for which the EU Member States have voted²². As stated in the preamble to the resolution, this action was taken in conformity with the Opinion of the ICJ, particularly paragraph 153, and the principles of humanitarian law and human rights.²³ By June 2009, some 1,500 complaints had been registered.²⁴ However, in the absence of any cooperation by Israel, effective reparation for the Palestinian populations affected by the construction of the wall is likely to remain a pious intention.

The second demand, addressed to Switzerland, led to the publication by the latter of a report in July 2005. The report contains the results from the consultations with the Member States in

²¹ See A. Imseis, *op. cit.*, 114-117.

²² A/RES/ES-10/17 15 December 2006.

²³ Article 3 of the Regulations concerning the Laws and Customs of War on Land. 18 October 1907, and article 29 of the 4th Geneva Convention of 1949.

²⁴ Voy. OCHA, *Five Years after the International Court of Justice Advisory Opinion. A Summary of the Humanitarian Impact of the Barrier*, United Nations, July 2009, p. 30.

relation to the means available to ensure Israel's respect of the 4th Geneva Convention, and in particular in relation to the construction of the wall.²⁵ Without going into detail²⁶, the Swiss report did not produce any precise recommendation for the adoption of specific measures to ensure compliance by Israel with humanitarian law, due to a lack of consensus among States.

Apart from support for measures under resolution ES10/15, EU policy has been restricted to reiterating condemnation of the construction of the wall in several declarations concerning the Middle East peace process.²⁷

2. Failure to take other measures available to the EU and its Member States which may help ensure compliance by Israel with its international obligations.

Since the aforementioned EU policy, basically consisting of condemnatory statements, has proved ineffective, there is a need to see whether there might be other reasonable measures which might have been more effective in persuading Israel to comply with the provisions of international law.

The "sanctions" available to States wishing to signal their disapproval of a serious violation of human rights include retaliatory measures, which can be defined as unfriendly actions which are legal in themselves and are taken as a reaction to an unfriendly or illegal action.²⁸ In the present case, these measures could consist of curtailing of commercial benefits. In particular, there is the possibility of the suspension or the termination of the Association Agreement entered into by the European Union with Israel²⁹, which provides Parties with a number of economic and customs advantages. Such a measure would hardly give rise to any legal difficulties, since article 82 authorizes each of the Parties to "denounce the Agreement by notifying the other Party". In that case, the Agreement "shall cease to apply six months after the date of such notification". Denunciation of the Association Agreement is also logical since article 2 provides that "relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement" while the preamble highlights "the

²⁵ Report by Switzerland, in its capacity as the depositary of the Geneva Conventions, pursuant to U.N.G.A. Res. ES-10/15 (27 June 2005), Annex to the letter dated 30 June 2005 from the Permanent Representative of Switzerland to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/ES-10/304 (5 July 2005).

²⁶ For a deeper analysis of the Report, see Fr. DUBUISSON, « The Implementation of the Advisory Opinion of the International Court of Justice concerning *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* », *Palestine Yearbook of International Law 2004-2005*, vol. XIII, 2007, 27-54.

²⁷ See a.o. Conclusions of the Foreign Affairs Council on the Middel-East peace process, 8 December 2009, 17281/09, § 6 ; Conclusions of the Foreign Affairs Council on the Middel-East peace process, 23 April 2007, 8768/07, § 7; Conclusions of the General Affairs and External Relations Council on the Middel-East, 22 January 2007, 5548/07, § 6 ; Conclusions of the General Affairs and External Relations Council on the Middel-East, 10 April 2006, 8228/06, p. 3; Conclusions of the General Affairs and External Relations Council on the Middel-East, 21 November 2005, 14754/05, § 7.

²⁸ See J. SALMON (ED.), *DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC*, 1007 (2001).

²⁹ Euro-Meditarrenean Agreement, establishing an Association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, *O.J.* 2001 (L147/3) (21 June 2001). On this matter, see also M. CHEMILLER-GENDREAU, *op. cit.*

importance which the Parties attach [...] to the principles of the United Charter". The fact that an ICJ decision finds Israel responsible of multiple violations of human rights and humanitarian law and the persistent refusal by this State to end such violations makes it difficult to justify failure by the EU to make continued application of the Agreement dependent on respect for international law.

We observe that measures are available to the EU under international law, but that it makes a political choice - officially in order to promote the negotiation process - not to apply them.³⁰ The continuation of the peace process is in this respect frequently invoked to tolerate the continuation of violations of international obligations³¹, of which the Court has highlighted the *erga omnes* character.³² This strategy has been severely criticised by a group of eight human rights experts and special rapporteurs for the UN, in a declaration published in August 2005:

« In large measure it seems that the ICJ's Opinion has been ignored in favour of negotiations conducted in terms of the Road Map process. The exact nature of these negotiations is unclear but it seems that they are not premised on compliance with the Opinion of the ICJ. They seem to accept the continued presence of some settlements, which were found by the ICJ to be unlawful, and by necessary implication the continued existence of some parts of the wall in Palestinian territory. In short, there seems to be an incompatibility between the Road Map negotiations and the Court's Opinion [...] »³³.

³⁰ See, for instance, the answer given by the Belgian Minister of Foreign Affairs to a parliamentary question on the means that Belgium and EU intended to implement the International Court of Justice's decision :

"The European Council, held on 16 and 17 June 2005, in its Declaration on the peace process in the Middle-East, stressed that "although acknowledging Israel's right to ensure the security of its citizens, the Council was preoccupied by the continuation of the construction of the wall in the occupied Palestinian territory, including East Jerusalem and surroundings, in contradiction with the relevant dispositions provided by international law".

As a member of the Union, Belgium complies with the abovementioned Declaration and remains vigilant with respect to all developments possibly threatening the peace process in the Middle-East. The continuation of the construction, contributing to the degradation of the living conditions of the Palestinians and risking to create facts on the ground is such as to render even more difficult the efforts of the international community and in particular those of the Quartet US-EU-UN-Russia, in favour of a just and durable peace in the Middle-East.

Nor sanctions, nor any activation of the EU-Israel association agreement clause relating to the respect of the Human Rights seem appropriate. The reason for this is that positive developments, although relative, have been reached since the summits of Sharm el-Sheikh between Mahmoud Abbas and Ariel Sharon, last February. The European Council of 16 and 17 June 2005, in its Declaration on the Middle-East, takes note of these positive developments" (Reply to a Parliamentary Question by Christian Brotcorne to Minister of Foreign Affairs about the Advisory Opinion of the International Court of Justice of 9 July 2004 concerning the Separation Wall constructed by Israel (n° 3-960), 15 July 2005, Belgian Senate).

³¹ On that point, voy. M. KOHEN, « The Advisory Opinion provides the legal framework for the Israël-Palestinian conflict », *in* Implementing the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory — The role of Governments, intergovernmental organizations and civil society, *op. cit.*, pp. 88-92.

³² Advisory Opinion, §§ 155-157.

³³ Un Experts Mark Anniversary of ICJ "Wall Opinion" : Call on Israël to Halt Construction of the Wall, HR/05/092, 4 August 2005, Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 Prof. John Dugard, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living Mr. Miloon Kothari, Special Rapporteur on violence against women, its causes and consequences Ms. Yakin Erturk, Special Rapporteur on the right to education Mr. Vernor Munoz Villalobos, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health Mr. Paul Hunt, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance Mr. Doudou Diène, Chairperson, Rapporteur, Working Group on arbitrary detention Ms. Leila Zerrougui, Special Rapporteur on trafficking in persons, especially in women and children Ms. Sigma Huda.

It is therefore essential that the EU, *inter alia* within the Quartet, promote a negotiation process based on immediate compliance by Israel with its international obligations, particularly by halting the construction of the wall in the Occupied Palestinian Territory, which, as noted by the ICJ, encourages the unlawful establishment of settlements and entails a “risk of further alterations to the demographic composition of the Occupied Palestinian Territory”³⁴. By failing to insist that any peace process be premised on prior compliance by Israel with its international obligations, the EU is failing in its duty to ensure respect for humanitarian law and to promote the right to self-determination of the Palestinian people.

3. The adoption by the EU of measures running counter to the objective of compliance by Israel with international law

Since the ICJ rendered its Opinion, the EU has not considered any retaliation against Israel but has, on the contrary, actually granted it additional political and economic advantages. On 8 December 2008, the Council of the EU decided to upgrade its bilateral relations with Israel, with a view to strengthening the structures for political dialogue with that State.³⁵ This upgrading of relations includes an annual summit meeting at the level of Heads of State; three meetings at the level of Ministers of Foreign Affairs; an invitation to Israeli experts to attend meetings of working groups dealing with issues such as the Middle East peace process, human rights or counter-terrorism; an invitation to Israel to align itself with the EU's positions on joint foreign and security policy; and efforts to normalize the status of Israel within the institutional system of the United Nations. Quite paradoxically, the Council's decision stresses “that building-up must be based on the shared values of both parties, and particularly on democracy, respect for human rights, the rule of law and fundamental freedoms, good governance and international humanitarian law”, whereas, at the same summit meeting, the Council condemned Israel's settlement policy as being “contrary to international law and a hindrance to the creation of a viable Palestinian State”. An agreement which gives Israel a privileged status with respect to the EU, supposedly based on respect for human rights and international humanitarian law, in parallel with a determination that the State seriously violates these rights and has no intention of ending such violations, appears to be clearly inconsistent with the obligation of the EU and its Member States to ensure respect for the fourth Geneva Convention and to promote the right of the Palestinian people to self-determination. Since the government set up by B. Netanyahu came into function, it seems that the implementation of the upgrade of the relations with Israel was slowed down by the European authorities.³⁶ But in the absence of an official decision to suspend or postpone the decision to upgrade Europe's bilateral relationship with Israel, the latter remains in its principle and continues to be a problem regarding international engagements of the EU and its Member States.

Conclusions

This report allows us to draw the following conclusions concerning the international responsibility of the EU and its Member States with respect to the construction of the Wall by Israel in the Occupied Palestinian Territory:

³⁴ Advisory Opinion, § 122.

³⁵ Conclusions du Conseil – Renforcement des relations bilatérales de l'Union européenne avec ses partenaires méditerranéens, 2915^e session, 8-9 décembre 2008.

³⁶ Voy. « EU-Israel meeting ends with no progress on 'upgrade' », 16 juin 2009, <http://euobserver.com/9/28310>.

- the international obligations of the EU and its Member States:

In accordance with the relevant principles of international law as applied in the Opinion of the ICJ of 9 July 2004 and reflected in United Nations General Assembly resolution ES 10/15, the EU and its Member States are obliged not to recognize the unlawful situation resulting from construction of the wall nor to render aid or assistance in maintaining the situation created by such construction. They are also obliged to ensure compliance by Israel with international humanitarian law and an end to restrictions on the exercise by the Palestinian people of its right to self-determination. There is, finally, an obligation to consider, within the United Nations, what further action is required to put an end to the unlawful situation resulting from the construction of the wall.

- the international responsibility of the EU and its Member States pursuant to these obligations:

1. Following their repeated declarations condemning the construction of the wall as unlawful, the EU and its Member States have fulfilled their obligation not to recognize and validate the unlawful situation resulting from the construction of the wall in the Occupied Palestinian Territory;
2. There are no grounds to conclude that the EU and its Member States have failed in their obligation not to render aid or assistance in maintaining the situation created by the construction of the wall;
3. By failing to take effective measures to encourage Israel's compliance with international law, such as suspension of the Association Agreement, the EU and its Member States are violating their obligation to ensure respect for international humanitarian law and to promote the right of the Palestinian people to self-determination;
4. By promoting within the Quartet a peace process which does not require that Israel immediately halt construction of the Wall, and instead allows construction to continue, the EU and its Member States are violating their obligation to ensure respect for international humanitarian law and to promote the right of the Palestinian people to self-determination;
5. By according additional advantages to Israel under an upgrade agreement, supposedly based on respect for international humanitarian law, when such law is in fact violated seriously and persistently by that State, the EU and its Member States are violating their obligation to ensure respect for international humanitarian law and to promote the right of the Palestinian people to self-determination.