

.....

Unchart(er)ed Waters?: Consequences of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory for the Responsibility of the UN for Palestine

Iain Scobbie*

*We were the first that ever burst
Into that silent sea*

Samuel Taylor Coleridge: *The rime of the ancient mariner*

The consequences that the Advisory Opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹ could pose for the responsibility of the United Nations for Palestine are myriad. As the Court itself observed:

Within the institutional framework of the Organization, this responsibility has been manifested by the adoption of many Security Council and General Assembly resolutions, and by the

* Sir Joseph Hotung Research Professor in Law, Human Rights and Peace Building in the Middle East, School of Oriental and African Studies, University of London. Email: is17@soas.ac.uk. Many thanks to Sarah Hibbin for her research assistance.

¹ Delivered 9 July 2004. The text of the Opinion, and the representations made to the Court during the course of the proceedings, with the exception of Israel's submission that Judge Elaraby should be disqualified (see the Court's 30 Jan. 2004 Order on the composition of the Court, and Opinion, para. 8), are available at www.icj-cij.org. The text of the opinion is also available as UN Doc.A/ES-10/273, and at 43 ILM (2004) 1009.

creation of several subsidiary bodies specifically established to assist in the realization of the inalienable rights of the Palestinian people.²

Given the existence of these subsidiary bodies, as well as the numerous specialized United Nations organs that could exercise competence over discrete and diverse aspects of the Israel-Palestine situation, in addition to the more sweeping powers of the General Assembly and Security Council, this paper will principally examine questions of principle rather than substance. The Advisory Opinion has the potential to raise thorny issues concerning the inter-relationship between responsibilities ascribed to international organizations, those ascribed to their member states, and the proper or appropriate *locus* of action aimed at discharging these responsibilities.

For present purposes, the relevant part of the question posed by the General Assembly in Resolution ES-10/14 (8 December 2003) was:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory . . . considering the rules and principles of international law . . . and relevant Security Council and General Assembly resolutions?

Two broad categories of issues should be addressed in the light of the Advisory Opinion:

- (i) How did the Court treat the numerous resolutions that have been adopted by the Security Council and General Assembly on this matter? In other words, how did the Court lock the United Nations into its answer?
- (ii) Did the Court identify legal consequences or responsibilities that specifically affect the United Nations? Does it bear responsibilities that can be disaggregated from those borne by individual states which are also United Nations members; is there any necessary or appropriate inter-relationship or coordination between the United Nations' and Member States' legal responsibilities?

The term to be used to refer to the barrier/fence/wall was a matter of some controversy in the proceedings. Israel contended that the term 'wall', employed by the General Assembly in its request for an advisory opinion was pejorative (Israel's written statement, *supra* note 2, para. 2.7). On this the Court commented (Opinion, para. 67):

the 'wall' in question is a complex construction, so that the term cannot be understood in a limited physical sense. However, the other terms used, either by Israel ('fence') or by the Secretary-General ('barrier'), are no more accurate if understood in the physical sense. In this Opinion, the Court has therefore chosen to use the terminology employed by the General Assembly.

The Court also refers to the 'wall, and its associated régime' in the Opinion to designate the structure and its associated regime of roads and ditch: see para. 82. To maintain consistency with the Court, the term 'wall' shall be used in this paper.

For a concise summary of the Opinion, with comments on its significance, see Akram and Quigley, 'A Reading of the International Court of Justice Advisory Opinion on the Legality of Israel's Wall in the Occupied Palestinian Territories', available at www.palestinecenter.org. See also Abi-Saab, 'Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé: quelques réflexions préliminaires sur l'avis consultatif de la Cour internationale de Justice', 86 *Int'l Rev Red Cross* (2004) 633.

² Advisory opinion, *supra* note 2, para. 49.

1 The Legal Rhetoric of the Advisory Opinion

Apart from criticism on matters of substance, such as the Court's summary rejection of Israel's reliance on the plea of self-defence as justification for the construction of the wall in paragraph 139 of the Opinion,³ commentators have also criticized the sparseness of the Court's reasoning throughout this Opinion,⁴ reflecting Judge Higgins' disappointment at a failed opportunity:

It might have been expected that an advisory opinion would have contained a detailed analysis, by reference to the texts, the voluminous academic literature and the facts at the Court's disposal . . . Such an approach would have followed the tradition of using advisory opinions as an opportunity to elaborate and develop international law.⁵

This the Court conspicuously did not do but, equally conspicuously, on the key substantive rulings that structure its Opinion, the Court expressly employed General Assembly and/or Security Council resolutions in its justification – for instance, in relation to the applicability of Geneva Convention IV to the Occupied Palestinian Territory;⁶ in affirming the right of the Palestinian people to self-determination;⁷ and in determining that Israeli settlements in the Occupied Palestinian Territory are unlawful because they breach Article 49(6) of Geneva Convention IV.⁸

With the exception of the last point, the Court generally employed General Assembly and Security Council resolutions as subsidiary or additional reasons to confirm a conclusion already reached on other grounds. In relation to the illegality of the settlements, however, the Court relied solely on Security Council resolutions – citing Resolutions 446 (22 March 1979), 452 (20 July 1979) and 465 (1 March 1980) – despite the plethora of other material on this point. Although this ruling is undoubtedly correct,⁹ it seems odd that the Court chose to rely solely on Security Council resolutions which were not binding under Chapter VII, adopted by an entity which is not party to Geneva Convention IV,¹⁰ with no reference to the affirmation of this interpretation

³ See, for instance, Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-defence', 99 *AJIL* (2005) 52, and Murphy, 'Self-defence and the Israeli Wall Advisory Opinion: an *ipse dixit* from the ICJ?', 99 *AJIL* (2005) 62; *contra*, see Scobbie, 'Words my Mother never Taught Me – "In Defense of the International Court"', 99 *AJIL* (2005) 76.

⁴ See, for instance, Imseis, 'Critical Reflections on the International Humanitarian Aspects of the ICJ Wall Advisory Opinion', 99 *AJIL* (2005) 102; Kretzmer, 'The Advisory Opinion: the Light Treatment of International Humanitarian Law', 99 *AJIL* (2005) 88; and Scobbie, 'Smoke, Mirrors and Killer Whales: the International Court's Opinion on the Israeli Barrier Wall', 5 *German LJ* (2004) 1107, available at www.germanlawjournal.com.

⁵ Separate Opinion of Judge Higgins, *supra* note 2, at para. 23.

⁶ Advisory Opinion, *supra* note 2, at paras 98–99.

⁷ *Ibid.*, at para. 118; see also paras 88 and 156.

⁸ *Ibid.*, at para. 120.

⁹ See, for instance, the Declaration of Judge Buergenthal, *supra* note 2, at para. 9, and Kretzmer, *supra* note 5, at 89–91 for affirmations of the Court's ruling.

¹⁰ The UN is not party to the Geneva Conventions on the grounds that these envisaged that only states should be parties, and that the UN does not possess the requisite capabilities to implement numerous provisions, especially of Geneva Convention IV, which presuppose the possession of full governmental powers. On 6 Aug. 1999, however, the Secretary-General promulgated a *Bulletin on the observance by*

contained in state practice, declarations by the states parties to Geneva Convention IV and by the International Committee of the Red Cross, and the writings of publicists.¹¹ Unless only illustrative, this would appear to be too great a weight to place on these non-binding resolutions; yet if only illustrative then the ruling lacks any justificatory argument that is illustrated by these resolutions.

2 United Nations' Responsibility for Palestine

On the other hand, the Court's reliance on these resolutions might be an emanation of the UN's responsibility for Palestine:

Given the powers and responsibilities of the United Nations in questions relating to international peace and security, it is the Court's view that the construction of the wall must be deemed to be directly of concern to the United Nations. The responsibility of the United Nations in this matter also has its origin in the Mandate and Partition Resolution concerning Palestine . . . This responsibility has been described by the General Assembly as 'a 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' (General Assembly resolution 57/107 of 3 December 2002).¹²

On this view, the UN's responsibility is thus ultimately rooted in the Mandate for Palestine entrusted to Great Britain by the League of Nations in 1922 in fulfilment of Article 22(4) of the League Covenant. This provided:

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone.

Article 22(1) of the Covenant laid down the fundamental principle of the Mandate system, that to the population of territories placed under Mandate, 'there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation'. In the *Wall Advisory Opinion*, the International Court reaffirmed the views it had expressed on the nature of mandates in its *International Status of South West Africa Advisory Opinion*,¹³ namely:

United Nations forces of international humanitarian law, 28 ILM (1999) 1656. This sets out 'fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations command and control'. Section 2 of this *Bulletin* expressly concedes that:

The present provisions do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel, and do not prejudice the application thereof, nor do they replace the national laws by which military personnel remain bound throughout the operation. See Szasz, 'UN Forces and International Humanitarian Law', in M.N. Schmitt (ed.), *International Law across the Spectrum of Conflict: Essays in Honor of Professor LC Green on the Occasion of his Eightieth Birthday* (2000), at 507.

¹¹ See Kretzmer, *supra* note 5, at 89 for citations to such materials.

¹² Advisory Opinion, *supra* note 2, at para. 49.

¹³ [1950] ICJ Rep 128.

that 'The Mandate was created, in the interests of the inhabitants of the territory, and of humanity in general, as an international institution with an international object – a sacred trust of civilization.' (*ICJ Reports 1950*, p. 132.) The Court also held in this regard that 'two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] form[ed] "a sacred trust of civilization"' (*ibid.*, p. 131).¹⁴

When in 1947 the United Kingdom announced its intention to resign as Mandatory and withdraw from Palestine by 1 August 1948,¹⁵ the General Assembly adopted Resolution 181(II) (29 November 1947) – the Partition Resolution¹⁶ – which provided for the termination of the Mandate,¹⁷ and for the creation of a United Nations Commission to administer the territory of Mandate Palestine which 'as the mandatory Power withdraws its armed forces, [shall] be progressively turned over to the Commission, which shall act in conformity with the recommendations of the General Assembly, under the guidance of the Security Council'.¹⁸ Although the Partition Resolution was not implemented, it clearly envisaged United Nations' responsibility for the administration of the territory of Mandate Palestine pending the establishment of independent Arab and Jewish states on that territory.

In his Separate Opinion, Judge Elaraby argued that this proposed transitional period of United Nations administration of Mandate Palestine provided 'a legal nexus with the Mandate'. He contended:

The notion of a transitional period carrying the responsibilities emanating from the Mandate to the present is a political reality, not a legal fiction, and finds support in the dicta of the Court, in particular, that former mandated territories are the 'sacred trust of civilization' and 'cannot be annexed'. The stream of General Assembly and Security Council resolutions on various aspects of the question of Palestine provides cogent proof that this notion of a transitional period is generally, albeit implicitly, accepted.¹⁹

He concluded, nevertheless, that 'this special responsibility was discharged for five decades without proper regard for the rule of law'.²⁰

3 The Implications of Self-determination

Article 22.4 of the League Covenant expressly provided for the creation of independent states in the territories detached from Turkey after the First World War. As the

¹⁴ Advisory Opinion, *supra* note 2, at para. 70.

¹⁵ This date was subsequently amended to 15 May 1948.

¹⁶ Resolution 181 envisaged the partition of Mandate Palestine into two independent states in an economic union, one Arab and the other Jewish, with Jerusalem under a special international régime. The Arab population of Palestine and Arab states members of the UN rejected the partition plan, while Israel declared its independence on the basis of resolution 181 on 14 May 1948. For the Court's discussion of resolution 181, see Advisory Opinion, *supra* note 2, at para. 71, and paras 71–75 generally.

¹⁷ General Assembly resolution 181, operative para. I.A.1.

¹⁸ *Ibid.*, operative para. I.B.2.

¹⁹ Separate Opinion of Judge Elaraby, *supra* note 2, at para. 2.3.

²⁰ *Ibid.*, at para. 1.

Court recalled in the *Wall* Advisory Opinion, however, it had ruled in the *Namibia* Advisory Opinion²¹ that:

‘... the ultimate objective of the sacred trust’ referred to in Article 22, paragraph 1, of the Covenant of the League of Nations, ‘was the self-determination ... of the peoples concerned’ (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 131, paras. 52–53). The Court has referred to this principle on a number of occasions in its jurisprudence (*ibid.*; see also *Western Sahara*, Advisory Opinion, ICJ Reports 1975, p. 68, para. 162). The Court indeed made it clear that the right of peoples to self-determination is today a right *erga omnes* (see *East Timor (Portugal v Australia)*, Judgment, ICJ Reports 1995, p. 102, para. 29).²²

The Court further ruled that, with regard to the right of self-determination, the existence of a ‘Palestinian people’ was not in doubt and had been expressly recognized by Israel. In particular, the 28 September 1995 Israel-Palestine Interim Agreement on the West Bank and Gaza Strip referred repeatedly to the Palestine people and its ‘legitimate rights’. The Court ruled that these rights included the right to self-determination, noting that the General Assembly had affirmed this repeatedly.²³

The Court concluded that the construction of the wall by Israel had violated its ‘obligation to respect the right of the Palestinian people to self-determination’, which the Court emphasized was an obligation *erga omnes*,²⁴ and that consequently all states were under an obligation not to recognize the illegal situation resulting from its construction, nor render aid and assistance in maintaining this situation. Further, all states, ‘while respecting the United Nations Charter and international law’, were under the duty to ensure that any impediment to the exercise of self-determination of the Palestinian people caused by the construction of the wall was brought to an end.²⁵ Thus, the consequences for states were formulated as a series of broad propositions which stated detached legal principles, but without giving guidance for their practical implementation.

Similarly, the Court did not elaborate the responsibilities of the United Nations to any great degree. The Court noted that its task was simply:

to determine in a comprehensive manner the legal consequences of the construction of the wall, while the General Assembly – and the Security Council – may then draw conclusions from the Court’s findings.²⁶

This is reflected in the final paragraphs of the reasoning. The Court stated:

160 ... the Court is of the view that the United Nations, and especially the General Assembly and Security Council, should consider what further action is required to bring an end to the

²¹ [1971] ICJ Rep 16.

²² Advisory Opinion, *supra* note 2, at para. 88.

²³ *Ibid.*, at para. 118.

²⁴ See *ibid.*, at paras 155–156; quotation at para. 155.

²⁵ *Ibid.*, at para. 159.

²⁶ *Ibid.*, at para. 62.

illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

161. The Court, being concerned to lend its support to the purposes and principles laid down in the United Nations Charter, in particular the maintenance of international peace and security and the peaceful settlement of disputes, would emphasize the urgent necessity for the United Nations as a whole to redouble its efforts to bring the Israeli-Palestinian conflict, which continues to pose a threat to international peace and security, to a speedy conclusion, thereby establishing a just and lasting peace in the region.

162 . . . The 'Roadmap' approved by Security Council resolution 1515 (2003) represents the most recent of efforts to initiate negotiations to this end. The Court considers that it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region.²⁷

The Court thus placed an obligation of result on the United Nations – the cessation of the Israel-Palestine conflict leading to 'a just and lasting peace in the region' and the establishment of an independent Palestinian state – without indicating any specific measures that could or should be taken to achieve this result.

It is perhaps not surprising that the Advisory Opinion gave no tangible guidance regarding the material steps that should be taken by the United Nations – or indeed by states – to discharge their responsibilities. Even in contentious cases, the Court is loathe to dictate courses of conduct to litigant states when the methods of compliance with its rulings are essentially at the parties' discretion. For instance, the *Haya de la Torre* case²⁸ was essentially an attempt by the parties to the earlier *Asylum* case²⁹ to obtain guidance as to how that judgment should be implemented. The Court had found that the diplomatic asylum extended to Mr Haya de la Torre by Colombia in its embassy in Lima was unlawful and should be terminated. In *Haya de la Torre*, the Court noted that its judgment in the *Asylum* case:

confined itself . . . to defining the legal relations which the Havana Convention had established between the Parties. It did not give any directions to the Parties, and entails for them only the obligation of compliance therewith. The interrogative form in which they have formulated their Submissions shows that they desire that the Court should make a choice amongst the various courses by which the asylum should be terminated. But these courses are conditioned by facts and by possibilities which, to a very large extent, the Parties are alone in a position to appreciate. A choice amongst them could not be based on legal considerations, but only on conditions of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice.³⁰

²⁷ *Ibid.*, at paras 160–162. This ruling of principle is reiterated in operative para. 163.3.E which provides: The United Nations, and especially the General Assembly and Security Council, should consider what further action is required to bring an end to the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion.

²⁸ [1951] ICJ Rep 71.

²⁹ [1950] ICJ Rep 266.

³⁰ [1951] ICJ Rep 79.

No doubt the particular circumstances of implementing its advice in terms of alternative possible strategies and alternative measures could not be foreseen by the Court. The consequence is, however, that the United Nations' responsibilities are left abstract and detached: an affirmation of an amorphous obligation which appears to be more an exhortation to action than a delineation of the precise content of that duty.

4 The General Assembly's Initial Response to the Advisory Opinion

On 2 August 2004, the General Assembly adopted Resolution ES-10/15,³¹ which, in its preamble, reaffirmed the right of the Palestinian people to self-determination and, in its operative paragraphs, *inter alia*, acknowledged the Advisory Opinion³² and, while demanding that Israel comply with its legal obligations as these had been enumerated by the Court,³³ only called upon Member States to comply with the obligations the Court had found were incumbent upon them.³⁴ Resolution ES-10/15 also called upon all states party to Geneva Convention IV to ensure that Israel respect the provisions of the Convention,³⁵ and invited Switzerland, as depository of the Geneva Conventions, to hold consultations on this matter and report to the General Assembly.³⁶ Further, the General Assembly requested the Secretary-General to establish a register of damage caused to all natural or legal persons as the result of the construction of the wall: this was expressly related to Israel's obligation to make reparation declared in paragraphs 152–153 of the Advisory Opinion.³⁷ By a letter dated 11 January 2005 addressed to the President of the General Assembly, the Secretary-General set out a legal and administrative framework for the compilation of this register through the mechanism of a Registry which would be created as a subsidiary organ of the United Nations operating under the authority of the Secretary-General.³⁸

In paragraph 155 of the Advisory Opinion, the Court had observed that 'the obligations violated by Israel include certain obligations *erga omnes*', identifying these as the obligation to respect the right of the Palestinian people to self-determination as well as some unspecified obligations under international humanitarian law, namely the 'intransgressible principles of international customary law' which the Court had invoked, but not identified, in the *Nuclear Weapons* Advisory Opinion.³⁹ It also recalled

³¹ UN Doc.A/RES/ES-10/15 (2 Aug. 2004).

³² *Ibid.*, operative para. 1.

³³ *Ibid.*, operative para. 2.

³⁴ *Ibid.*, operative para. 3.

³⁵ *Ibid.*, operative para. 7: this reflected the Court's affirmation that states parties to Geneva Convention IV have a duty, arising from Art. 1, to ensure that its provisions are complied with by other parties – see Advisory Opinion, *supra* note 2, at paras 159 and 163.3.D.

³⁶ UN Doc.A/RES/ES-10/15, *supra* note 32, operative para. 7.

³⁷ *Ibid.*, operative para. 4.

³⁸ See UN Doc.A/ES-10/294 (13 Jan. 2005).

³⁹ Advisory Opinion, *supra* note 2, at para. 157, reaffirming the *Legality of the threat or use of nuclear weapons advisory opinion* [1996] IICJ Rep 226, at 257, para. 79.

that in the *Barcelona Traction* case, it had indicated that obligations *erga omnes* were the concern of all states which have a legal interest in their protection.⁴⁰ Despite this classification of the norms which were at the heart of the proceedings and central to the question of Israeli responsibility, the General Assembly only called upon states to discharge the responsibilities identified as incumbent upon them by the Opinion. Can it be said that this adequately addresses the findings of the International Court and the responsibility placed upon the General Assembly to 'consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime, taking due account of the present Advisory Opinion'?⁴¹

5 Discharging Obligations *erga omnes*

The Court's final exhortation to the General Assembly was that it should encourage efforts aimed at achieving, 'on the basis of international law', a negotiated solution leading to the creation of a Palestinian State.⁴² In contrast, in his Separate Opinion, Judge Al-Khasawneh bluntly stated that, 'negotiations are a means to an end and cannot in themselves replace that end. The discharge of international obligations including obligations *erga omnes* cannot be made conditional upon negotiations.'⁴³ This contention raises thorny conceptual issues regarding the normative array of international law. States – and other entities that possess international personality – can, in principle, vary rules of general international law in their relations *inter se*. On the other hand, peremptory norms – *jus cogens* norms – cannot be disregarded by agreement: they allow no derogation. The question is whether the category of *jus cogens* norms is coincidental with that of obligations *erga omnes*. Doctrine affirms that there is a conceptual connection between the two categories, but does not conclusively affirm their coincidence.⁴⁴ Judge Al-Khasawneh's contention appears to hint at such an identity and also, perhaps, that the failure to adequately respect an obligation *erga omnes* in an agreement is no longer a matter confined within the parties' bilateral relationship *inter se*, but becomes the legitimate concern of the entire international community.

Other judges were more sceptical about the import of obligations *erga omnes*. Judge Higgins thought that the 'invocation of the uncertain concept of *erga omnes*' was supererogatory, arguing that the consequences of non-recognition and non-assistance

⁴⁰ The Court was affirming the rulings set out in *Barcelona Traction, Light and Power Co Ltd: second phase, final judgment* [1970] ICJ Rep 3, at 32, para. 33: see also Advisory Opinion, *supra* note 2, at paras 156–157.

⁴¹ *Ibid.*, at paras 160 and 163.3.E.

⁴² *Ibid.*, at para. 162.

⁴³ Separate Opinion of Judge Al-Khasawneh, *supra* note 2, at para. 13.

⁴⁴ See, for instance, J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 244–245; A. de Hoogh, *Obligations erga omnes and International Crimes* (1996), at 53–56, 91; and M. Ragazzi, *The Concept of International Obligations erga omnes* (1997), at Ch. 3, 182 and 190. At 53, de Hoogh underlines that obligations *erga omnes* are essentially connected with secondary rules of international law: the notion of *ius cogens* norms places emphasis on their substantive primary nature. Compare Crawford, *supra*, and see also Ragazzi, at 203 ff.

flowed simply and inexorably from the Court's conclusion that an illegal situation existed.⁴⁵ Further, the classification of certain norms of international humanitarian law as imposing obligations *erga omnes* was 'equally irrelevant. These intransgressible principles are generally binding because they are customary international law, no more and no less'.⁴⁶ She observed that the *Barcelona Traction* dictum, reiterated by the Court in paragraph 155 of the Advisory Opinion, 'is frequently invoked for more than it can bear'. She maintained that it merely dealt with jurisdictional *locus standi*, a view which she claimed the International Law Commission had affirmed in its commentary to its 2001 *Articles on the Responsibility of States for Internationally Wrongful Acts*.⁴⁷ Judge Higgins was adamant that this *dictum* 'has nothing to do with imposing substantive obligations on third parties to a case'.⁴⁸

Judge Higgins could have gone further. Within the confines of the *Barcelona Traction* judgment itself, the Court circumscribed, or perhaps even contradicted, the implications of this *dictum*.⁴⁹ The Court had identified fundamental human rights as obligations *erga omnes*,⁵⁰ but subsequently remarked that universal human rights instruments did not confer on states the capacity to protect the victims of violations of these rights regardless of their nationality.⁵¹ It is, of course, possible that this qualification has been superseded by subsequent developments in general international law – and this is apparently the view of the International Law Commission in its *Articles on State Responsibility*⁵² – but, as Judge Gros commented in the *Nuclear Tests* cases:

This process of covert and contradictory allusions, in which the conflicts of views expressed in the opinions sometimes reappear, is not without its dangers. This is evident . . . as regards the attempts to make use of paragraphs 33 and 34 of the Judgment in the *Barcelona Traction* case without taking account of the existence of paragraphs inconsistent with these, ie, paragraphs 89 to 91, which were in fact intended to qualify and limit the scope of the earlier pronouncement.

⁴⁵ Separate Opinion of Judge Higgins, *supra* note 2, at para. 38.

⁴⁶ *Ibid.*, at para. 39.

⁴⁷ See Crawford, *supra* note 45, 'Commentary to Chapter III of Part Two', at 242 – but compare the statement by Professor Crawford in his *Fourth Report on State Responsibility*:

It does not seem disproportionate to allow all States to insist upon the cessation of a breach of an obligation owed to the international community as a whole. This would seem to follow directly from the Court's *dictum* in *Barcelona Traction*. Whether a claimant State should be able to seek reparation 'in the interests of the injured State or of the beneficiaries of the obligation breached' is, perhaps, less clear.

UN Doc.A/CN.4/517 (2 April 2001), at 16, para. 41.

⁴⁸ Separate Opinion of Judge Higgins, *supra* note 2, at para. 37.

⁴⁹ On the status, implications, and exegesis of the *Barcelona Traction dictum*, see Ragazzi, *supra* note 45, Ch. 1; and de Hoogh, *supra* note 45, at 49–53.

⁵⁰ See *Barcelona Traction, Light and Power Co Ltd: second phase, final judgment* [1970] ICJ Rep 3, at 32, para. 34.

⁵¹ *Barcelona Traction, Light and Power Co Ltd: second phase, final judgment* [1970] ICJ Rep 3 at 47, para. 91. It should also be recalled that in the *East Timor case*, the Court observed that 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things': [1995] ICJ Rep 90, at 102, para. 29.

⁵² See Art. 48.1.b of the Commission's 2001 *Articles on State Responsibility* regarding the invocation of responsibility by a state other than an injured state, but compare Art. 44.a which reaffirms the nationality of claims rule. In this connection, see Scobbie, 'The Invocation of Responsibility for the Breach of "Obligations under Peremptory Norms of General International Law"', 13 *EJIL* (2002) 1201, at 1212–1218.

That pronouncement was in fact not directly related to the subject of the judgment, and was inserted as a sort of bench-mark for subsequent use; but all bench-marks must be observed.⁵³

Judge Kooijmans expressed doubts akin to those of Judge Higgins. Although he acknowledged that in the *East Timor* case the Court had categorized the right to self-determination in a colonial context as a right *erga omnes* and thus opposable to all, 'it said nothing about the way in which this "right" must be translated into obligations for States which are not the colonial Power'.⁵⁴ Judge Kooijmans confessed that he had 'considerable difficulty in understanding why a violation of an obligation *erga omnes* by one State should necessarily lead to an obligation for third States'. The nearest he could come to such an understanding was in the obligations envisaged in Article 41 of the International Law Commission's Articles on State Responsibility.⁵⁵ By invoking Article 41, like Judge Al-Khasawneh, Judge Kooijmans effaced any conceptual distinction between *ius cogens* norms and obligations *erga omnes*, as Article 41 deals with the consequences of a serious breach of a peremptory norm of international law. It provides in paragraphs 1 and 2:

- (1) States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.⁵⁶
- (2) No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.

Article 41 was, however, not mentioned in the Advisory Opinion. What implications should be drawn from this omission? Because Judges Higgins and Kooijmans expressed reservations about the consequences of designating an obligation as having *erga omnes* status, it must be assumed that this issue was discussed during the Court's deliberations.⁵⁷ Their views were expressed in opposition to the implications of the Advisory Opinion. Although these are inarticulate, or at least not clearly and

⁵³ *Nuclear tests (Australia v France) case: judgment* [1974] ICJ Rep 253, Separate Opinion of Judge Gros, 276, at 290, para. 24. On authorial responsibility for the *Barcelona Traction dictum*, see Ragazzi, *supra* note 45, at 8–9.

⁵⁴ Separate Opinion of Judge Kooijmans, *supra* note 2, at para. 33.

⁵⁵ *Ibid.*, at para. 40.

⁵⁶ Art. 40 provides:

- (1) This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
- (2) A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

⁵⁷ This flows from the nature of the Court's deliberative process embodied in its Resolution on Internal Judicial Practice adopted in 1976. This is available at www.icj-cij.org. To compare the 1976 resolution with the Court's previous practice, see Guyomar, 'La révision par la CIJ de la résolution visant la pratique interne de la Cour en matière judiciaire', 22 *Annuaire français de droit international* (1976) 116, and G. Guyomar, *Commentaire du Règlement de la Cour internationale de Justice adoptée le 14 avril 1978: interprétation et pratique* (1983), at 75 ff; Lillich and White, 'The Deliberative Process of the International Court of Justice: a Preliminary Critique and Some Possible Reforms', 70 *AJIL* (1976) 28; and S. Rosenne, *Procedure in the International Court* (1983), at 225 ff; see also his *The Law and Practice of the International Court, 1920–1996* (1997), at 1562 ff. On the possible impact of the Court's deliberative practice on the content of the *Wall advisory opinion*, see Scobbie, *supra* note 5, at 1111–1113.

unequivocally stated, this judicial interchange indicates that the Court as a whole thought that obligations *erga omnes* do impose substantive obligations on third states. It is possible that this is the import of the ruling in paragraph 159 that all states have a duty ‘to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end’. But if obligations *erga omnes* ordain substantive obligations for third states, do they not equally bind inter-governmental organizations composed of states?

This conundrum is not solved by an exegesis of the terminology consciously used by the International Law Commission in preference to ‘obligations *erga omnes*’, namely ‘obligations owed to the international community as a whole’.⁵⁸ It is clear from the Commission’s commentary to its Articles on State Responsibility that this term refers to the international community of states as a whole and, by virtue of the inclusion of self-determination within this category of norms, to those entitled to exercise that right. It is not clear – indeed, it is not even considered – whether these obligations are also owed by or to intergovernmental organizations.⁵⁹

This issue therefore takes us into relatively uncharted waters: What are the responsibilities of intergovernmental organizations, and also their member states, in relation to the discharge of obligations *erga omnes*?

6 Uncharted Waters – The International Responsibility of International Organizations and their Member States

The ‘responsibility’ of the United Nations for the discharge of an obligation incumbent upon it has a dual denotation. The most obvious is that of the responsibility, or liability, for the breach of, or the failure to duly satisfy, a given international obligation; in other words, the secondary rules of international responsibility that regulate the modalities and consequences of a breach of a primary obligation.⁶⁰ More broadly, in a non-technical sense, responsibility encompasses the measures that could or should be taken to discharge a given primary obligation.

To deal first with the issue of the secondary rules of international responsibility that regulate the fulfilment by international organizations of their primary obligations: this question, and that of the inter-relationship of the responsibilities of an organization and its member states, was excluded from the International Law Commission’s

⁵⁸ Given the surfeit of terms used to denote concepts that are assuredly closely related – *ius cogens* norms, obligations *erga omnes*, obligations owed to the international community [of States] as a whole, intransgressible principles – one can only wonder whether it is not time for Occam’s Razor – *entia non sunt multiplicanda praeter necessitatus* (entities should not be multiplied except from necessity) – to be wielded in order to prune the conceptual undergrowth of the international deontic array.

⁵⁹ On the Commission’s deliberate avoidance of the term ‘obligations *erga omnes*’, see Crawford, *supra* note 45, ‘Commentary to Article 48’, at 278, paras 8–10 and ‘Commentary to Article 25’, at 184–185, para. 18.

⁶⁰ For a critical comment on this dichotomy of primary and secondary obligations, see S. Rosenne, *Developments in the Law of Treaties 1945–1986* (1989), at 37.

Articles on State Responsibility.⁶¹ Since 2002, this issue has been under authoritative consideration by the International Law Commission, with Professor Gaja acting as *rapporteur*.⁶² During its 55th Session (2003),⁶³ the Commission adopted its initial draft Articles on this topic. Draft Article 3 sets out the general principles of the responsibility of international organizations, and provides:

- (1) Every internationally wrongful act of an international organisation entails the international responsibility of the international organisation.
- (2) There is an internationally wrongful act of an international organisation when conduct consisting of an action or omission:
 - (a) Is attributable to the international organisation under international law; and
 - (b) Constitutes a breach of an international obligation of that organisation.⁶⁴

The Commission's commentary to this Article notes that for both states and international organizations, the legal relationship resulting from an internationally wrongful act need not be bilateral but may implicate, for instance, the international community as a whole: 'Thus in appropriate circumstances more than one subject may invoke, as an injured subject or otherwise, the international responsibility of an international organization'.⁶⁵

⁶¹ Art. 57 provides:

These Articles are without prejudice to any question of the responsibility under international law of an international organisation, or of any State for the conduct of an international organisation.

For commentary on this Art., see Crawford, *supra* note 45, at 310–311.

⁶² Aspects of the international responsibility of international organizations and their member states have also been examined by both the Institut de Droit International and the International Law Association: see Higgins (*Rapporteur*), 'The Legal Consequences of Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties', 66 (i) *Annuaire de l'Institut de Droit International* (1995) 249; and Shaw and Wellens (*Co-rapporteurs*), 'Committee on Accountability of International Organisations: Third Report Consolidated, Revised and Enlarged Version of Recommended Rules and Practices', International Law Association: Report of the Seventieth Conference (New Delhi) (2002) 772, at 793 ff. The Committee's first and second reports may be found in International Law Association, Report of the Sixty-Eighth Conference (Taipei) (1998) 584 and International Law Association, Report of the Sixty-Ninth Conference (London) (2000) 875. For doctrinal analysis see, e.g., Amerasinghe, 'Liability to Third Parties of Member States of International Organizations: Practice, Principle and Judicial Precedent', 85 *AJIL* (1991) 259 and *Principles of the Institutional Law of International Organizations* (1996), Chs. 8 and 9; Schermers, 'Liability of International Organizations', 1 *Leiden J Int'l L* (1988) 3; and Scobbie, 'International Organizations and International Relations', in R.J. Dupuy (ed.), *Manuel sur les organisations internationales* (2nd edn., 1998), at 830, 886 ff.

⁶³ The Commission's work on the responsibility of international organizations has been discussed in its Reports to the General Assembly covering its work during its 58th and 59th sessions – see UN Doc.A/58/10 (2003), at Ch. 4 and UN Doc.A/59/10 (2004), at Ch. 5. Professor Gaja has produced three reports for the Commission – UN Doc.A/CN.4/532 (26 Mar. 2003), UN Doc.A/CN.4/541 (2 Apr. 2004) and UN Doc.A/CN.4/553* (13 May 2005). These documents are available at <http://www.un.org/law/ilc/>.

⁶⁴ See International Law Commission, *Report of the Work of its 55th Session*, UN Doc.A/58/10, at 45–49; and G. Gaja, *First Report on Responsibility of International Organizations*, UN Doc.A/CN.4/532 (26 Mar. 2003), at 20–21, para. 39.

⁶⁵ International Law Commission, *supra* note 65, at 47, para. 7.

In relation to the United Nations, this draft Article only affirms the ruling recognizing that the United Nations may incur international responsibility delivered by the International Court in the *Curamaswamy* Advisory Opinion:

the Court wishes to point out that the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity.

The United Nations may be required to bear responsibility for the damage arising from such acts.⁶⁶

The United Nations itself has accepted that it is capable of being internationally responsible for an internationally wrongful act. This is an attribute of its international personality and its capacity to bear international rights and obligations.⁶⁷ There should be no doubt that an organization is responsible for delictual acts committed by that organization:

It is also a reflection of the principle of State responsibility – widely accepted to be applicable to international organizations – that damage caused in breach of an international obligation and which is attributable to the State (or to the Organization), entails the international responsibility of the State (or of the Organization) and its liability in compensation.⁶⁸

This requires some reformulation. Responsibility is not dependent on the existence of material damage or loss, but arises directly from the breach of the obligation.⁶⁹

Some aspects of the régime of organizational responsibility – in particular, whether member states are concurrently responsible or retain a residual responsibility for acts of an organization – are unsettled and controversial. This issue has arisen in domestic courts as a result of, for instance, the collapse of the International Tin Council, and was also canvassed to an extent before the International Court in both the *Certain Phosphate Lands in Nauru* and the *Legality of the Use of Force* cases. In both of these, the issue under examination was whether member states of an organization may be held jointly and severally liable for delictual acts of the organization. In both, however, due to the discontinuance of the *Phosphate Lands* litigation,⁷⁰ and the Court's rejection

⁶⁶ *Difference relating to immunity from legal process of a special rapporteur of the Commission on Human Rights advisory opinion* [1999] IICJ Rep 62, at 88–89, para. 66.

⁶⁷ See, for instance, *Secretary General's Report on Administrative and Budgetary Aspects of the Financing of United Nations Peacekeeping Operations*, UN Doc.A/51/389 (20 Sept. 1996), reproduced at 37 ILM (1998) 700, at 702, para. 4.

⁶⁸ *20 September 1996 Secretary General's Report*, *supra* note 68, at 702, para. 6. The liability of the European Community for non-performance of an agreement was expressly recognised by the European Court of Justice in *French Republic v EC Commission*, 101 ILR (1994) 30, at 63, para. 25.

⁶⁹ See ILC, *Report of the work of its 55th Session*, UN Doc.A/58/10, 46, para. 4.

⁷⁰ In the *Certain phosphate lands case: preliminary objections judgment*, the Court expressly reserved this issue for the merits of the case: [1992] ICJ Rep 240, at 258, para. 48. The question of joint and several liability was addressed in the written pleadings as follows: Nauruan Memorial, at paras. 622–630; Australian Counter-Memorial, Pt III, Ch. III, 'The Legal Consequences of Shared Responsibility', especially at paras 567–572; Australian Preliminary Objections, Pt III, Ch. I, 'The Nauruan Theory of Liability'; and Nauruan Written Observations on the Australian Preliminary Objections, paras 266–277 (this last document is not posted on the International Court's website).

of the Yugoslavian (Serbia and Montenegro) applications in the *Legality of the Use of Force* cases due to lack of jurisdiction,⁷¹ this issue was not judicially addressed.⁷²

Further, in relation to the attribution of the conduct of an organ of an organization as the basis on which to found responsibility, even when that organ acts within the scope of its functions, the International Law Commission has opined that:

It is not always sure that the action of an organ of an international organization acting in that capacity will always be purely and simply attributed to the international organization as such rather than, in appropriate circumstances, to the States members of the organization, if it is a collective organ, or otherwise to the State of nationality of the person or persons constituting the organ in question.⁷³

At least in relation to the regional protection of human rights, this view finds support in the jurisprudence of the European Court of Human Rights. For example, in the *Senator Lines* case,⁷⁴ the European Court ruled:

The Member States of the European Union remain (collectively) responsible even for acts of the Community Institutions. These Community Institutions are to be seen as the expression of the collective co-operation of the Member States with the consequence that their action is therefore to be considered as the action of the Member States under other forms. This means that

⁷¹ The applications against Spain and the US were dismissed due to manifest lack of jurisdiction at the interim measures stage: see *Orders of 2 June 1999, Yugoslavia v Spain* [1999] II ICJ Rep 761; and *Yugoslavia v the United States* [1999] II ICJ Rep 916. The remaining applications lodged against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, and the UK were dismissed in the *Legality of the use of force cases: preliminary objections judgments* of 15 Dec. 2004: the *Serbia and Montenegro v Belgium* judgment is reproduced at 44 ILM (2005) 299. On the question of the interplay between the international responsibility of NATO member states and NATO see, in particular, the oral hearings in the interim measures proceedings at CR.99/14 (10 May 1999), Erinski (Yugoslavian agent), paras 5.1–5.5; CR.99/16 (10 May 1999), Kirsch (Canadian agent), para. 34; CR.99/25 (12 May 1999), Brownlie (Yugoslavian counsel) (no paragraphing); CR.99/27 (12 May 1999), Kirsch (Canadian agent), *Joint and several liability*; and CR.99/31 (12 May 1999), Lammers (Netherlands' agent), para. 3.

⁷² On the question of joint and several liability of an organization and its member states, see also Gaja, 'Second Report on Responsibility of International Organizations', UN Doc.A/CN.4/451 (2 Apr. 2004), at 3–5, paras 6–8; and Shaw and Wellans, *supra* note 63, at 797–799. The issue also arose before the European Court of Human Rights in *Banković v Belgium and Others* (App. No. 52207/99). The applicants argued that NATO member states were jointly and severally liable for the actions of NATO (see *ibid.*, paras 57 ff). France contested this, arguing that, as NATO was an organization with an international legal personality separate from that of its member states, its action was not imputable to its members (see judgment of 12 Dec. 2001, 123 ILR 94, at 103, para. 32). Because the European Court rejected the application as inadmissible as the applicants were not within the jurisdiction of the respondent states, it did not consider the question of joint and several liability. My thanks are due to Professor Françoise Hampson for supplying me with copies of the applicants' pleadings in this case.

⁷³ This statement was made in the ILC commentary to draft Art. 13 which was adopted in 1996; see para. 3 of the commentary. Draft Art. 13 provided:

The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction.

Both the texts of the 1996 draft Arts. and the ILC commentaries on these Arts. are available on the Lauterpacht Research Centre of International Law State responsibility project pages on the University of Cambridge website at http://lcil.law.cam.ac.uk/projects/state_document_collection.php.

⁷⁴ *Senator Lines v Member States of the European Community: decision of 4 July 2000 to communicate the application to the respondent governments*, 21 Human Rights LJ (2000) 112.

the possibility must exist to hold the Member States responsible for acts of these Institutions . . . If the Member States could not be held responsible for acts of the EC Institutions, there would be a major loophole in the system of protection of human rights which would be widened daily with the progressive transfers of power by Member States to the European Union, or other similar international organisations.⁷⁵

Also, as the International Law Commission warned in 1996, ‘the responsibility of international organizations is governed by rules which are not necessarily the same as those governing the responsibility of States’.⁷⁶ One apparent difference is that an organization may be responsible even if the delictual conduct in question is not attributable to it. Professor Gaja observes that an organization may assume an obligation whose compliance depends on the conduct of its member states. Should they fail to discharge this obligation, the organization would be responsible for the resultant breach without the need to attribute member states’ conduct to it.⁷⁷

With regard to the responsibility of the United Nations for the discharge of obligations *erga omnes*, the current work of the International Law Commission on the responsibility of international organizations offers guidance, but is still at an early stage. The Commission appears not yet to have fully addressed the issues that might arise regarding the discharge of duties of the General Assembly’s and Security Council’s duties arising under the *Wall advisory opinion*.

7 International Organizations and Obligations *erga omnes*

As the *Senator Lines* case demonstrates, there is some authority for the proposition that states cannot evade their international obligations by hiding behind the independent personality of an international organization of which they are members. This question was also examined, admittedly obliquely, in a case heard by the European Court of Justice, namely *SAT Fluggesellschaft mbH v European Organization for the Safety of Air Navigation (Eurocontrol)*.⁷⁸

Eurocontrol was established in 1960 to provide common air navigation services in the airspace of its European member states. SAT’s action against Eurocontrol alleged that Eurocontrol’s fixing of route charges amounted to an abuse of a dominant market position, contrary to Article 86 of the EEC Treaty. Before the European Court of Justice, Eurocontrol objected to the Court’s jurisdiction, arguing that as:

it [was] an international organization subject to a legal order which is different from that of the European Community; relations between the two organizations are therefore governed by international law.

⁷⁵ *Ibid.*, at 118, para. 48, note omitted: see at 116–118, paras 37–51.

⁷⁶ ILC commentary to 1996 draft Art. 13, para. 9: see also Crawford, *supra* note 45, ‘Commentary to Article 57’, at 311, para. 4.

⁷⁷ See International Law Commission, *Report of the work of its 55th Session*, UN Doc.A/58/10, ‘Commentary to draft Article 3’, at 45, para. 1; *Report of the work of its 56th Session*, UN Doc.A/59/10, at 101, para. 2; and G. Gaja, *Second Report on Responsibility of International Organizations*, UN Doc.A/CN.4/541, at 6, para. 11, see also at 6–8, paras 11–13.

⁷⁸ 101 ILR (1994) 9.

Eurocontrol relies, therefore, on the general principle '*par in parem non habet imperium*'. . . as applying to international organizations as well as to States, and it claims that any disputes arising between two international organizations should consequently be resolved, in accordance with general international law, by recourse to arbitration.⁷⁹

This plea was rejected by both Advocate General Tesauero and by the European Court of Justice.⁸⁰ The Advocate General also expressed the view that the fact that Eurocontrol was an international organization did not insulate it from the Community's competition laws. In justifying his conclusion, Advocate General Tesauero raised an interesting point:

Just as it is not permissible for a Member State to have recourse to its own domestic law in order to limit the scope of Community law, since that would undermine the unity and effectiveness of Community law, so it would not be possible to arrive at a similar result by relying on the obligations arising from an international agreement . . . In other words, if national public bodies and Member States themselves, in so far as they carry on an economic activity, are under an obligation to respect the provisions of Article 85 et seq. of the Treaty, they may not escape that obligation by entrusting the activity to an international organization.⁸¹

This consideration is surely capable of a more general application beyond the confines of the European legal order. *Prima facie* it seems illegitimate to allow states to evade responsibility simply through the fact of combination.

Given the nature of obligations *erga omnes*, is it possible to argue that states, in addition to their duty to ensure that the actions of an organization of which they are members do not infringe these obligations, also should not be able to evade the discharge of obligations *erga omnes* which are incumbent upon them by contending that the proper *locus* or mechanism for this is an international organization whose agenda and actions they effectively control? Is it even possible to go further: Do states have a duty to utilize any appropriate international organisation to implement obligations *erga omnes* effectively? These are thorny questions but, if Judges Higgins and Kooijmans have incorrectly gauged the scope of obligations *erga omnes* and they do impose substantive obligations on third states, issues such as these must be addressed if this category of international norms is to have any practical as opposed to rhetorical utility.

Converse issues also need to be addressed. If we assume that some, if not all, obligations *erga omnes* bind international organizations directly (as opposed to derivatively because their member states are bound), and/or impose specific duties on organizations which differ from those imposed on their member states, then surely – indeed obviously – organizations have an independent responsibility to discharge these

⁷⁹ *Ibid.*, at 14, at para. 4 of Tesauero AG's Opinion.

⁸⁰ *Ibid.*, at 15, para. 5 (Tesauero AG) and 24, para. 9 (Judgment). The core of Tesauero AG's Opinion was that Eurocontrol was not subject to Community rules on competition because it was not pursuing an economic activity with a view to profit. Rather, it was acting as a public authority guaranteeing the safety of air navigation (*ibid.*, at 18–21, paras 9–14). This view was accepted by the Court (*ibid.*, at 25 ff).

⁸¹ *Ibid.*, at 17, para. 7.

obligations.⁸² It is not inconceivable that international organizations can bear incidents of obligations *erga omnes* which are distinct from those arising for their member states; nor is it inconceivable that an organization could breach these obligations. Somewhat anachronistically, as the case arose before the classification of self-determination as an obligation *erga omnes*, the *Northern Cameroons* case⁸³ perhaps illustrates this possibility.

In its application initiating proceedings in the *Northern Cameroons* case, Cameroun alleged that the United Kingdom's administration of the Trust Territory of Northern Cameroons was in breach of obligations arising under the Trusteeship Agreement concluded between the United Kingdom and the United Nations. In particular, Cameroun complained of the conduct of a plebiscite by which the inhabitants of Northern Cameroons had decided that the territory should form part of Nigeria. The result of the plebiscite had been endorsed by the General Assembly of the United Nations, which consequently terminated the Trusteeship Agreement. Cameroun's underlying objective in bringing the case was to have this question of the destination of the territory re-opened in order that it could make a bid for sovereignty.

In its judgment, the International Court refused to enter into the merits of the claim which Cameroun had presented on the ground that it would be impossible to deliver a judgment capable of effective application.⁸⁴ The Court noted that Cameroun had stated that it did not ask the Court to revise or reverse the decision of the General Assembly to integrate the Trust Territory of Northern Cameroons into Nigeria. Accordingly the Court refused to consider whether it was competent to do so, but it recorded that Cameroun had asked for rulings which were at variance with the conclusions that had been reached by the General Assembly.⁸⁵

The pleadings had dealt extensively with the import of the Cameroun application on United Nations' interests, in particular those of the General Assembly and Trusteeship Council. From the outset, the United Kingdom had argued that, as Administering Authority of the Trust Territory of Northern Cameroons, it was not the proper destination of complaints made by Cameroun regarding the administration and supervision of the Territory. Rather, by virtue of Article 75 of the Charter, responsibility for administration and supervision lay with the United Nations, which was the proper forum for members' complaints.⁸⁶ Further it argued that Cameroun was simply attempting to re-open a question which had been settled by the General Assembly and thus have that action judicially reviewed. The core of this argument was that if

⁸² This is an issue which arises acutely when the United Nations administers territory: see, for instance, Abraham, 'The Sins of the Saviour: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo', 52 *Am U L Rev* (2003) 1291; and Bongiorno, 'A Culture of Impunity: Applying International Human Rights Law to the United Nations in East Timor', 33 *Columbia HR L Rev* (2002) 623.

⁸³ *Northern Cameroons case (Cameroun v United Kingdom)* [1963] ICJ Rep 15.

⁸⁴ See *ibid.*, at 31–38, especially at 34 and 37–38.

⁸⁵ *Ibid.*, at 32–33.

⁸⁶ See *ibid.*, Pleadings, at 56–57, 61–62, and 287–288.

individual United Nations members were capable of utilizing the Court in this way, then this would disrupt the finality of decisions taken by the General Assembly.⁸⁷

Cameroun responded to this argument by drawing a distinction between the nature of the trusteeship supervisory functions exercised by the General Assembly and by the International Court. It claimed that the General Assembly operated in the realm of politics whereas the Court determined legal issues, relying on the dichotomy drawn in the *1962 South West Africa* cases⁸⁸ between administrative supervision and judicial protection. Cameroun continued that just as judicial protection was the ultimate protection against violations of the Mandate System,⁸⁹ so it was for the Trusteeship because the political nature of General Assembly supervision could sacrifice legal rights in pursuit of political expediency.⁹⁰ The United Kingdom declared this dichotomy to be irrelevant because United Nations political organs took all aspects, including the legal aspects, into account when dealing with a dispute.⁹¹

The Court, while refusing to rule on the claims presented, nevertheless indicated that it agreed with the arguments led by the United Kingdom. It stated that its role was not the same as that of the General Assembly, and that General Assembly decisions would not be reversed by any judgment it could deliver, which, moreover, would not be binding on Nigeria, any other state, or on the United Nations.⁹²

Cameroun had effectively alleged that the General Assembly's action in the integration of Northern Cameroons in Nigeria was unlawful, by virtue of its role in the termination of the Trusteeship. The United Kingdom underlined that only it and the United Nations could terminate the Trusteeship Agreement, as they alone were party to it.⁹³ This at least indicates the conceivable possibility that the General Assembly could act in breach of self-determination, and thus in breach of an obligation *erga omnes* which moreover confers responsibilities on it that differ from, and are independent of, the responsibilities imposed on its Member States.

8 Organizational Discharge of Obligations *erga omnes*

What then are the broader responsibilities of an international organization, such as the United Nations, to ensure that it fulfils its own duties with regard to obligations *erga omnes*? To some degree, this must depend on the particulars of the obligation; for instance, assuming that the prohibition of genocide binds the United Nations, then at

⁸⁷ See *ibid.*, Pleadings, at 59–60, 62–63, 284, 293, 375, 395, and 399.

⁸⁸ *South West Africa cases (Ethiopia v South Africa, Liberia v South Africa)* [1962] ICJ Rep 319, at 336, 344. For an extended analysis of the relationship between the *South West Africa* and *Northern Cameroons* cases see Scobbie, 'The Responsibility of Great Britain in respect of the Creation of the Palestinian Refugee Question', 10 *Yearbook of Islamic and Middle Eastern Law* (forthcoming, 2005).

⁸⁹ Relying on *South West Africa cases* [1962] ICJ Rep 336.

⁹⁰ *Northern Cameroons*, *supra* note 84, Pleadings, at 191, 200, 204–206, 209, 228, 342–343, and 351–366.

⁹¹ *Ibid.*, Pleadings, at 378.

⁹² *Ibid.*, [1963] ICJ Rep, 33: see also at 34–36.

⁹³ *Ibid.*, Pleadings, at 379–380.

one level this must entail that the Organization ensures that United Nations forces do not themselves commit genocide, but should they also act to prevent others doing so?⁹⁴ Or does the prohibition of genocide entail that the United Nations refrain from taking steps that could impede defence against genocide?⁹⁵

In the *Wall* Advisory Opinion, the principal obligation *erga omnes* imposing responsibilities on the United Nations, particularly the General Assembly and Security Council, is self-determination, but what does this entail? The Court underlined that the General Assembly should encourage efforts aimed at reaching a negotiated solution to the Israel-Palestine conflict which would lead to the creation of a Palestinian state,⁹⁶ and that both it and the Security Council should consider what further action is required to bring an end to the illegal situation resulting from the construction of the wall.⁹⁷ It also recalled that under General Assembly Resolution 2625 (XXV)(24 October 1970), the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations:

Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . .⁹⁸

This proposition flows logically from the terms of Articles 1(2) and 2(5) of the Charter, although, as the International Law Commission indicated, the duty upon states to cooperate to bring to an end serious breaches of peremptory norms of international law does not necessarily mean that this takes place within the United Nations.⁹⁹ Nevertheless, does the United Nations bear some duty – for instance, a duty of due diligence – to ensure, or attempt to ensure, that this cooperation takes place in order that Palestinian self-determination is achieved? At the very least, it would appear that the United Nations, and particularly the General Assembly and Security Council, is under a duty to act in good faith to foster such cooperation. A potential obstacle is

⁹⁴ In his *Third report*, Professor Gaja is clearly of the opinion that, under certain circumstances, the UN may be under a duty to prevent genocide. Using the failure to prevent genocide in Rwanda as an example, he comments:

Assuming that general international law requires States and other entities to prevent genocide in the same way as the Convention on the Prevention and Punishment of the Crime of Genocide, and that the United Nations had been in a position to prevent genocide, failure to act would have represented a breach of an international obligation. Difficulties relating to the decision-making process could not exonerate the United Nations.

UN Doc.A/CN.4/553 at 4, para. 10.

⁹⁵ Compare the Separate Opinion of Judge *ad hoc* Lauterpacht, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide case: further requests for the indication of provisional measures order of 13 September 1993 (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro))* [1993] ICJ Rep 325, at 407, 439 ff, paras 98 ff.

⁹⁶ Advisory Opinion, *supra* note 2, at para. 162.

⁹⁷ *Ibid.*, at para. 160.

⁹⁸ *Ibid.*, at para. 156.

⁹⁹ See Crawford, *supra* note 45, 'Commentary to Article 41', at 249, para. 2.

that action by the political organs of the United Nations is fundamentally dependent on the political will of its Member States, and thus:

what is at stake is the fundamental question of the relationship between the minority on a given issue and the majority (both shifting, and both liable to fundamental change as the general political situation evolves), when the differences between the minority and the majority at any given point of time have their origin not in differences of legal or political theory but in a real clash of political interests, often of the highest order.¹⁰⁰

On the other hand, can this consideration absolve either an international organization or its member states from the consequences of a delictual failure to observe their international obligations? As Advocate General Tesaurò's opinion in *Eurocontrol* reminds us, states cannot hide behind the personality of an international organization in an attempt to divest themselves of individual responsibility. Further, as Professor Gaja observes, although an organization's ability to perform a given act may be difficult when 'action presupposes that a certain majority is reached within a political organ', this is not a factor unique to international organizations.¹⁰¹

¹⁰⁰ Rosenne, *supra* note 61, at 193.

¹⁰¹ Gaja, *Third Report*, UN Doc.A/CN.4/533*, at 3–4, paras 8–9.