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# The ICJ Advisory Opinion on the Israeli Wall

- An International Law Analysis From the  
Law of Self-Defence Perspective

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# Summary

This essay contains an analysis of the International Court of Justice's advisory opinion on the Israeli Wall and a comparison between this judgement and others from the Court regarding the right to self-defence. Moreover, State practice and doctrine on the subject will be evaluated.

The wall, or the 'security fence', built by Israel on Occupied Palestinian Territory, has become the world's most controversial barrier since the Berlin Wall. The Israeli government insists that it is necessary in order to secure Israel from suicide bombers from the West Bank, but those affected by it say that it is destroying communities and playing into the hands of extremist groups.

The conflict and controversies in the Middle East date several thousands years back; hence, it is an extremely difficult situation with no easy answers or solutions. Consequently, when the ICJ was asked to deliver an advisory opinion about the wall, the Court was faced with a question that, whatever the outcome, would be of interest for and upset not only the population in the region in question, but also international organisations and States and governments all round the world.

On July 9, 2004, the Court rendered its advisory opinion on this matter. The advisory opinion was initiated by the United Nations General Assembly that at its Tenth Emergency Special Session in December, 2003, adopted resolution ES-10/14 in which they requested the ICJ for an advisory opinion. The question involved the legal consequences, which arose from the construction of the wall, also considering relevant laws and regulations of international law.

One of Israel's main arguments for why the wall was not in contradiction of international law was their claim for acting in self-defence. This argument was, however, quite hastily dismissed by the Court. In the aftermath of the advisory opinion there has been much debate on the judgement, and about the self-defence issue in particular. Many critical voices have been heard both in favour of and against the Court's judgement. The question however remains, is there a new tendency to be seen in the Court's ruling? Furthermore, is it possible to unite the Court's view with today's State practice? One may wonder whether there is need for a draft Declaratory Resolution on self-defence, in order to bring clarity to one of the most fundamental concepts of international law. This question, and many others, will be dealt with in this essay.

# Preface

I would like to take the opportunity to thank my supervisor, Ulf Linderfalk, for his skilful help and support during the process of writing this essay. I would also like to thank my friends, family and my boyfriend Micael, for putting up with me, and my temper, during my writing. You have all helped and supported me tremendously and without you, nothing ever would have been possible.

# Abbreviations

AJIL	American Journal of International Law
EJIL	European Journal of International Law
GA	General Assembly
ICJ	International Court of Justice
IDF	Israel Defence Forces
ILM	International Legal Materials
LNTS	League of Nations Treaty Series
NATO	North Atlantic Treaty Organization
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organization
SC	Security Council
UN	United Nations
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNSCOP	United Nations Special Committee on Palestine Majority Report
UNTS	United Nations Treaty Series

# 1 Introduction

In October 2003, the Israeli permanent representative to the United Nations addressed the General Assembly on why Israel felt compelled to build a lengthy barrier spanning hundreds of kilometres across certain areas of the occupied West Bank. Among other things, Ambassador Dan Gillerman stated:

“A security fence has proven itself to be one of the most effective non-violent methods for preventing terrorism in the heart of civilised areas. The fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the UN Charter. International law and Security Council resolutions, including resolution 1368 (2001) and 1373 (2001), have clearly recognised the right of States to use force in self-defence against terrorists attacks, and therefore surely recognise the right to use non-forcible measures to that end.”<sup>1</sup>

In its advisory opinion of July 9, 2004<sup>2</sup>, the International Court of Justice (hereinafter ICJ) considered the legal basis for the construction of the Israeli barrier in a mere five sentences. After quoting Article 51 of the UN Charter<sup>3</sup>, the Court stated:

“Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

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<sup>1</sup> General Assembly Emergency Session Special, 21st Meeting, October 20, 2003, UN Doc. A/ES-10/PV.21, p.6 (2003) available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A%2FES-10%2FPV.21&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A%2FES-10%2FPV.21&Lang=E), last visited on March 1, 2007.

<sup>2</sup> International Court of Justice, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (hereinafter *The Wall* case), July 9, 2004, para. 139, ILM vol. 43, p.1009, 2004.

<sup>3</sup> Article 51 states that: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.”<sup>4</sup>

## 1.1 Topic and Purpose

The position taken by the Court is somewhat remarkable in its briefness and, upon analysis, unsatisfactory and the Court has been criticized for its unwillingness to address this matter more detailed. In this essay, I will make an analyse of the advisory opinion and compare this with other judgements delivered by the Court as well as State practise, and examine whether this criticism is justified and what importance the opinion has for international law. Some commentators claim that the doctrine of self-defence has undergone a development in later years as a consequence of several decisions rendered by the Court, one of those being the advisory opinion regarding the Israeli Wall. My undertaking in this essay is to find out whether these assertions are correct. Therefore, the question to be addressed in this essay will be as follows:

*What are the consequences of the ICJ advisory opinion regarding the wall built by Israel on the occupied Palestine territories for the interpretation and application of international law, and the right of self-defence in particular? Compared with other decisions taken by the ICJ, does the Wall case show a new way of reasoning?*

## 1.2 Method and Material

In pursuing my purpose, I will not only analyse the *Wall* case put under scrutiny in this essay, but additionally other decisions from the ICJ as well as some State practise and the ongoing debate by scholars. The concept of and the right to self-defence and its components will be in the focal point of this essay.

I have limited this essay to deal with the aspect of self-defence and the arguments in the advisory opinion that relates to that, and furthermore what consequences the Court's interpretation has had on international law today, concerning the right of self-defence.

The basis of the part of history and the situation is mainly based on written literature. For the part on international law I have mainly used written literature and conventions, resolutions from the UN, the UN-Charter, the *Wall* case advisory opinion as well as other relevant judgements from the ICJ. The analysis will, to a great extent, be based upon articles in law journals and information from the Internet since the question is so pressing that there are not many other sources yet to obtain.

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<sup>4</sup> The *Wall* case, para 139.



## 1.3 Organisation of Work

In order to understand the underlying reason why the wall is being built, I have in chapter 2 a rather extensive section describing the history of the area and the situation between Israelis and Palestinians. During the course of my writing, I found it almost impossible to fully comprehend the situation without examining the history between Israelis and Palestinians properly, therefore, I believe that this section also helps the reader. The chapter goes on with a factual description of the wall itself. The last part of chapter 2 also contains facts about the ICJ in general and about advisory opinions in particular. In chapter 3 I will give a survey of the advisory opinion in detail and the center of gravity in this essay, the self-defence, will be dealt with in chapter 4. In chapter 5 an analysis of the *Wall* case will be made also in comparison with other decisions from the ICJ as well as State practise and the ongoing debate to see whether a new tendency can be observed regarding the interpretation of Article 51 and the concept of self-defence. In the final chapter, chapter 6, I will conclude this essay by briefly adding some of my own thoughts and reflections. To simplify for the reader I have chosen to have a number of maps and pictures in the supplements.

## 1.4 Remarks

Traditionally, two rights of self-defence are to be found in international law today. Firstly, it is the right to self-defence as found in customary law, as the law was before the drafting of the UN Charter in 1945. Hence, the second right is the one to be found in the UN Charter, that is Article 51 which speaks about the inherent right of self-defence. I make the assumption that these two interpretations are in no way contrary to each other, neither do they exclude one another. I believe they can, and in fact are, co-existing and that the content of both rights are indeed identical.

In materials I have used, the writers refer to the construction either as a wall or a (security) barrier or fence. I have found that sources of Israeli origin almost always use the term barrier or security barrier and that the UN uses the term wall. Since the UN General Assembly has determined that the term wall is preferable I have chosen to use that term, unless quoting from a source that uses another term.

# 2 Background and History

## 2.1 History

Around 1000 B.C. Hebrews constituted a community in Palestine in the area, which is now called the West Bank, while the Philistines occupied the coastal plain. In 928 B.C. the Hebrew State split into two parts, in the north Israel and in the south Judea.<sup>5</sup> The Hebrews were driven out of both areas, but started to return and gain dominance in Judea again around 150 B.C. In 63 B.C. the Romans took over the control of the areas and by 133 A.D. the Hebrews were expelled. In the seventh century A.D. Arabs conquered the area, but since the numbers of Arabs that came to the area were small, their impact on the ethnic composition was as well. In 1881 the majority (450 000) of the population in Palestine were descended from groups such as the Canaanites, which inhabited Palestine in the second millennium B.C. while there were only about 20-25 000 Hebrews (Jews).<sup>6</sup>

The controversy of the legal status of Occupied Palestine Territories goes back to the time of the Ottoman Empire. It was after the dissolution of the Empire and the extension of the League of Nations Mandate system that the international status of Palestine as a Mandate was decided. At that time, Great Britain was given the Mandate over Palestine and hence received authority under the League of Nations treaty to protect and preserve the rights of native Palestinians in Palestine. The mandate was a provisional mandate until Palestine would obtain independence.<sup>7</sup> Britain however adopted a policy, the Balfour declaration of November 2, 1917, promoting Zionist immigration into Palestine.<sup>8</sup> After the Second World War and in the face of increasing Zionist terrorism that contained military operations against British army personnel, bridges and roads and conflicts between the Palestinians and the Zionist immigrants, Britain decided it would terminate its mandate, and requested a special meeting of the United Nations General Assembly. In 1947, Britain announced that they would leave Palestine but since they had not found any solution to the Jew-Arab-situation they turned to UN for help. Upon this request, the UN initiated a study, which resulted in the United Nations Special Committee on Palestine Majority Report (UNSCOP). As a consequence of the Report, the UN General Assembly adopted resolution 181.

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<sup>5</sup> *Palestine-Net: Chronology of Palestinian History*, available at <http://www.palestine-net.com/history/bhist.html> last visited on February 21, 2007.

<sup>6</sup> *Israel – History*, available at <http://en.wikipedia.org/wiki/Israel#History> last visited on February 21, 2007.

<sup>7</sup> Mallison, p. 32.

<sup>8</sup> *The Question of Palestine*, available at <http://www.un.org/Depts/dpa/ngo/history.html> last visited on March 13, 2007.

### 2.1.1 Resolution 181

The resolution<sup>9</sup> adopted the Special committee's proposal recommending the creation of two independent states, one 'Jewish' and one 'Arab', with a special International Regime for Jerusalem as a *corpus separatum*,<sup>10</sup> under international administration.<sup>11</sup> The United Nations Conciliation Commission on Palestine was created to resolve remaining issues between the parties, and to protect the rights of peoples in Palestine after Britain withdrew. The Commission was furthermore given the power to establish the frontiers of the two States and Jerusalem according to geographic boundaries laid out in the proposal. Moreover, the Commission was to select a Provisional government in each of the two States through democratically-held elections, with both Arabs and Jews entitled to vote in the State where they became citizens, that is, both States would represent both the Arabs and Jews within that territory.<sup>12</sup> The key requirement incorporated in the Partition scheme was that, if the recommendations were adopted, the rights of minorities in each territory were to be fully respected, that is, there was to be full equality of all citizens, whether they were a minority or majority in the newly created State, with equal voting rights.<sup>13</sup>

Nevertheless, Israel declared its 'Jewish State' in May 1948 but did not define the borders of its State, and, in the ensuing conflict, caused the exodus of over 700 000 Palestinian refugees. Israel, furthermore, enlarged its territory to encompass all the remaining areas that were allocated to the 'Arab State' except the West Bank and the Gaza Strip, which fell under Jordanian and Egyptian administration respectively.<sup>14</sup> In the conflict that followed, and with the Israeli acquisition of the remaining territories, the 'Arab State' envisioned by resolution 181, was never established. Under negotiated truce arrangements, the parties withdrew to the borders now internationally legally recognised as the 1949 Armistice Lines, also known as the "Green Line", and Israel incorporated its expanded areas into its domestic jurisdiction.<sup>15</sup> The line ran between the areas the Zionists had conquered and the areas that were still inhabited by Arabs; the West Bank including Eastern Jerusalem and the Gaza Strip. As the war ended Israel had 77 per cent of the former British mandate of Palestine and the line was for almost 20 years the real border of Israel.

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<sup>9</sup> UN General Assembly Resolution 181, November 29, 1947.

<sup>10</sup> *Corpus separatum* is Latin for "separated body". The 1947 UN Partition Plan used this term to refer to a proposed internationally administered zone to include Jerusalem and some nearby towns.

<sup>11</sup> Mallison, supra note 7, at p. 17 – 18.

<sup>12</sup> See G.A. Res 181, supra note 9, part 1 para 9.

<sup>13</sup> *Ibidem.*, at ch. 2, para. 1-8. See also Mallison, supra note 7, p.19-21.

<sup>14</sup> Flapan, p.18.

<sup>15</sup> Quigley, p. 22.

### 2.1.1.1 The Binding Force of the Resolution

Generally, decisions taken by the General Assembly are not binding, but mere recommendations. It is therefore not clear whether the General Assembly had the legal authority to impose the intended partition. There are contradictory opinions in international law whether a recommendation from the General Assembly does constitute a legal obligation to follow it or not.<sup>16</sup> Some argue that the General Assembly has the power to decide the status over a territory whose sovereignty is unclear.<sup>17</sup> Others claim that the General Assembly does not have the power to make binding decisions in general but that it had decision-making power over a territory that was under a League of Nations mandate.<sup>18</sup> There is an uncertainty surrounding the binding force of the resolution, even if the recommendation was indeed deemed to be binding, whether the General Assembly had the power to determine the future status of a mandate territory against the wishes of the inhabitants, which was the case with resolution 181. If the resolution was to be regarded as a binding determination of a future status, it would have violated the Arabs' right of self-determination and, according to the UN Charter Article 80 paragraph 1, the rights of a people under a League of Nations mandate may not be altered to its detriment. Consequently, if the resolution were to be regarded as binding, it would result in a violation of the UN Charter for the Palestinian population. Another argument, however, is that the resolution became binding because the Security Council affirmed it. Even though the Security Council issued resolutions<sup>19</sup> concerning Palestine, none of them can be seen as an affirmation of resolution 181. Furthermore, even if the Security Council had reaffirmed the resolution, this would not automatically make the resolution binding since the Security Council does not have the authority to dispose over a territory.<sup>20</sup>

### 2.1.3 Modern History

During the 1967-war, the so-called "Six-Days-War", Israel occupied the remaining territory of Palestine, until then under Jordanian and Egyptian control (the West Bank and Gaza Strip). This included the remaining part of Jerusalem, which subsequently was annexed by Israel. As a consequence of the war, a second exodus of Palestinians occurred, estimated at half a million and Israel established its authority in those areas under military regulations.<sup>21</sup> On November 22, 1967, the Security Council unanimously adopted resolution 242, which called on Israel to withdraw from territories it

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<sup>16</sup> *Ibidem*, p. 47.

<sup>17</sup> *Ibidem*, p. 48.

<sup>18</sup> *Ibidem*.

<sup>19</sup> See e.g. United Nations Security Council Resolution 62, November 16, 1948, SC Resolution 54, July 15, 1948, SC Resolution 43, April 1, 1948.

<sup>20</sup> Quigley, p. 47-53.

<sup>21</sup> Quigley, p. 30-32.

had occupied in the 1967 conflict.<sup>22</sup> The resolution was taken under Chapter VI of the UN Charter, as a recommendation and not under Chapter VII that would make it binding for its member States. Israel did however not comply with the resolution and instead of a withdrawal, they increased their acquiring of land.

In December 1987, a demonstration among the Palestinian Arabs developed into severe riots. They refused to go to their jobs and boycotted Israeli goods. This riot was to be known as the (first) *intifada*.<sup>23</sup> The *intifada* continued until 1993. However, when Prime Minister Ariel Sharon in the year 2000 entered the Temple Mountain in Jerusalem, one of the most holy places for Muslims, that was the beginning for the second *intifada*, which at present time is still going on.

Israel's invasion and occupation of the Palestinian territories by force, and its military occupation, have the legal status of a 'belligerent occupation'.<sup>24</sup> The UN and the majority of its member States have recognised the 1949 Armistice Line as *de facto* Israeli borders<sup>25</sup> and the West Bank and Gaza as 'occupied territories.'<sup>26</sup> Numerous UN General Assembly and Security Council resolutions reaffirm such recognition.<sup>27</sup>

## 2.2 The Wall

In November 2000, the then Prime Minister of Israel, Ehud Barak, gave green light to the project of the building of a wall at the West Bank and in June 2002, the Israeli army began building the wall running within the West Bank territory on all sides, and around Jerusalem.<sup>28</sup> In October 2003 the United Nations Special Rapporteur on the Right to Food, Jan Ziegler, completed a mission to the Occupied Palestinian Territories. His report from the mission stated that the wall was a huge barrier, sometimes a fence, sometimes a concrete wall, over 8 meters high and that the building of the wall constituted a violation of the obligation to respect the right to food

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<sup>22</sup> See supra note 8, *The Question of Palestine*.

<sup>23</sup> *Intifada* is an Arabic word for 'shaking off', though it is generally translated into English as 'rebellion'.

<sup>24</sup> Belligerent military occupation occurs when the control and authority over a territory belonging to a State passes to a hostile army.

<sup>25</sup> Mallison, p. 46-48.

<sup>26</sup> See generally Palestine Oral Statement, *Verbatim Record of Proceedings*, Public sitting held on February 23, 2004, at the Peace palace, President Shi presiding, available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> at p. 23, see also Written Statement submitted by Palestine, available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>, January 30, 2004.

<sup>27</sup> See, for example, S.C. Res. 242, November 22, 1967.

<sup>28</sup> The Palestinians refer to the structure as a "separation wall"; the Israelis refer to it as a "security fence"; the UN Secretary General has referred to it as a "barrier". Human rights advocacy organisations have termed it an "apartheid wall" The author (me) refer to it here as a "wall", using the terminology of the UN General Assembly itself in the request for advisory opinion to the ICJ.

because it cut off Palestinians from their agricultural lands, wells and means of subsistence.<sup>29</sup>

The Wall has been justified by the Israeli government as a “defensive measure, designed to block the passage of terrorists, weapons and explosives into the State of Israel and thus save lives, and not to annex territory.”<sup>30</sup> Almost 90 per cent of the wall is being constructed well within the Green Line in part to encompass some 60 Israeli settlements on Palestinian territory.<sup>31</sup> The Israeli side of the Green Line encompasses 78 per cent of what was Palestine in 1947. Although the line does not denote an official border, it is in practice largely used to differentiate between those areas within the Israeli side of the Line, which are administered as part of the State of Israel, and the areas outside it, which are either administered by the Israeli military or in agreements with the Palestinian National Authority. According to the UN Office for the Coordination of Humanitarian Affairs in the Occupied Palestinian Territories, when the wall is complete, it will cut off 13,5 per cent of the West Bank, the most fertile land in Palestinian territory. According to UNRWA (the UN Relief and Works Agency for Palestine Refugees in the Near East), 33 communities (69 019 people) will be separated from their farms and wells that lie west of the barrier. Fifteen communities (138 593 people) will be almost completely imprisoned by the winding route of the wall, including 40 000 people who will be trapped in the village of Qalqilya, surrounded on all sides by an 8 meter high wall with only one road out, controlled by an Israeli checkpoint. Fourteen communities (13 636 people) will be trapped in the land defined as a ‘closed military zone’ between the Wall and the Green Line, cut off from the Palestinian territories but forbidden to enter Israel.<sup>32</sup> The Israeli human rights organisation, B’Tselem furthermore documents that some 200 000 Palestinians who live in East Jerusalem will be separated from the rest of the West Bank.<sup>33</sup>

To provide for movement between the different areas that the wall separates, a limited number of gates have been built into the wall structure. Israeli authorities control the gates and monitor movement through the gates with a heavily restricted permit system. In order to gain access through one of the gates a ‘special permit’ is required. This permit applies to the majority of

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<sup>29</sup> *Report by the Special Rapporteur, Jean Ziegler, Addendum, Mission to the Occupied Palestinian Territory*, UN ESCOR, October 31, 2003, UN Doc. E/CN.4/2004/10/Add.2, available at <http://www.unhchr.ch/pdf/chr60/10add2AV.pdf> last visited on May 15, 2007.

<sup>30</sup> *The Israel Ministry of Defence and the Israel Defence Forces (IDF) have completed the first stage of the Security Fence project*, July 31, 2003, available at <http://seamzone.mod.gov.il/Pages/ENG/news.htm#news5> last visited on May 15, 2007.

<sup>31</sup> B’Tselem, The Israeli Center for Human Rights Violations, *Separation Barrier*, available at [http://www.btselem.org/english/Separation\\_Barrier/Index.asp](http://www.btselem.org/english/Separation_Barrier/Index.asp) last visited on May 18, 2007.

<sup>32</sup> United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”), *The impact of the First Phase of Barrier on UNRWA-Registered Refugees*, available at <http://www.un.org/unrwa/emergency/barrier/f-phase.html> last visited on May 2, 2007.

<sup>33</sup> B’Tselem, The Israeli Center for Human Rights, *Map of the Separation Barrier*, available at [http://btselem.org/English/Separation\\_Barrier/Map.asp](http://btselem.org/English/Separation_Barrier/Map.asp) last visited on May 10, 2007.

the Palestinians, but is not applicable to Israeli citizens, tourists with valid visas, or Jews, among others.<sup>34</sup> Hence, Palestinian farmers need a permit to access their land, students require permits to go to school, business owners to their offices, medical staff to assist the sick and wounded, etc.

The building of the wall is under construction and of the planned 723 kilometres, in April 2006, 409 kilometers of the barrier had been constructed which constitute 56 per cent of the barriers planned length. 66 kilometres are still under construction and 248 kilometres had yet not begun being built.<sup>35</sup>

## 2.3 The International Court of Justice

The International Court of Justice (ICJ), which sits at The Hague in the Netherlands, acts as a world court. It decides in accordance with international law disputes of a legal nature submitted to it by States. Additionally, certain international organs and agencies are entitled to call upon it for advisory opinions. It was set up in 1945 under the Charter of the United Nations to be the principal judicial organ of the Organisation, and its basic instrument, the Statute of the Court, forms an integral part of the Charter.

### 2.3.1 Advisory Opinions

Apart from deciding contentious cases between States, the ICJ has an additional competence, the competence to deliver advisory opinions. Mainly, there are three aspects that distinguish the advisory opinion from the contentious case; the absence of Parties, the absence of a binding decision and the different class of international actors involved, namely international organisations and not States.<sup>36</sup> Since States alone have the capacity to appear before the Court, public international organisations cannot as such be parties to any contentious proceedings. If a question arises concerning the interpretation or implementation of their constitutions or of conventions adopted in pursuance thereof, it is for their member States to bring contentious proceedings to the ICJ and in such a case, the organisation concerned is informed of the proceedings by the Registrar and receives copies of the pleadings. All that it can then do is to furnish the Court with relevant information.

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<sup>34</sup> Palestinians under the age of 12, 'green' permit holders or Palestinians with valid Israeli work permits are exempt from the permit system. See *The Impact of Israel's Separation Barrier on Affected West Bank Communities*, March 2004, available at <http://www.reliefweb.int/hic.opt/docs/HEPG/Wallreport.pdf> last visited on June 1, 2007.

<sup>35</sup> *Separation Barrier - statistics*, available at [http://www.btselem.org/english/Separation\\_Barrier/Statistics.asp](http://www.btselem.org/english/Separation_Barrier/Statistics.asp), last visited on September 11, 2007.

<sup>36</sup> Eyffinger, p. 146.

Mainly, the purpose of an advisory opinion is not to settle inter-states disputes, but rather to “offer legal advice to the organs and institutions requesting the opinion”.<sup>37</sup> The question before the Court must not relate to any specific dispute, nor does it matter if the question posed is abstract in nature. For example, in the *Eastern Carelia* case<sup>38</sup> the PCIJ established the general rule that it would not exercise its advisory jurisdiction in respect of a central issue in a dispute between the parties where one of these parties refused to take part in the proceedings. However, this principle has been undermined in a number of cases before the Court. In the *Interpretation of Peace Treaties* case<sup>39</sup> it was stressed that while the basis of the Court’s jurisdiction in contentious cases rests upon the consent of the parties to the dispute, the same would not be applicable to advisory opinions. These opinions are not binding upon anyone, nor given to the particular States but to the organs which had called for them.<sup>40</sup>

### 2.3.1.1 The Request for and the Delivery of an Advisory Opinion

The Court’s advisory jurisdiction is governed by Article 65<sup>41</sup> of the ICJ Statute and Article 96<sup>42</sup> of the UN Charter. Through the effect of Article 96, the General Assembly and the Security Council have as it were inherited with respect to the ICJ a power which the Covenant of the League of Nations previously conferred on the Assembly and Council of the League with respect to the PCIJ. In the time of the League, only the Council availed itself of this power, which then extended to “any dispute or question”.<sup>43</sup>

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<sup>37</sup> International Court of Justice, Advisory Opinion, *The Legality of the Threat or Use of Nuclear Weapons* case (hereinafter *Nuclear Weapons* Advisory Opinion), para 15, July 8, 1996, ICJ Reports, 1996, p. 226.

<sup>38</sup> PCIJ, Advisory Opinion, *Status of the Eastern Carelia*, July 23, 1923.

<sup>39</sup> ICJ Advisory Opinion, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, July 18, 1950, ICJ Reports 1950, p. 65.

<sup>40</sup> Shaw, p. 1001.

<sup>41</sup> Article 65 of the ICJ Statute reads:

1. The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.
2. Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.

<sup>42</sup> Article 96 of the UN Charter reads:

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

<sup>43</sup> Article 14, The Covenant of the League of Nations reads:

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.



Since 1947 it has applied to “any legal question” and it is above all the General Assembly of the United Nations that has made use of it.

It is of the essence of the Court’s advisory opinions that they are advisory, that unlike the Court’s judgements in the contentious cases, they have no binding effect. The requesting organ, agency or organisation remains free to give effect to the opinion by any means open to it, or not to do so. It is only in a few specific cases that it is stipulated beforehand that an opinion shall have binding force (e.g., those concerning the General Convention on the Privileges and Immunities of the United Nations and the host agreement between the UN and the United States).<sup>44</sup> The Court’s advisory function is herein different from its function in contentious cases, and should be distinguished from the role played by the supreme court of certain countries as an interpreter of those countries’ constitutions. However, the authority of an advisory opinion by the ICJ within the international community should not be underestimated. In practise, given that the opinion is based upon principles of international law, an advisory opinion delivered by the Court gives it a great deal of weight.<sup>45</sup> This non-binding character does not mean that such opinions are without legal effect, because the legal reasoning embodied in them reflects the Court’s authoritative views on important issues of international law. Moreover, in arriving at its opinion the ICJ follows essentially the same rules and procedures that govern its binding judgments delivered in contentious cases between sovereign States. An advisory opinion derives its status and authority from the fact that it is the official pronouncement of the principal judicial organ of the United Nations.

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<sup>44</sup> The International Court of Justice, *Questions and answers about the principal judicial organ of the United Nations*, 2000, p. 46.

<sup>45</sup> Eyffinger, p. 147.

### 3 The Advisory Opinion

By resolution ES-10/14<sup>46</sup>, adopted on December 12, 2003 at its Tenth Emergency Special Session, the General Assembly decided to request the ICJ for an advisory opinion on the following question: “What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East-Jerusalem, as described in the Report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?” On July 9, 2004, the Court rendered its advisory opinion.

The Court began by finding that the General Assembly, which had requested the advisory opinion, was authorised to do so under Article 96 (1) of the UN Charter. It further found that the question fell within the competence of the General Assembly pursuant to Articles 10 (2) and 11 of the Charter. Moreover, in requesting an opinion of the Court, the General Assembly had not exceeded its competence, as qualified by Article 12 (1) of the Charter, which provides that while the Security Council is exercising its functions in respect of any dispute or situation the Assembly must not make any recommendations with regard thereto unless the Security Council so requests. The Court further observed that the General Assembly had adopted resolution ES-10/14 during its Tenth Emergency Special Session. The resolution was convened pursuant to resolution 377 A (V), the Uniting for Peace Resolution<sup>47</sup> that provides that in a situation where the Security Council cannot agree on a situation constituting a threat to international peace and security, the General Assembly shall meet immediately to deal with the matter. Israel argued, however that the Security Council did not ‘fail to act’ in such a way that the Uniting for Peace procedures could be triggered. In legal terms, Israel claimed that the request for an advisory opinion was *ultra vires* the competence of the General Assembly.<sup>48</sup> The Court however found that the conditions laid down by resolution 377 (V) A had been met when the Tenth Emergency Special Session was convened, and in particular when the General Assembly decided to request the opinion, as the Security Council had at that time been unable to adopt a resolution concerning the construction of the wall as a result of the negative vote of a permanent member. Lastly, the Court rejected the argument that an opinion could not be given in the present case on the ground that the question posed was not a legal one, or that it was of an abstract or political nature.

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<sup>46</sup> *Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory*, UN General Assembly, A/RES/ES-10/14, December 12, 2003.

<sup>47</sup> UN General Assembly, *Uniting for Peace*, A/RES/377(V) A, November 3, 1950.

<sup>48</sup> See Israel’s Written Statement, para. 0.6., January 30, 2004, available at [www.icj-cij.org](http://www.icj-cij.org), last visited March 14, 2007.

Once it had established its jurisdiction, the Court considered the propriety of giving the requested opinion. Normally, a State has to give its consent to its contentious jurisdiction; however, this does not apply to advisory opinions. The Court stated that the giving of an opinion in the present case would not have the effect of circumventing the principle of consent to judicial settlement, since the subject-matter of the request was located in a much broader frame of reference than that of the bilateral dispute between Israel and Palestine, and as of direct concern to the UN.<sup>49</sup>

Considering the question of the legality under international law concerning the construction of the wall, the Court started with determining the rules and principles of international law relevant to the question posed by the General Assembly. After recalling the principles laid down in Article 2 (4) of the UN Charter and in the General Assembly resolution 2625 (XXV)<sup>50</sup>, which prohibits the threat or use of force and emphasise the illegality of any territorial acquisition by such means, the Court further cited the principle of self-determination of peoples, as enshrined in the UN Charter and reaffirmed by resolution 2625 (XXV). In relation to international humanitarian law, the Court then referred to the provisions of the Hague Regulations of 1907, which it found to have become part of customary law, as well as to the Fourth Geneva Convention of 1949. The Court was holding that these were applicable in those Palestinian territories which, before the armed conflict of 1967, lay to the east of the 1949 Armistice Line, the “Green Line”, and were occupied by Israel during that conflict.

Under customary international law in Article 42 of the 1907 years Hague Regulations Respecting the laws and Customs of War on Land annexed to the Fourth Hague Convention of October 18, 1907, territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised. The territories situated between the Green Line and the former eastern boundary of Palestine under the British mandate, were occupied by Israel in 1967. Under customary international law, these areas are therefore since 1967 occupied territories in which Israel has the status of occupying power. As for the Fourth Geneva Convention of 1949, this Convention is according to Article 2 (2) applicable to occupation. Israel ratified the Convention in 1951 and PLO declared themselves bound to the four Geneva Conventions from 1949 as well as their two additional protocols from 1977 in 1989. In the advisory opinion, Israel argued that the fourth Geneva Convention was not applicable to the specific occupation of the Palestinian territories. The basis for this argumentation was that the Convention could not be applicable to areas which have never belonged to any other State and that they therefore could not be occupied.<sup>51</sup>

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<sup>49</sup> The *Wall* case, paras. 49-50.

<sup>50</sup> G. A Resolution 2625 (XXV), October 24, 1970, *Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*.

<sup>51</sup> Bring, & Körlöf., p. 258.

The Court sought to ascertain whether the construction of the wall had violated the above-mentioned rules and principles. Noting that the route of the wall encompassed some 80 per cent of the settlers living in the Occupied Palestinian Territory, the Court, citing statements by the Security Council in that regard in relation to the Fourth Geneva Convention, recalled that those settlements had been established in breach of international law.<sup>52</sup> The Court noted that the construction of the wall created a *fait accompli*<sup>53</sup> on the ground that could well become permanent. The Court concluded that the construction of the wall severely impeded the exercise by the Palestinian people of its right to self-determination and was thus a breach of Israel's obligation to respect that right. Furthermore, the Court found that the construction of the wall was contrary to the relevant provisions of the Hague Regulations of 1907 and of the Fourth Geneva Convention. It impeded the liberty of movement for the inhabitants of the territory as guaranteed by the International Covenant on Civil and Political Rights, as well as their exercise of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the Convention on the Rights of the Child.

The Court then considered the clauses or provisions for derogation contained in certain humanitarian law and human rights instruments, which might be invoked *inter alia* where military exigencies or the needs of national security or public order so requires. The Court, however, found that such clauses were not applicable in the present case, stating that it was not convinced that the specific course Israel had chosen for the wall was necessary to attain its security objectives, and that accordingly the construction of the wall constituted a breach by Israel of certain of its obligations under humanitarian and human right law.<sup>54</sup> Finally, the Court concluded that Israel neither could rely on a right of self-defence nor on a state of necessity as claimed in order to preclude the wrongfulness of the construction of the wall and that such construction accordingly was contrary to international law.<sup>55</sup>

### 3.1 The Separate Opinions

Article 57 of the Statute of the Court gives the judges, if the judgment does not represent in whole or in part the unanimous opinion of the judges, a right to deliver a separate opinion. In the *Wall* case, seven judges made use of this right. While some of them concerned questions of self-determination, humanitarian law and the Court's treatment of the justiciability question, others referred to questions more relevant for this essay, mainly those of self-defence. Judge Higgins found fault with much of the Court's self-

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<sup>52</sup> See e.g. S.C Res 446, March 22, 1979, Res 452, July 20, 1979 and Res 465, March 1, 1980.

<sup>53</sup> *fait accompli* means something that has already happened and is thus unlikely to be reversed.

<sup>54</sup> The *Wall* case paras. 135-137.

<sup>55</sup> *Ibidem*, para. 142.

defence analysis, reiterating her view that Article 51 does not in itself require an armed attack by a “State”. In any case, she expressed doubts about the Court’s conclusion that an attack originating in the West Bank could not be an armed attack by a “State”.<sup>56</sup> She further voted for the remaining portions of the *dispositif*, but she again expressed reservations about the supporting analysis. She agreed with the Court’s holding that States had a duty not to recognize or support the resulting illegal situation, but she saw no need to invoke the concept of obligations *erga omnes* in support of this conclusion.<sup>57</sup>

In his separate opinion, Judge Kooijmans said that Security resolutions 1368 and 1373 had broadened the notion of self-defence so as to include “international terrorism”, not necessarily attributable to a particular State, and he chided the Court for having ‘bypassed’ this wrinkle of self-defence law. Nonetheless, he did not see terror attacks emanating from occupied territory as “international”.<sup>58</sup>

Judge Buergenthal voted against every subparagraph of the *dispositif* except the finding that the Court had jurisdiction. His dissenting votes did not mean he disagreed with everything the Court said; in fact, he found “*much in the Opinion with which I agree*”.<sup>59</sup> Instead, his votes reflected his view that the Court should have exercised its discretion not to issue an opinion because it lacked the factual record necessary to reach an informed conclusion.<sup>60</sup> In his view, the “nature” and “impact” of cross-Green Line terror attacks were “never really seriously examined by the Court”.<sup>61</sup> Had the majority considered Israel’s justifications for the wall more carefully, Judge Buergenthal said, “that would have given the Opinion the credibility I believe it lacks”.<sup>62</sup> He furthermore criticized the Court for so quickly dismissing Israel’s self-defence argument. Like some of the concurring judges, Judge Buergenthal noted that Article 51 is not by its terms limited to State-sponsored “armed attack”, and he stressed the broad wording of the Security Council’s recent resolutions on terrorism. He therefore took the view that an armed attack emanating from the West Bank across the Green Line did implicate Article 51, and he faulted the Court for having failed to analyse whether the wall was a necessary and proportionate response to the terror threat.<sup>63</sup> He criticised the Court for asserting without explanation that it was “not convinced” that the military necessity exceptions in humanitarian law were applicable.<sup>64</sup>

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<sup>56</sup> The *Wall* case, Separate Opinion of Judge Higgins, paras. 33-34.

<sup>57</sup> *Ibidem.* paras. 37-39.

<sup>58</sup> The *Wall* case, Separate Opinion of Judge Kooijmans, paras. 35-36.

<sup>59</sup> The *Wall* case, Declaration of Judge Buergenthal, para.1.

<sup>60</sup> *Ibidem.*

<sup>61</sup> *Ibidem.* para 3.

<sup>62</sup> *Ibidem.*

<sup>63</sup> *Ibidem.*, paras. 4-6.

<sup>64</sup> *Ibidem.*, para. 7.

## 3.2 The Legal Consequences of the Construction of the Wall

The Court examined the consequences of the abovementioned violations. It determined that Israel was under an obligation to comply with international obligations, such as humanitarian law and human rights, to respect the right of the Palestinian people to self-determination and to ensure freedom of access to holy places. Furthermore, they recalled the well-established principle of the obligation of a State responsible for an internationally wrongful act to put an end to that act. Therefore, Israel was under an obligation to immediately cease the works of the construction and repealing or rendering ineffective all legislative and regulatory acts adopted with a view to the construction of the wall. Israel finally had the obligation to make reparations for the damage caused to all natural or legal persons affected by the wall's construction.<sup>65</sup>

Certain obligations violated by Israel included obligations *erga omnes*<sup>66</sup>; these were for example the obligation to respect the right of the Palestinian people to self-determination. Such obligations are by their very nature the concern of all States and all States have a legal interest in their protection.<sup>67</sup> The Court found that because of the character and importance of the rights and obligations involved, all States were under an obligation not to recognise the illegal situation resulting from the construction of the wall and under an obligation not to render aid or assistance in maintaining the situation created by the construction. Additionally, the Court stated that all State Parties to the Fourth Geneva Convention were under the obligation to ensure compliance by Israel with international humanitarian law as embodied in that Convention. Finally, the Court noted that the UN had a responsibility to consider what further action was required to bring an end to the illegal situation that had arisen due to the construction of the wall and what further actions needed to be taken in order to put an end to the conflict between Israel and Palestine.

### 3.2.1 Israel's Response to the Advisory Opinion

According to the advisory opinion, the wall is illegal. The government of Israel, however, refused to accept the opinion and their preliminary response was to reject the Court's opinion altogether. Israel refused to cooperate in the proceeding, contending that the Court did not have jurisdiction to hear the matter. Instead of following the decision by the ICJ, the government

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<sup>65</sup> The *Wall* case, paras. 145, 151-153.

<sup>66</sup> Obligations *erga omnes* are those obligations owed by States that relate to rights of such great importance that all States have undeniable interests in their perpetuation.

<sup>67</sup> International Court of Justice, *Barcelona Traction, Light and Power Company, Limited*, Second Phase, *Belgium v. Spain*, para. 33, February 5, 1970, ICJ Reports 1970, p. 32.

followed the decision in the domestic *Beit Sourik* case<sup>68</sup>, which required that the route must reflect proportionality between the needs of Israel to defend themselves and the Palestinian humanitarian needs. Unlike the ICJ, the Israeli Court stated that Israel had a right to construct the wall for security reasons. A consequence of this decision was that the wall was built closer to the Green Line. The General Assembly adopted on August 2, 2004 resolution ES-10/15<sup>69</sup> which *inter alia* acknowledged the advisory opinion<sup>70</sup> and, while demanding Israel to comply with its legal obligations as these had been enumerated by the Court, only called upon Member States to comply with the obligations the Court had found were incumbent upon them.<sup>71</sup> By this acknowledgement of the General Assembly, Israel is obliged to follow the opinion and dismantle the wall and pay compensation. If the Israeli government declines to do this, it should at least follow its own High Court Judgement in the *Beit Sourik* case, which states that the parts of the wall not in compliance with the principle of proportionality should be dismantled.

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<sup>68</sup> H CJ 2056/04, Beit Sourik Village Council v. Israel (hereinafter *Beit Sourik* case), June 30, 2004, ILM vol. 43, p.1099, 2004.

<sup>69</sup> UN General Assembly Resolution, UN Doc.A/RES-10/15, adopted at the Tenth Emergency Special Session, August 2, 2004.

<sup>70</sup> *Ibidem.* operative para. 1.

<sup>71</sup> *Ibidem.* operative para. 3.

# 4 Self defence

## 4.1 Introduction

In order to be able to do a comprehensive analyse of the arguments and claims presented by Israel regarding their invocation of self-defence, and to compare this with other cases where the question of self-defence have been invoked, I will in this chapter present a short background on the history of self-defence, as found in customary international law as well as in Article 51 of the UN Charter. I will furthermore describe some of its components and prerequisites as well as, among other things, self-defence against terrorist attacks and irregular forces.

### 4.1.1 The Academic Debate

Among writers and scholars a disagreement exist as to the scope of self-defence and this disagreement generally concerns the interpretation of Article 51 of the UN Charter. Those in favour of a broad right of self-defence claim that this right goes beyond the right to respond to an armed attack on a State's territory. Moreover, they make two arguments to support their interpretation. Firstly, they claim that given that Article 51 refers to the 'inherent' right of self-defence, this means that the earlier customary international law of the right to self-defence is preserved and that pre-existing rights of States are not taken away without expressed provision. Secondly, arguments are made relating to the time of the Conclusion of the Charter and that it at that time existed a wide customary international law of right to self-defence which was accepting protection of nationals and anticipatory self-defence.<sup>72</sup> Contrary to these arguments stands those who mean that the meaning of Article 51 is clear in that a right of self-defence only arises *if* (emphasis added) an armed attack occurs and that this right is only to be used as an exception to the prohibition of the use of force in Article 2 (4). Because of this, Article 51 should be narrowly interpreted, as the restrictions imposed in Article 51 would be meaningless if a wider customary law on the right to self-defence would be permitted. They furthermore hold that those still supporting a wide right of self-defence overlook the dismissal of their position by the large majority of States in practise since 1945. They mean that the Charter preserves the customary law as it allegedly was in 1945. Due to this fact, the term 'inherent right of self-defence' is not a term capable to vary in meaning over time, but the right was fixed in 1945. It is hard to find support for either view in the Charter's *travaux préparatoire*.<sup>73</sup> Having said that, I will go on examining the history of the law of self-defence.

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<sup>72</sup> Bowett, p. 185-189.

<sup>73</sup> Randelzhofer, p. 792.



## 4.2 History on the Law of Self-Defence up to World War I

In the UN Charter, Article 51, the phrase “inherent right of individual or collective self-defence” is used which implies that this is a ‘natural’ or ‘inherent’ right. This approach can be derived from the traditional naturalists doctrine expressed for example by Grotius’s: “The right of self-defence...has its origin directly, and chiefly, in the fact that nature commit to each his own protection...”<sup>74</sup>

A second school of thought with the proposition that self-defence cannot be governed by law is the belief that “the survival of states is not a matter of law”.<sup>75</sup> This implies that the preservation of the State has precedence over positive law and that each State must decide what is necessary for its self-defence.

The development of self-defence did not evolve in a vacuum but must be viewed as a part of a general development of the rules of use of force by States. As far back as the Middle Ages, the theologian St. Thomas Aquinas developed the concept of “just” and “unjust” wars (*bellum iustum* and *bellum iniustum*). He meant that one of the criteria for a just war was that a ‘just’ cause was necessary, that is to say that those who were attacked should be attacked for the reason that they deserved it because of some fault.<sup>76</sup> In theory, this meant that States were free to resort to war, as an aspect of sovereignty, since no other prohibition of war or use of force existed.<sup>77</sup> This was a major deficiency in international law and no clear regulations were stipulated until the 20<sup>th</sup> Century.<sup>78</sup>

One of the most classical cases in international law regarding self-defence is the *Caroline Case* (1837).<sup>79</sup> The case had to do with a Canadian rebellion against the British authorities in Canada. The U.S. vessel the *Caroline* was used to transport reinforcements from the U.S. by American sympathisers to the insurgents in Canada. A British force, however, attacked the vessel still on the U.S. shore, set her on fire and sent her over the Niagara Falls. Two Americans were killed in the attack and the United States demanded compensation from Britain. Britain, however, refused and referred *inter alia* to self-defence and self-preservation. In 1842, a British national, McLeod, was arrested due to the attack. Britain demanded his release, once again claiming the attack had been an expression of a legitimate act of self-

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<sup>74</sup> Grotius, Hugo, *De Jure Belli Ac Pacis* II (1625), in Schachter, p. 259.

<sup>75</sup> Statement by Dean Acheson, former Secretary of State in the United States cited in Schachter O, supra note 74, p. 260.

<sup>76</sup> *Summa Theologica*, II ii 40, in Brownlie, p. 6.

<sup>77</sup> Randelzhofer, p.109.

<sup>78</sup> Brownlie, p. 19 f.

<sup>79</sup> Jennings R Y, *The Caroline and McLeod Cases*, AJIL, vol. 32, 1938, p. 82 ff.

defence. Daniel Webster, the American Secretary of State, called upon the British government to show a “necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation”. He furthermore stated that the local authorities of Canada “did nothing unreasonable or excessive, since the act, justified by the necessity of self-defence must be limited by that necessity, and kept clearly within it”. This so-called Webster Formula expressed the principle of proportionality, which is a part of the self-defence rule. There was no clear distinction made between self-defence and self-preservation in this dispute, but the terms were mixed as if they were synonymous. The fact that the *Caroline* case was interpreted as an instance of the doctrine of necessity or self-preservation did not mean that a standardised right of self-defence was established. Still, Webster’s statement was generally accepted as a correct description of international law as it was an attempt to set the limits for these kinds of rights.<sup>80</sup>

The customary law of the 19<sup>th</sup> Century regarding self-defence is complex due to the fact that it existed a contradiction between the right for States to go to war on the one hand, and a tendency to provide different justifications for resort to war on the other. Moreover, there was also a lack of coherent terminology, the terms self-defence, self-preservation, necessity and protection of vital interests were used in an inconsistent manner.<sup>81</sup> The doctrine of necessity was very similar to the right of self-preservation and was applicable when action was necessary for the security, safety or fundamental interests of a State. A common feature of the different justifications was that the State taking action was regarded as the judge of the situation.<sup>82</sup> This led to a subjectivity of the terms, which decreased their value as legal terms capable of regulating a State’s conduct. They were rather used as camouflage for the self-interests of States to provide a “just” cause for action. Classic international law on self-defence and similar rights lasted during the 19<sup>th</sup> Century and until the end of World War I. Characterizing was the distinction between measures in war, were no rules were governing the use of force, and forcible measures of self-help when not in war, including self-defence.

#### **4.2.1 The League of Nations and Self-Defence**

With the establishment of The League of Nations in 1919, this was the beginning of a new era of the regulation of use of force by States in international law. The Covenant of the League of Nations introduced a distinction between legal and illegal wars based upon whether procedural requirements for the pacific settlement of disputes had been observed by the States. According to Article 11 of the Covenant, any war or threat of war was a matter of concern to the whole League. Article 12 declared that the Members of the League undertook to submit to arbitration, judicial

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<sup>80</sup> Bring, p.152.

<sup>81</sup> Brownlie, p. 40 f.

<sup>82</sup> Brownlie, p. 42 f, Bring, p. 152.

settlement or conciliation by the Council, all disputes likely to lead to rupture. Furthermore, in Article 13-15 the Members accepted not to go to war at all against a State, which complied with the judgment of the arbitration, the judgement of the Court or the unanimous report of the Council. In effect, Article 11-15 set up some procedural restrictions on the right to resort to war and this was the beginning of a development leading to a greater restriction on the use of force by States, including a more restrictive view on self-defence.

Another document of relevance was The General Treaty for the Renunciation of War, aka the *Kellogg-Briand Pact*. This treaty was signed on August 27, 1928. Formally still in force, it has however for practical purposes now been superseded by the UN Charter. In the Pact, war was outlawed as an instrument of national policy and this is also to be found in the UN Charter Article 2 (4) which states that all member States must refrain from the threat or the use of force against the territorial integrity or the political independence of any State. The *Kellogg-Briand Pact* is unique in that it was the first treaty with a comprehensive prohibition of war in international relations. The Pact was accepted by the signatories with the reservations only of the right of self-defence set out in the diplomatic exchanges prior to the signature of the treaty. The American reservation stated for example that there was nothing in the treaty, which restricted or impaired in any way the right of self-defence.<sup>83</sup> The reservations tend to imply the common thought at this time that a State should be its own judge regarding its use of self-defence.

One conclusion to be drawn from the above line of reasoning seems to be that up until World War II, permissible self-defence for a State was to resort to force in response to an actual or imminent use of force by another State. Anticipatory self-defence was thus, in some way, permitted subject to the restrictions imposed by the *Caroline* case.

### **4.3 The Prohibition of Use or Threat of Force Under the UN Charter**

Article 2 (4) in the UN Charter reads: “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. The article bans all levels of force, not only force in war, but also forcible actions short of war. One improvement of paramount importance compared with earlier treaties, e.g., the abovementioned Kellogg-Briand Pact, is that the latter, when using the word ‘war’ in its provisions, did not cover all levels of force between States as compared to the meaning of Article 2 (4) in the UN Charter.

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<sup>83</sup> Brownlie, p. 236.

Moreover, in Article 2 (4) the mere threat of force is prohibited, which was not the case in the Kellogg-Briand Pact.<sup>84</sup>

### 4.3.1 Article 51 and Self-Defence

The right of self-defence in Article 51 of the UN Charter stipulates an exception to the prohibition of force found in Article 2 (4). Article 51 reads: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”. This is a more confined notion than the one found in Article 2 (4), which speaks of the use or threat of force. Article 51, on the other hand, speaks about “an armed attack” and not every use of force is necessarily an armed attack.<sup>85</sup> Thus, when reading Article 51 in connection with Article 2 (4) it may seem as a “loophole” between the articles since States are not entitled to self-defence against every use of force, but only against an “armed attack”. This may seem like dissimilarity between different articles in the Charter, however, this was certainly intended since the unilateral use of forces is meant to be excluded as far as possible.<sup>86</sup>

#### 4.3.1.1 Definition of an Armed Attack

There is a general agreement that if an armed attack occurs, the right of self-defence arises. There are however dissenting opinions on what constitutes an armed attack. It is of highest importance to define the concept of an armed attack since only this triggers the right of self-defence. As already noted, an “armed attack” is a narrower concept as the concept of “use of force” in Article 2 (4). An example to be mentioned is the invasion of the Republic of Korea by North Korea in 1950 which was condemned by the Security Council as an armed attack.<sup>87</sup> Furthermore, the invasion of Kuwait by Iraq on August 2, 1990, was referred to as an armed attack by the Security Council in its resolution of August 6, 1990, where it also affirmed the right of self-defence in response to the attack.<sup>88</sup>

#### 4.3.1.2 “Armed Attack” in the *Nicaragua* case

The definition of what constitutes an armed attack was crucial to the ICJ in their reasoning on collective self-defence in the *Nicaragua* case.<sup>89</sup> In the case, USA maintained that its force against Nicaragua was justified as collective self-defence of Honduras, Costa Rica and El Salvador as a

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<sup>84</sup> Randelzhofer, p. 112.

<sup>85</sup> *Ibidem*, p. 663 f.

<sup>86</sup> *Ibidem*.

<sup>87</sup> SC Res. 82 of June 25, 1950.

<sup>88</sup> SC Res. 661 of August 6, 1990.

<sup>89</sup> International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (hereinafter *Nicaragua* case), June 27, 1986, ICJ Reports 1986, p. 14.

response to armed attacks on those states by Nicaragua. The Court however concluded that the attacks from Nicaragua were not to be constituted as “armed attacks”. The judgment is a very important one regarding the question what constitutes an armed attack and the Court’s interpretation is one of the most cited in this field. The Court based the judgement on customary international law since it found that the US multilateral treaty reservation did not allow it to apply the UN Charter. The Court, however, found that it was possible to use customary international law, which continued to exist alongside treaty law.<sup>90</sup> Furthermore, the Court stated that, even though it had no jurisdiction to determine whether the actions of the USA constituted a breach of the UN Charter, it still had a responsibility to consider them in determining the content of customary international law.<sup>91</sup> In the case, the parties had relied only on the right of self-defence in the case of an armed attack which had already occurred, the question of a response to an imminent threat which had not yet occurred was not mentioned.<sup>92</sup> Since the parties agreed that any exercise of self-defence must be proportionate as well as necessary, the Court went on to define which other specific conditions that had to be fulfilled before the right of exercising collective self-defence could be taken into question.<sup>93</sup>

The Court started by reflecting on what constituted an armed attack in this particular case and considered whether an armed attack had to be carried out by a regular army. It used the Definition of Aggression to support its view that “the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to an actual armed attack conducted by regular forces, or its substantial involvement therein” could be an armed attack.<sup>94</sup> The conclusion was that the sending by the US of armed bands, rather than a regular army, could constitute an armed attack, given that the scale and effects of the operation were such to be established as an armed attack and not just a mere frontier incident. The assistance to the rebels by providing them with weapons or other logistical support could sum up to a threat or use of force or intervention, but did however not constitute an armed attack. The Court furthermore observed that “it is also clear that it is the State which is the victim of the armed attack which must form and declare the view that it has been so attacked. There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation. Where collective self-defence is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack”.<sup>95</sup> The Court also maintained that there was no rule that authorised the exercise of collective self-defence if there was not a request

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<sup>90</sup> *Nicaragua* case paras. 172-6.

<sup>91</sup> *Ibidem*, para. 183.

<sup>92</sup> *Ibidem*, para. 194.

<sup>93</sup> *Ibidem*.

<sup>94</sup> Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX), cited in the *Nicaragua* case, para. 195.

<sup>95</sup> *Nicaragua* case, para. 195.

by the State that regarded itself to be the victim of an armed attack. In regard to Article 51 of the UN Charter and the requirement to report to the Security Council the Court said that this was not to be regarded as a customary law requirement, however, the absence of a report could be viewed as an indicator that a State itself was not convinced it was acting in self-defence.<sup>96</sup>

#### 4.3.1.3 “Armed Attack” in the *Oil Platforms* case

A different set of questions regarding what constituted an “armed attack” arose in the *Oil Platforms* case.<sup>97</sup> The Iran–Iraq war of 1980–88 disrupted international shipping in the Persian Gulf. A number of incidents were particularly relevant to the dispute before the Court; e.g. The *Sea Isle City*, a US-(re-)flagged ship, was hit by a missile in October 1987. The United States attributed the attack to Iran and as a response, claiming the right of self-defence, destroyed two Iranian oil platforms (Reshadat and Resalat) they deemed had been engaged in a variety of actions directed against US vessels and other non-belligerent vessels and aircrafts. A second central attack in this case occurred in April 1988 when a US warship, the USS *Samuel B. Roberts*, was struck by a mine in international waters. The United States also attributed this incident to Iran and, again asserting the right of self-defence, attacked two other Iranian oil platforms (Salman and Nasr).

Iran brought the case to the International Court of Justice, claiming that USA had violated Article X of the 1955 *Treaty of Amity* which guaranteed freedom of commerce and navigation between the two States. The USA however claimed that Iran had also broken the treaty when attacking vessels in the Gulf with mines and missiles. Firstly, the Court reaffirmed the principal elements required to justify the invocation of the right of individual self-defence.<sup>98</sup> There must be established the occurrence of an armed attack and the response must be necessary and proportionate. With regard to the US attack on the two oil platforms in 1987 (Reshadat and Resalat), the US claim of self-defence was based on the contention that various incidents attributed to Iran amounted, individually or cumulatively, to an armed attack. The Court held that the United States had not discharged the burden of proof necessary for the Court to attribute these actions to Iran. Equally, the Court rejected the USA’s arguments that there were any basis for finding that an armed attack had occurred justifying the attack on the oil platforms in 1988 (Salman and Nasr). The Court held that, notwithstanding ‘highly suggestive’ evidence, the laying of the relevant mine could not be attributed to Iran.<sup>99</sup>

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<sup>96</sup> *Ibidem*, para. 200.

<sup>97</sup> International Court of Justice, *Case Concerning Oil Platforms* (hereinafter *Oil Platforms* case), November 6, 2003, ILM vol. 42, p. 1334, 2003.

<sup>98</sup> *Ibidem*, para 51.

<sup>99</sup> *Ibidem*, para, 71.

A few general comments can be made on the Court's analysis of "armed attack" in the *Oil Platforms* case. First, when the Court considered the scope of "armed attack" in the *Nicaragua* case, in particular at paragraph 195 of the judgement on the merits, it explained both its positive and its negative conclusions. The Court ruled that the sending by a State of irregulars might constitute an armed attack, but mere assistance to rebels could not constitute an armed attack. In contrast, in the *Oil Platforms* case, the Court restricted itself to certain negative conclusions. It ruled out the possibility of finding an armed attack on the basis of certain incidents, but at no point did it explain what level or kind of use of force, in the maritime context, would constitute an armed attack. Such positive conclusions can be very useful to States when reviewing judgements of the Court and from a practical point of view; it is helpful to know what is ruled in, as well as what is ruled out. The second general comment relates to the Court's application of the reasoning in the *Nicaragua* case. In the *Oil Platforms* case, the Court relied almost exclusively on the authority provided in the *Nicaragua* case. Critically, it reasoned as follows: "As the Court observed in the case concerning Military and Paramilitary Activities in and against Nicaragua, it is necessary to distinguish 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms . . .'"<sup>100</sup>

The Court went on to find that the incidents cited by the United States did not amount to an armed attack, individually or cumulatively, because they did not qualify as 'a "most grave" form of the use of force'.<sup>101</sup> In the *Nicaragua* case, the Court was applying the Definition of Aggression annexed to General Assembly resolution 3314 (XXIX).<sup>102</sup> The precise status of this resolution as a reflection of customary international law has been the subject of much debate and remains somewhat unclear. Nevertheless, the Court in the *Nicaragua* case regarded the UNGA Definition of Aggression as reflecting customary international law and equated that definition of aggression with the scope of 'armed attack' for the purposes of defining the scope of the right of self-defence.

Yet the Court in the *Nicaragua* case was applying Article 3 (g) of the UNGA Definition of Aggression. This subparagraph includes within the definition of aggression the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein. Consideration of the 'gravity' of acts of armed force becomes relevant when such acts are committed by 'armed bands, groups, irregulars or mercenaries' rather than the conventional armed forces of a State. While any use of armed force by conventional armed forces amounts to an armed attack, only particularly grave acts by unconventional forces acting for a State are to be regarded as amounting to an armed attack. The Court applied this reasoning in the *Nicaragua* case and it has the effect that there are certain unlawful uses of

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<sup>100</sup> *Ibidem.* para 51.

<sup>101</sup> *Ibidem.* para 64.

<sup>102</sup> G,A Res 3314 (XXIX) of December 14, 1974 (Definition of Aggression).

force, committed by irregular forces, which self-defence is impermissible against. Therefore, States would be left without any legal means of self-protection in such circumstances. The Court's reasoning appears to be extending the relevance of the 'gravity' of acts of armed force for the purposes of defining the scope of an armed attack. In the *Oil Platforms* case, the Court gave no explanation, legal or otherwise, for extending the reasoning of the *Nicaragua* case in this way. Finally in this regard, there is substantial academic support for the view that 'gravity' is irrelevant to the question of whether there has been an armed attack by regular military forces.<sup>103</sup> Concerning the test of proportionality and necessity in the case, the Court reaffirmed both principles and held that US actions were neither necessary nor proportionate.<sup>104</sup>

### 4.3.2 Necessity and Proportionality

The *Nicaragua* case and the *Oil Platforms* case both reaffirm the restriction of necessity and proportionality when exercising self-defence, individual as well as collective. In the *Nicaragua* case, the Court mentioned a "specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law".<sup>105</sup> Moreover, in the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court referring to the *Nicaragua* case, held that "this dual condition applies equally to Article 51 of the Charter, whatever the means of force employed".<sup>106</sup> The Court treated these limitations of necessity and proportionality as marginal considerations when stated that the use of force by the USA was firstly not held to qualify as lawful self-defence, and then secondly, its illegality was confirmed because the actions were neither necessary nor proportionate. Even if the supply of arms from Nicaragua to the opposition forces in El Salvador had amounted to an armed attack, the measures taken by the USA were not necessary due to the fact that they were taken months after the major offensive of the opposition against the government of El Salvador had been completely repulsed. The US mining of Nicaraguan ports and attacks on oil installations were furthermore not proportionate to the aid received by the Salvadorian opposition from Nicaragua.<sup>107</sup> In the *Oil Platforms* case, the Court stated that not only did the USA fail to show that the attacks were attributable to Iran, but also that the US response was neither necessary nor proportionate.

The effect of the principle of proportionality and necessity is that self-defence must not be retaliatory or punitive and the purpose should always

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<sup>103</sup> Brownlie, e.g., argues that gravity is relevant only to the proportionality of the response to a particular attack rather than the scope of what constitutes an 'armed attack', Brownlie, p. 366. See also the discussion of 'gravity' in Dinstein, p. 173-6.

<sup>104</sup> *Nicaragua* case, paras. 73-77.

<sup>105</sup> *Ibidem*, para. 176.

<sup>106</sup> International Court of Justice, Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, July 8, 1996, para. 41, ICJ Reports 1996, p. 226.

<sup>107</sup> *Nicaragua* case para. 237.



be to stop and repel an attack. The defending State is not limited to use the same weapons as being used against it, nor to have the same number of armed forces as the attacking state.

#### 4.3.2.1 Necessity

The formulation of necessity in the 1837 years *Caroline* case is generally accepted as encapsulating the requirement of the right of self-defence under the UN Charter. Necessity is rarely analysed in relation to the Charter scheme on self-defence, nevertheless consistently referred to.<sup>108</sup> The requirement of necessity in the *Caroline* case must be viewed against the background of the then unsettled situations in which States were regarded as having the right to use force. At that time, there was widespread uncertainty as to the degree of the right of self-preservation and the doctrines of necessity and necessity of defence. The condition that a forceful action must be necessary could be deemed as performing the function of controlling, to some extent, the wide range of situations in which States could debatably resort to force. Thus, necessity could be viewed as a limiting factor at a time where there were no other restrictions.

Today, the situation is different and the way States may resort to force restricted. It should also be noted that in the *Caroline* case, the action taken by the British was preventive in nature. This factor may have affected the content of the Webster formula to make it less relevant in a situation where self-defence is limited to a response to an armed attack that has already occurred. The UN Charter considers that States have the right to respond to an armed attack only for the period it takes the Security Council to be notified and take actions necessary to restore international peace and security. States have, however, been reluctant to accept this ‘immediacy’ requirement of self-defence under the Charter, and as a consequence of this, support has developed for the legitimacy of ‘defensive reprisals’ and anticipatory self-defence, mainly in the context of sustained insurgent actions.<sup>109</sup> However, State practice and the views of commentators confirm that the relevance of immediacy is still very important in order to legitimate exercise of self-defence. What the requirements of immediacy really consist of under the Charter is in no way clear. The strict way of looking at self-defence suggests that once an armed attack is over, the right of self-defence comes to an end and States must consequently turn to the Security Council, relying on them to take actions. However, State practise in general is not consistent with this view of immediacy, and traditionally, States are granted a flexibility of time in which to initiate their defensive action.<sup>110</sup> On the other hand, the longer the period is between the armed attack and the

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<sup>108</sup> See e.g. Brownlie, p. 429.

<sup>109</sup> See e.g. Dinstein, p. 215-26.

<sup>110</sup> The 1982 conflict between Argentina and the United Kingdom over the Falkland Islands further illustrates this phenomenon. It was quite uncontroversial that in the circumstances, the United Kingdom reserved themselves the right to self-defence for some time after the initial attack and the ensuing occupation of the targeted territory. However, the international support for the British position faded thereafter, particularly when a large-scale conflict ensued.

response, the more pressure there will be on States to settle the matter with peaceful means. The importance of the temporal or immediacy aspect of necessity is furthermore confirmed in the *Nicaragua* case. Regarding the question of necessity, it was the laps of time between the events on which the necessity was based and the change in circumstances that the Court regarded as inconsistent with a plea of necessity.<sup>111</sup> Hence State practice tends to support the need for a temporal link between an armed attack and a defensive response. The *Webster* formulation, however, also stipulates that if an armed attack is to be viewed as legitimate, the attacked State must have ‘no choice of means’ available other than force to defend itself. In many cases, the occurrence of an armed attack will meet this test of necessity, such as where a State subjected to an ongoing-armed attack can show that there is no realistic outlook of the effectiveness of peaceful methods of settlement. Yet again, this may not always be the case and States need to reflect on whether an armed response is the only alternative to repulsing the attack.

#### 4.3.2.2 Proportionality

Regarding the principle of proportionality, the first step is to determine the legitimate aim of self-defence under the Charter. Proportionality, moreover, remains relevant throughout a conflict. It is not sufficient for a State to only consider proportionality at the time of making the decision, any following forceful action will need to be supervised continuously to make sure that the strategic objectives and the methods chosen to achieve them still remain proportionate to the aim of the response. The repulsion of an attack includes not only resistance to an ongoing-armed attack but also the expulsion of invaders and the re-establishment of the territorial status as it was before the attack.<sup>112</sup> In the previous situation, the measurement of proportionality will vary subject to whether the consideration is made in relation to a separate armed attack or whether there is an ongoing state of an armed conflict. In the latter situation, it is a rather straightforward task to state the theoretical responsibility of the defending force, that is, to make sure that only those actions are taken that are proportionate to accomplishing the objective, that is, the expulsion of the invader. Then again, the practical implementation of the responsibility in such a case is far from uncomplicated.

The International Court of Justice considered the question of proportionality, in the context of collective self-defence, in the *Nicaragua* case. As the Court found that no armed attack had in fact occurred to justify the forceful response, the issue of proportionality was debatable. In the case, the United States had alleged a right of collective self-defence in support of El Salvador, based on the provision of aid by Nicaragua to the armed opposition in that State. The activities of the United States put under

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<sup>111</sup> On the question of necessity, the Court noted that the measures taken by the United States in December 1981 “cannot be said to correspond to a ‘necessity’ justifying the United States action against Nicaragua on the basis of assistance given by Nicaragua to the armed opposition in El Salvador”. *Nicaragua* case, para, 237.

<sup>112</sup> Higgins, R, *Problems and Process: International Law and How We Use It*, 1994, p. 232.

scrutiny were the laying of mines in Nicaraguan ports and some ten attacks involving the use of force on such targets as oil installations.<sup>113</sup> The Court balanced these activities with the faults provoking them, the aid to Salvadorian guerrillas, and concluded that “whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid”.<sup>114</sup> In her dissenting opinion in the *Nuclear Weapons* advisory opinion, Judge Higgins supported the view adopted by the Court in the *Nicaragua* case that the approach is not to focus on the nature of the attack itself and ask what is a proportionate response but rather to determine what is proportionate to achieving the legitimate goal under the UN Charter, that is, the repulsion of the attack.<sup>115</sup>

### 4.3.3 The Doctrine of Preventive and Anticipatory Self-Defence

The question of the legality concerning preventive and anticipatory self-defence by a State is indeed a controversial matter in international law. An accurate definition of the concepts is hard to find, however most sources make a distinction between the two concepts. The most common understanding is that preventive self-defence means use of force by a State against another State with the aim of preventing an attack sometime in the future by the second State which the defending State fears for some reason. It is in the nature of preventive self-defence that the defending State claims that there is a *general* threat of a future attack by another State. Anticipatory self-defence, conversely, is also use of force by a State against a future attack by another State, but when it comes to anticipatory self-defence, the defending State claims to act in self-defence against an imminent attack by the second State. Thus, the State acts against a threat of attack which it claims is *concrete*, that is, an alleged attack will take place in the nearest future, and the aim with the self-defence is to hinder this imminent attack.

As a result of the terrorist attacks in New York City and Washington DC on September 11, 2001, the difficult question rose whether self-defence against terrorist attacks should be allowed only when an actual attack has occurred or whether a purely preventive action could be legal. The US letter to the Security Council as a response to the attacks stated that “In response to these attacks and in accordance with the inherent right of individual and collective self-defence, United States forces have initiated actions designed to prevent and deter further attacks on the United States”.<sup>116</sup> This statement shows a tendency that preventive actions that before September 11 would have been regarded as illegal reprisals, after the attacks, by some, was seen

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<sup>113</sup> *Nicaragua* case, para. 81.

<sup>114</sup> *Ibidem*, para 237.

<sup>115</sup> *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, Dissenting Opinion of Judge Higgins, ICJ Reports 1996, p. 226, paras. 4-9.

<sup>116</sup> UN Document S/2001/946, available at <http://www2.kobe-u.ac.jp/~shotaro/kogi/2005kiko/s-2001-946e.pdf> last visited on September 3, 2007.

as lawful self-defence measures. However, in this case, an attack had actually occurred and the USA's subsequently attempts to extend the right of self-defence to cover also pure preventive and anticipatory action has proved to be controversial and met with strong criticism.

Moreover, the High-Level Panel appointed by the UN Secretary General has taken a position on the lawfulness of the right of anticipatory self-defence. In its *Report on Threats, Challenges and Changes*, dated December 1, 2004 the Panel supports the interpretation embodied in the theory of 'anticipatory self-defence', which allows for reaction when an attack is imminent.<sup>117</sup> According to the High Panel report, the mere existence of a threat to security is not enough to legitimate an armed reaction. This means that only the fact that a State acquires weapons of mass destruction, does not give another State a right to act in self-defence. This was demonstrated in resolution 487 of June 19, 1981<sup>118</sup> in which the bombing and destruction of an Iraqi nuclear reactor by Israeli aircraft was condemned as a violation of the UN Charter.

The doctrine of preventive self-defence in reaction to a latent threat has recently been rejected by the ICJ in the *Armed Activities* case<sup>119</sup> on the basis that it is a matter that falls within the competence of the Security Council which should, if needed, authorise the use of force. More specifically, the Court stated that "Article 51 of the Charter may justify a use of force in self-defence only within the strict confines there laid down. It does not allow the use of force to protect perceived security interests beyond these parameters. Other means are available to a concerned State, including, in particular, recourse to the Security Council".<sup>120</sup>

President Bush's doctrine on 'preventive war', as spelled out in the 2002 National Security Strategy of the United States,<sup>121</sup> is in reality a new and expanded interpretation of the notion of *immediacy* of armed attack, which affords new possibilities to react in self-defence. In the Presidential document, the new threats are constituted by the possession of Weapons of Mass Destruction by States ready to use them and by terrorist movements. Earlier, the imminence of an attack was more visible when armies had to be mobilised, and military equipment be transported etc. Nowadays, however, terrorist movements operate underground ready to strike at no warning and with today's sophisticated technology, missiles can be launched thousands of miles from its target. This position highlights how serious the new threats

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<sup>117</sup> 'A more secure world: our shared responsibility', Report of the Secretary-General's High-Level Panel on Threats, Challenges and Changes, available at <http://www.un.org/secureworld> last visited September 9, 2007.

<sup>118</sup> UN Security Council Resolution 487, June 19, 1981.

<sup>119</sup> International Court of Justice, *Case Concerning Armed Activities on the Territory of the Congo* (hereinafter *Armed Activities* case), 19 December 2005, ILM vol. 45, p. 271, 2006.

<sup>120</sup> *Armed Activities* case, para. 148.

<sup>121</sup> *The National Security Strategy of the United States of America*, 2002, available at <http://www.globalsecurity.org/military/library/policy/national/nss-020920.pdf> last visited September 9, 2007.

are. In a certain way, it has been endorsed by the above-mentioned reports of the High-Level Panel and the Secretary General.

## 4.4 Self-Defence Against Terrorists

Mainly, two problems with self-defence can be envisioned when dealing with terrorism. Firstly, terrorist movements are non-state actors, hence the question is whether their attacks qualifies as an ‘armed attack’ under Article 51 in the UN Charter. Article 51 does not state that the attack must come from a State, however some commentators claim there is a tendency today to allow a State to react in self-defence even if the armed attack is coming from a non-state entity. They claim that the passing of the SC Resolutions, immediately after the terrorist attacks on September 11, 2001, supports this tendency.<sup>122</sup> Also the action of NATO can be seen as a tendency in this direction when it for the first time in its history activated the machinery under Article 5, stating that the attacks on September 11 qualified as an armed attack triggering the mechanism of collective self-defence under the North Atlantic Treaty.<sup>123</sup> It is therefore interesting to note that the ICJ in its *Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territories* stated that an armed attack should be attributable to a State to fall under the law of self-defence.<sup>124</sup> This statement was criticised by some of the judges, e.g., Judge Higgins, who in her separate opinion observed that “...nothing in the text of Article 51...stipulates that self-defence is available only when an armed attack is made by a State”.<sup>125</sup> In his separate opinion, Judge Kooijmans likewise pointed out that Article 51 only “conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years”.<sup>126</sup>

In its *Armed Activities* judgement, the Court did however not take a negative stance as in the *Wall* case when they affirmed that the attacks by irregular forces were not attributable to, nor made on behalf, of Congo. Accordingly, it had “no need to respond to the contention of the Parties as whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces”.<sup>127</sup> In his separate opinion, Judge Kooijmans stated that by once again avoiding to clarify the abovementioned issue, the Court was giving the impression that

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<sup>122</sup> UN S.C. Resolution 1368, September 12, 2001, and 1373, September 28, 2001.

<sup>123</sup> Article 5 in the North Atlantic Treaty states that: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations,...”.

<sup>124</sup> The *Wall* case, para. 139.

<sup>125</sup> The *Wall* case, Separate Opinion by Judge R. Higgins, para. 33.

<sup>126</sup> The *Wall* case, Separate Opinion by Judge P.H. Kooijmans, para. 35.

<sup>127</sup> *Armed Activities* case, para. 147.

it endorsed a narrow interpretation of Article 51, supporting the opinion according to which ‘the right of self-defence is conditional on an attack being attributable, either directly or indirectly, to a State’.<sup>128</sup> In their separate opinions, both Judge Kooijmans and Judge Simma pointed out that if armed attacks are carried out from the territory of a neighbour State, they still are to be seen as armed attacks, hence triggering the right of self-defence, even if they are not attributable to any State.<sup>129</sup>

The second problem with self-defence when dealing with terrorism relates to the territory on which terrorists are located. If the State which territory the terrorists are operating from is either unable or unwilling to keep them off its territory, the aggrieved State is generally allowed to react in self-defence. This affirmation, however, runs counter to the dictum of the Court, which in the *Nicaragua* case stated that mere assistance to rebels, such as logistical support, does not amount to an armed attack.<sup>130</sup>

#### 4.4.1 Cross-border Actions by Irregular Forces

The line of reasoning in the *Nicaragua* case was followed with some variation in the later *Armed Activities* case. The Court stated that the attacks on Uganda emanated from armed bands or irregulars within the meaning of Article 3 (g) of the General Assembly Resolution on Aggression. Due to the fact that those acts could not be attributable to the Democratic Republic of Congo, Uganda was not entitled to act in self-defence against Congo.<sup>131</sup>

The question of cross-border actions by irregular forces has led to much controversy. The situation is less of controversy if the irregular forces are acting on behalf of the State from whose territory they are operating and their actions are to be considered as an armed attack. However, it has proven extremely difficult to decide what amount of State involvement is needed to allow the use of force against the territory of the host State in self-defence. In the *Nicaragua* case the Court interpreted the words of *Definition of Aggression* ‘sending by or on behalf of a state ‘as to what constituted an armed attack. States like Israel and South Africa seem to implicitly have taken the view that if there is no State involvement in the irregular forces action, there can be no self-defence against that State. For example, Israel has since 1948 been involved in cross-border actions against irregular forces operating from their neighbouring States. In 1967 it undertook operations against forces in Lebanon claiming that Lebanon was responsible for the failure to prevent armed actions against Israel and claimed the right to take action in self-defence. More recently, Israel claimed to be acting in self-defence when responding forcible to attacks by Hezbollah across its border with Lebanon. Israel attributed the responsibility for the Hezbollah attack to

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<sup>128</sup> *Armed Activities* case, Separate Opinion by Judge Kooijmans, para. 27.

<sup>129</sup> *Ibidem.* para. 32, Separate Opinion by Judge B. Simma, para. 12.

<sup>130</sup> *Nicaragua* case, para. 195.

<sup>131</sup> *Armed Activities* case, para. 146.

Lebanon accusing it for supporting and approving that Hezbollah operated from its territory.

Even though self-defence can be permissible against attacks by irregular forces, the Security Council has generally not accepted the claims by e.g. Israel and South Africa when maintaining acting in self-defence. These claims were however weakened by the fact that these States were regarded as illegal occupants of the territory they were claiming to defend. The fact that many States considered Israel's occupation of the West Bank and Gaza, the Golan Highs, and until the year of 2000, areas of south Lebanon as illegal was enough for them to criticize Israel's use of force against cross-border attacks by irregular troops. They held that since Israel had no right to be in those territories in the first place, they could not rely on the right of self-defence against attacks on their troops within those territories.<sup>132</sup>

## 4.5 Conclusion

The traditional law of self-defence was interpreted in a very broad way before the entry into force of the Charter of the United Nations. The nineteenth century treaties did not contain any general prohibition on the use of force, and thus, there was no necessity to define self-defence. At those times, States enjoyed a right to engage in war without any real limitation under international law. The legal possibility to engage in war was limited both by the League of Nations and by the Kellogg-Briand Pact, yet the two treaties did not contain any clear definition of self-defence. This situation changed with the drafting of the UN Charter. Not only did it prohibit the threat and use of force, thus shifting the accent from war to force, but also it defined self-defence as a right that could not be impaired by the prohibition on the use of force set forth in Article 2 (4) of the UN Charter. The framers of the Charter did not substantiate the concept of self-defence, and States nowadays resort to force and justify their action as an exercise of the right of self-defence mainly for three reasons. Firstly, the Charter prohibits the use of force, and accordingly, self-defence, as a traditional plea for justifying violence, is thus invoked even when the use of force is in effect a violation of the UN Charter. Secondly, the collapse of the UN security system has obliged States to rely on their own means in defending themselves against external aggression, and States enhance their military capability by forming defensive alliances such as the North Atlantic Treaty Organization (NATO). Finally, modern constitutions usually contain provisions forbidding war and use of force in violation of international law, and accordingly, self-defence is a mean of overcoming constitutional constraints.

In practise, States claiming the right of self-defence tries to put forward arguments that will avoid doctrinal dispute and appeal to as wide range of States as possible. There is a tendency to invoke Article 51 even in cases

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<sup>132</sup> Cassese, p. 79.

where it is controversy to whether the scope of the article covers the situation. One may wonder whether this invocation is serious or just made as a ritual not to be taken seriously? Even in Security Council debates or General Assembly's resolutions on the use of force there is a tendency merely to state a wide or narrow interpretation with no going into the theoretical justifications for their considerations. States generally prefer not to enter the legal justification, as the processes can be very protracted.



# 5 A Development in International Law Concerning Self-Defence?

In this chapter, I intend to analyse the arguments put forward by Israel in the advisory opinion regarding their claim that the building of the wall is an expression of their right to self-defence. The chapter further addresses the Court's approach to the question of self-defence in the *Wall* case and places it in the broader context of ICJ pronouncements on the use of force and self-defence. It suggests that the Court failed to appreciate the complex legal problems to which Israel's claim gave rise, in particular the problem of self-defence against attacks by non-state actors. It shows that the Court's restrictive understanding of self-defence, while following the judgement in the *Nicaragua* case, is difficult to bring in line with modern State practise, and increases the pressure to admit other, non-written, exceptions to Article 2 (4) of the UN Charter.

## 5.1 Introduction

From the very beginning of its existence, however increasingly, States have submitted to the ICJ cases bearing the matter of the question on the use of force. In the first case of its history, the *Corfu Channel* case<sup>133</sup>, the Court took the opportunity to underline the absolute scope of the prohibition against the use of force.

In 1986, the use of force once again played a central role in the Court's judgement in the *Nicaragua* case. In its judgement, the Court went into details on the matter, *inter alia* clarifying the scope of the customary prohibition on the use of force, confirming a restrictive understanding of the notion of 'armed attack'<sup>134</sup>, and opting for an equally narrow approach to the question of 'private force'.<sup>135</sup> More recently, in its *Oil Platforms* judgement of 2003, the Court went out of its way to 'state its view on the legal limits on the use of force at a moment when these limits find themselves under the greatest stress'.<sup>136</sup>

In the *Wall* case the Court once again took the opportunity to pronounce on a much-discussed aspect of the legal regime governing the use of force by States. Having found the construction of that wall to be in violation of international law,<sup>137</sup> it assessed whether Israel's conduct could be justified

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<sup>133</sup> International Court of Justice, *Corfu Channel* case, April 9, 1949, ICJ Reports 1949, p.4.

<sup>134</sup> *Nicaragua* case, paras. 101-104.

<sup>135</sup> *Nicaragua* case. paras. 104, 115 and 195.

<sup>136</sup> *Oil Platforms* case, Separate Opinion of Judge Simma, p. 325.

<sup>137</sup> The *Wall* case, paras 115-137.

with reference to the right of self-defence under Article 51 of the UN Charter. Given the influences of its previous statements on the use of force, the Court's answer to this question deserves an in-depth analysis.

## 5.2 The Court's Treatment of the Self-Defence Argument in the *Wall* case

Unlike the *Nicaragua* case and the *Oil Platforms* case, in its advisory opinion regarding the *Wall*, the Court treated the matter of self-defence rather lightly. In one single paragraph the Court gave its response to this claim: "Under the terms of Article 51 of the Charter of the United Nations: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security'. Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also noted that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originated within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case."<sup>138</sup>

In addition to Article 51, the Court considered whether the construction of the wall could be justified based on necessity.<sup>139</sup> The question was, however, left open whether necessity could serve at all as a justification for Israel's wrongful acts. The Court held that in any event, the requirements of necessity, as spelled out in Article 25 of the International Law Commission's Articles on State Responsibility,<sup>140</sup> were not met, as "the construction of the wall along the route chosen' was not 'the only means to

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<sup>138</sup> *Ibidem*, para 139.

<sup>139</sup> *Ibidem*, para. 140.

<sup>140</sup> See article 25 of the *ILC's Drafts Articles on State Responsibility* (2001), Report of the ILC on the work of its 53rd Session (23 April – 1 June and 2 June – 10 August 2001), UN Doc. A/56/10, available at:

[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf) last visited May 29, 2007.

Art 25 provides: '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity'.

safeguard the interests of Israel against the peril which it has invoked as justification for that construction”.<sup>141</sup>

The Court’s finding that “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State” might be regarded as ambiguous. The Court did not expressly state that Article 51 recognizes self-defence *only* (emphasis added) by a State against another State. Perhaps the Court was simply recognising that a State may self-defend against another State as one type of self-defence under Article 51. Two problems can however be visualised with this reading by the Court. Firstly, Israel directly stated that it was invoking the right of self-defence as permitted under Article 51 against non-state terrorist attacks, and in the paragraph prior to its finding, the Court acknowledged that statement.<sup>142</sup> This indicates that the Court took note of the position of Israel that it was acting in self-defence against a non-state actor, however rejected that position on the ground that the attack did not emanate from another State. Secondly, the Court was well aware that its ‘State’-argument would lead to controversies as two of the judges in their dissenting opinions adopted another position in this regard. Judge Higgins, in her separate opinion, interpreted the Court as saying that ‘self-defence is available only when an armed attack is made by a State’.<sup>143</sup> Moreover, in his declaration in dissent, Judge Thomas Buergenthal stated that the Court’s position was problematic because Article 51, in affirming the inherent right of self-defence, ‘does not make its exercise dependent upon an armed attack by another State’.<sup>144</sup>

It is hard to imagine why the Court felt pressed to discard the relevance of Article 51 in this difficult situation. The protection of civilians against deliberate attacks is a fundamental rule of international humanitarian law. There is no obvious reason to place the inherent right of self-defence in a straitjacket that would protect States and their citizens merely against the violent acts of other States, or attacks emanating outside its own State, neglecting the destructive capabilities of private terror networks. The world has changed after September 11 and terrorist attacks must be treated differently in the future, bearing in mind that they do not always originate outside the attacked State’s territory.

### 5.2.1 The ‘External’ Argument

The first of the two substantive arguments referred to by the Court, the ‘external’ argument, raises important questions about the availability of self-defence in situations not involving inter-state force, or to use the Courts’ own words; “Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the

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<sup>141</sup> The *Wall* case, para. 139.

<sup>142</sup> *Ibidem*, para. 138.

<sup>143</sup> The *Wall* case, Separate opinion of Judge Higgins, para 33.

<sup>144</sup> The *Wall* case, Declaration of Judge Buergenthal, para. 6.

construction of the wall originates within, and not outside, that territory”.<sup>145</sup> In other words, the Court appears to make it its business to make clear that Article 51 could not be referred to against ‘attacks from within’ or ‘internal attacks’. Judge Kooijmans observed this in his separate opinion, when he asserted that the right of self-defence is a rule of international law and as such relates to international phenomena.<sup>146</sup> However clear the Article may seem, problem arises when question is about application, mainly, under what circumstances an armed attack can be considered sufficiently internationalised in order to generate the right of self-defence as found in Article 51, that is, when does an armed attack become an “international phenomena”? It may seem somewhat surprising that attacks originating within the Palestinian territories should not be sufficiently international to meet the required threshold. Clearly, they came from outside Israel, from a foreign territory. Additionally, all through the *Wall* proceedings, the Court emphasised the international character of the Israeli-Palestinian conflict by, for instance, highlighting the Palestinian peoples’ right to self-determination.<sup>147</sup> In her separate opinion, shared by Judge Buergenthal, Judge Higgins argued that “Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable.”<sup>148</sup>

Considering this, it appears to be indeed quite problematic to suggest that attacks originating within the West Bank and the Gaza strip are not an ‘international phenomena’. Even so, it is agreeable that the majority was right in declaring Article 51 inapplicable. However, the central argument to support this conclusion has little to do with whether the attacks coming from Palestine could be viewed as international or not, but rather the question regarding the status of the Palestinian territory. The Court had in the advisory opinion declared that these territories are ‘occupied territories’, administrated by the law of belligerent occupation.<sup>149</sup> While occupied territory is as far as one can tell ‘foreign’, the means of defence available to occupying powers seem to be administrated solely by the law of belligerent occupation. Provisions in the Fourth Geneva Convention and in the Hague Regulations, make out the right as well as the duty, of occupants to maintain public order within the occupied territory.<sup>150</sup> The majority of the Court, however, having affirmed Israel’s status as an occupying power, did not consider the consequences flowing from that status on the law of self-defence. If the Court had considered this, it would have had to analyse whether the construction of the wall could have been justified under any of the public order provisions found in the Fourth Geneva Convention and the 1907 Hague Regulations. If done so, they would have made an evaluation,

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<sup>145</sup> The *Wall* case, para. 139.

<sup>146</sup> The *Wall* case, Separate Opinion of Judge Kooijmans, para. 36.

<sup>147</sup> The *Wall* case, para. 118.

<sup>148</sup> The *Wall* case, Separate Opinion of Judge Higgins, para. 34.

<sup>149</sup> The *Wall* case, paras. 89-101.

<sup>150</sup> See in particular Article 43 of the 1907 Hague Regulations in which it is stated that the occupant is entitled to ‘take all the measures in his power to restore, and ensure, as far as possible, public order and safety’.

which might have given useful clarifications regarding the scope and limits of occupants' rights during long-term occupation. With regard to the regulations governing self-defence, the abovementioned considerations insinuate that the occupying power cannot count on self-defence in order to justify public order measures directed at holding back attacks deriving from within the occupied territories.

## 5.2.2 The "State" Argument

The Court's second argument, the 'State attack argument', is more problematic. It would appear evident that any pronouncement by the United Nations' 'principle judicial organ'<sup>151</sup> on the possibility of the use of self-defence against attacks by non-state actors would be very much newsworthy. Though the underlying question, whether armed attacks by non-state actors can trigger the right of self-defence, had been subject of an intense debate for a long time,<sup>152</sup> it had, since the late 1990's due to the course if the debates on anti-terrorist measures, gained prominence. In order to appreciate the Court's pronouncements, these debates need to be briefly discussed.

When analysing these events, two stages of the development stands out. The first stage can be referred to as the traditional approach. This stage is characterised by a restrictive interpretation of self-defence, which can be seen in the Court's famous 1986 *Nicaragua* judgement. In that case, the Court noted that armed attacks by non-state actors could trigger a right of self-defence. Then again, in order to trigger that right, the non-state conduct would have to be imputable to another state. As stated in the *Nicaragua* case, attribution, the Court noted, required 'effective control' by another State of the operations.<sup>153</sup> The mere 'provision of weapons or logistical or other support' was, however, not enough to amount to an armed attack.<sup>154</sup> The traditional, restrictive understanding of the right of self-defence has however been modified and other, wider interpretations are on the way. As for State practise, the second stage, there is a tendency that many States, since the late 1990's, have embraced the broader reading of Article 51, a view earlier maintained above all by Israel and South Africa. Several States have during recent years exercised or asserted a right of self-defence against armed attacks by non-state actors, even when their conduct could not be attributable to another State. Lately, other States have been far more inclined to accept this broader view than was the case two decades ago when almost all States rejected Israel and South Africa's claim of self-defence.

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<sup>151</sup> Art 92 of the UN Charter reads: "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

<sup>152</sup> See for example Bowett 'Reprisals Involving Recourse to Armed Force', AJIL vol 66, No 1, January 1972, p. 31.

<sup>153</sup> *Nicaragua* case para. 109 and para 115.

<sup>154</sup> *Ibidem.* para. 195.

One important event when examining the development of interpretation of the right of self-defence against non-state actors is the September 11 attacks in New York City and Washington DC in 2001. The international community has explicitly confirmed, during notably the resolutions adopted due to the terrorist attacks, that self-defence could be exercised against armed attacks not attributable to another State.<sup>155</sup> It seems as during only a few days almost all States came to accept the view that a terrorist attack by a terrorist organisation was comparable to an armed aggression by a State, thus allowing the victim State to make use of its right to self-defence.<sup>156</sup> Judge Kooijmans observed this new approach to Article 51 after the September 11 bombings, an approach not in line with the restrictive *Nicaragua* approach; “The Security Council called acts of international terrorism, without any further qualification, a threat to international peace and security which authorizes it to act under Chapter VII of the Charter. And it actually did so in resolution 1373 (2001) without ascribing these acts of terrorism to a particular State. This is the completely new element in these resolutions. This new element is not excluded by the terms of Article 51 since this conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence”.<sup>157</sup>

It should also be noted that, from what has been stated above, no easy conclusion could be found concerning the law of self-defence against non-state actors. There can, however, with practically certainty be claimed that the traditional reading of self-defence, as set out in *Nicaragua*, is no longer ‘generally accepted’.<sup>158</sup> The abovementioned considerations tend to suggest that Israel’s self-defence claim would have raised many interesting, however, complex issues. It is therefore hard to imagine why the Court discarded the relevance of Article 51 in this difficult situation. Instead, the Court simply quoted Article 51, which in one way is very surprising since the wording of Article 51 does not contain any reference to State involvement but speaks of an ‘armed attack’ without any additional qualification. Illogically, the wording of Article 51 has generally been considered to provide the best support for a broad reading of it.<sup>159</sup>

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<sup>155</sup> SC Res. 1368 (2001), and 1373 (2001).

<sup>156</sup> See Cassese, “*Terrorism is also Disrupting Some Crucial Legal Categories of International Law*”, 12 EJIL, (2001) p. 997.

<sup>157</sup> The *Wall* case, Separate Opinion of Judge Kooijmans, para. 35.

<sup>158</sup> *Ibidem*.

<sup>159</sup> Dinstein, p. 214, the *Wall* case, Separate Opinion of Judge Kooijmans, para. 35, Declaration of Judge Buergenthal, para. 6 and Separate Opinion of Judge Higgins, para. 33.

### 5.2.3 A Correct Judgment of the Court?

From the abovementioned observations, one can quite easily establish that the Court's reasoning on the question of self-defence is highly problematic. But does this mean that the Court made a mistake in discarding Israel's claims based on self-defence? This is not necessarily the case, because as far as the result of the Court's analysis is concerned, it is generally agreed that they were fully correct in concluding that the building of the wall could not be justified based on Article 51. This was in fact common ground among the majority of the ICJ, notably most of those who expressed concerns about the majority's reasoning, for example Judge Higgins and Judge Kooijmans.<sup>160</sup> Moreover, it is suggested that the requirement for proportionality would have offered an alternative way of dismissing Israel's self-defence claim without going into more detailed considerations. Self-defence must, in order to be justified, be proportionate, just as proportionality has to be considered with regard to specific circumstances in which the supposedly justified measure has been taken. Based on that, Israel's claim could have been rejected quite easily as there was no clear evidence that the building of the wall was the only mean of protection against an armed attack. Moreover, there was no evidence that the chosen route of the wall, partly cut through occupied territory, was necessary in order to be effective. This factor alone could have been enough to reject Israel's claim of Article 51 as it would have failed to meet the strict requirements of the proportionality test embedded in that article. It should also be noted that by rejecting that justification, the Court diverged from the increasingly general opinion and focused on the more narrow issue of proportionality. One way for the Court to avoid a fuller exposition of the problems that rose concerning Israel's self-defence claims would have been to avoid the language used in paragraph 139 of the advisory opinion and instead focus on the proportionality question. I find it somewhat remarkable that the Court did not decide in line with these considerations, which would have contained the concerns of Judge Kooijmans and Judge Higgins. The Court may have addressed Israel's claim immediately if it had decided to reject them on the narrower, factual basis. The manner the Court now acted does, in my opinion, give rise to more confusion and questions.

### 5.3 The *Wall* Case in Comparison with other Cases from the ICJ

The *Wall* case and the *Oil Platforms* case both reaffirm the traditional, restrictive reading of self-defence as set out by the Court in the *Nicaragua* case. Thus, the Court has confirmed the *Nicaragua* case effects on the law of self-defence. The Courts' assertion in the *Wall* case shows its reluctance to take on a broader reading of Article 51 which would acknowledge a right

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<sup>160</sup> The *Wall* case, Separate Opinion of Judge Higgins, paras. 33-35 and Separate Opinion of Judge Kooijmans, paras. 35-36.

of self-defence against armed attacks by a non-state actor not directed and controlled by another State. This has a crucial effect on the role of Article 51 seen in the wider field regarding forcible responses against aggression. The Court's narrow interpretation of Article 51 implies that the article is applicable quite infrequently. This may lead to situations where States seeking to defend themselves against violence or attacks from private actors neither controlled nor directed by another State will not be able to rely on self-defence. One positive outcome can be that a restrictive reading of Article 51 further reduces the number of occasions in which States are allowed to use force unilaterally. However, practice has shown that States rather than invoking self-defence, intend to rely on other, non-written justifications in response to violence from non-state attackers. Whereas an extensive interpretation might have brought these responses within the scope of Article 51, hence subjected them to the procedural and substantive conditions of that provision, the restrictive interpretation confirmed by the Court intensify the pressure to acknowledge more non-written exceptions to Article 2 (4).

The more recent *Armed Activities* case illustrates a further problem. The case had to do with the military presence of Uganda in the eastern parts of Congo and Uganda's involvement in that country's civil war. In the case, the line of reasoning in the *Nicaragua* case was followed with some variation. The Court stated that the attacks on Uganda emanated from armed bands or irregulars within the meaning of Article 3 (g) of the General Assembly Resolution on Aggression. Because those acts were not attributable to Congo, Uganda was not entitled to react in self-defence against Congo. However, what is new in the *Armed Activities* case is that the Court left open the case of self-defence by the aggrieved State against a large-scale armed attack by irregulars not attributable to the State in whose territory the armed bands are located.

The *Armed Activities* judgment is different from previous judgments by the Court and it can rightly be described as 'historic'. For the first time, the Court discussed the scope of self-defence directly under Article 51 and it is a judgment where the Court has stuck to its jurisprudence constant, and it has made it clear that it does not follow the post September 11-trend to expand the scope of Article 51. The *Armed Activities* case, however, shows the members of the Court as divided on these rules, and especially on the role of non-state actors in self-defence, as the rest of the scholarly community. Undeniably, the *dispositif* shows greater unity on the issue than in the past;<sup>161</sup> only Judge ad hoc Kateka gave a dissenting opinion. However, there is a clear minority of critique, and choosing to remain silent does not necessarily mean that one agrees wholeheartedly with how the Court argued the case. It will be interesting to see whether the Court will continue to maintain its position and argue similar cases similarly in the future. All judges who disagreed with the Court on the law on self-defence criticized the Court for not providing enough substantial argument, but kept

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<sup>161</sup> The *Armed Activities* case, para. 345.



their criticism short as well. They reminded us that “it would be unreasonable to deny the attacked State the right to self-defence merely because there is no attacker State, and the Charter does not so require”,<sup>162</sup> but this is a political motivation for a future change in the law, rather than a reasoning to show how and by what means the law has changed. In its judgement, there is an impression that the Court wants to give the world some reassurance, some calm when they, once again, stresses that the UN Charter remains the centre of our legal world-view and its primary goal of avoiding ‘the scourge of war’ remains the guiding light in the interpretation of the Charter.

## 5.4 The Israeli Supreme Court Decision

In early 2004, residents of various villages northwest of Jerusalem filed petitions with the Israeli Supreme Court Sitting as the High Court of Justice seeking to invalidate military orders for the construction of sections of the wall. The petitions alleged that the orders violated Israeli administrative law and public international law. On June 30, 2004, just nine days before the ICJ issued its advisory opinion, the High Court of Justice handed down its opinion in *Beit Sourik Village Council vs. Israel*,<sup>163</sup> which invalidated orders for the construction of several parts of the wall and instructed the Israel Defence Forces (IDF) to reroute the wall so as to decrease its negative impact on daily Palestinian life. The President of the Court, Aharon Barak began by announcing what law was applicable. He reiterated the Court’s longstanding view that the Hague Regulations apply and are enforceable in Israeli Courts because they are customary international law, which is part of Israeli law. The Court then considered whether the military commander had the authority to erect the wall. In particular, the Court considered whether the wall was motivated by ‘security’ concerns. The Israeli government pointed to its repeated assertions that the purpose of the wall was to fight terror, that it was temporary, that it could be moved and that it was not intended to establish borders. In response, Palestinian villagers argued that the wall effected a creeping annexation. They claimed that if the purpose had been solely military, the wall would have followed the Green Line.<sup>164</sup>

The Court, however, came to the opposite assumption; security considerations would be more likely to require deviation from the Green Line. The Court further noted that the purpose of the wall was to promote security and it also found that the IDF had the authority to seize private property in order to construct the wall.<sup>165</sup> According to the Court, the crucial question was whether the route of the wall could be justified based

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<sup>162</sup> *Armed Activities* case, Separate Opinion by Judge Kooijmans, para. 30.

<sup>163</sup> H CJ 2056/04, *Beit Sourik Village Council v. Israel* (June 30, 2004), 43 ILM 1099 (2004), (hereinafter *Beit Sourik* case), available at [http://elyon1.court.gov.il/Files\\_ENG/04/560/020/a28/04020560.a28.htm](http://elyon1.court.gov.il/Files_ENG/04/560/020/a28/04020560.a28.htm) , last visited on August 29, 2007.

<sup>164</sup> *Beit Sourik* case, para. 30.

<sup>165</sup> *Ibidem.* para. 31.

on military necessity.<sup>166</sup> The main focus in the Court's judgement was concentrated to this question, whether the route struck an acceptable balance between security and humanitarian concerns. President Barak began his exploration by discussing the content of the requirement of proportionality.<sup>167</sup> He concluded that proportionality first of all required a reasonable relationship between the means and the ends. Secondly, there had to be shown that there were no less restrictive alternatives which could achieve the same security aims, and, thirdly, it had to be shown that the increased security originating from a given routing decision was proportionate to the corresponding increased harm to civilians.<sup>168</sup> This test was then applied to a series of military orders, each concerning a particular section of the wall and in each case, the Court found that the wall satisfied the first test, that is, whether there was a reasonable fit between the means and the ends.<sup>169</sup>

Likewise, the Court found that each section of the wall at issue satisfied the second stage of this three-part test, that is, if there was a less restrictive route that achieved the exact same security benefit. However, in several instances, the Court found that sections of the wall violated the third stage of the test, the requirement of a balance between security benefits and harm to the civilian people. For example, one ten-kilometer segment was routed so as to preserve Israeli military control of the strategic area of Jebel Muktam, which dominates the highway from Jerusalem to Modi'in. The Court observed that this route separated thirteen thousands farmers from their land, and that access gates would result in long lines and require farmers to take indirect routes to reach their land.<sup>170</sup> The Court made similar remarks as to another section of the wall, and again it stressed the damage to the livelihood of the farmers.<sup>171</sup> Finally, president Barak, reflected on the tension between the war on terror and democratic ideals, holding that: "A democracy must sometimes fight with one arm tied against her back". And furthermore: "Only a separation fence built on a base of law will grant security to the State and its citizens. Only a separation route based on the path of law, will lead the State to the security so yearned for".<sup>172</sup>

#### **5.4.1 The *Wall* case vs. the *Beit Sourik* case**

Overall, the *Wall* case and the *Beit Sourik* case, reflect fundamentally different judicial approaches, however share some characteristics, to the problem of the wall. As for the similarities, the ICJ and the Israeli Court did indeed agree on a few substantive issues. Both courts applied the Fourth Geneva Convention, in spite of Israel's position that the Convention does

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<sup>166</sup> *Ibidem.* para.32.

<sup>167</sup> *Ibidem.* paras. 36-40.

<sup>168</sup> *Ibidem.* para. 41.

<sup>169</sup> *Ibidem.* paras. 46-47, 56-57, 70, 75.

<sup>170</sup> *Ibidem.* para 60.

<sup>171</sup> *Ibidem.* para. 67.

<sup>172</sup> *Ibidem.* para.86.

not apply to Israel's occupation of the West Bank. Nonetheless, the Israeli Court's appliance of the Convention in cases like the *Beit Sourik* is surely a promising development. It is also helpful to have a statement in the same sphere from the ICJ. The Courts did agree on more than just the application of the Fourth Geneva Convention. They both found that the wall to some level violated humanitarian law, in the way that it disrupted the daily life of the civilian Palestinians.

However, there are far more differences than similarities between the Courts reasoning and judgements. The ICJ adopted a broad, sweeping holding that every section of the wall was in violation of international law. The Israeli Court focused narrowly on humanitarian law and Israeli administrative law. The Israeli Court employed in a detailed method, whereas the ICJ used a more generalized approach. As for Article 51, the ICJ briefly announced that it had "no relevance" to the case. It held that the case was different from those described in the Security Council terrorism resolutions of 2001 because the terror attacks originated within occupied territory, however it did not explain why that difference mattered.<sup>173</sup> The Israeli Court, on the other hand, spent several paragraphs developing, in detail, a three-part test of "proportionality". In the same way, the Israeli Court engaged in a careful, detailed, case-by-case analysis of a number of sections of the wall, it weighed security concerns against humanitarian and frequently found that unsatisfactory attention had been paid to humanitarian concerns. In comparison, the ICJ had little to say about the facts relating to security and terrorism. This silence was probably a result of the fact that Israel decided not to participate on the merits, but even without Israel's participation, it is difficult to understand why the Court did not consider the security concerns more detailed. For instance, in Israel, a lively debate has been going on for a whether the wall has in fact saved lives. Various statistics, comparing the number of deaths before and after the building of the wall, have been published.<sup>174</sup> But in the *Wall* case, the ICJ's decision contained no argument, or for that matter, any counterargument on these factual questions.

The differences point towards a deeper difference in the two Courts' conception of their judicial role. In the *Beit Sourik* case, the Court issued an opinion that can be understood and implemented by the military personnel responsible for the route of the wall, and that can be accommodated politically by the Israeli politicians responsible for authorizing and funding the wall. By contrast, in the *Wall* case, the ICJ is not only sweeping, it is primarily retrospective and relatively little concerned with practical

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<sup>173</sup> The *Wall* case, para 122.

<sup>174</sup> See e.g. Gutman, M, '*In The Last Five Months, We've Had Zero Attacks*', JM Post, June 2, 2004, available at [http://www.defenddemocracy.org/research\\_topics/research\\_topics\\_show.htm?doc\\_id=231576&attrib\\_id=8745](http://www.defenddemocracy.org/research_topics/research_topics_show.htm?doc_id=231576&attrib_id=8745) last visited September 29, 2007.

implementation. Those sections devoted to prospective implementation, fashioning practical relief to cure those violations, merely instructed Israel to tear down the entire wall. The question is whether any decision of the ICJ concerning the wall, would have enjoyed respect in Israel, it is however worth asking whether the Court might have achieved more had it engaged in a detailed, fact based, inquiry into whether certain sections of the wall could or could not be justified on security grounds.

## 5.5 A Development in the Right to Self-Defence?

As shown above, there is a disparity between the restrictive way of interpreting the right of self-defence by the ICJ, and the more expanding State practise. States are expanding the law of self-defence in several ways. According to some authorities and States, self-defence is considered lawful not only as a response to an armed attack that has occurred, but also in the case of a threat of an attack which still hasn't occurred, however, is imminent. It is important, however, that the threat is real. Notwithstanding the ICJ's refusal to take a stance of this interpretation, it has gained much recognition, something that State practise shows. Moreover, the notion of anticipatory self-defence has been stretched to not only include the danger of an imminent armed attack, but also latent threats. There is furthermore a tendency that self-defence against non-state entities gains legal recognition, even though the ICJ has yet not endorsed this doctrine.

Given the prohibition on the use of force under the UN Charter, States are stretching the meaning of self-defence to justify their forceful actions. A number of Declaratory Resolutions of the General Assembly have clarified the notion of prohibition of use of force and aggression, for instance stating the unlawfulness of armed reprisals, which the Charter's wording does not prohibit. One may wonder whether there is a need for a draft Declaratory Resolution on self-defence, in order to bring clarity to one of the most fundamental concepts of international law. The proposed resolution might take a clear position on the lawfulness of anticipatory self-defence, the meaning of imminence and on the scope of 'armed attack'. Additionally, the relation between "self-defence" and "state of necessity" should also be clarified, because States often invoke this latter plea to intervene in foreign territory when factual circumstances cannot allow it to rely on the right of self-defence. The plea for state of necessity cannot be invoked to circumvent the 'imminence' requirement under the doctrine of anticipatory self-defence. The Secretary General proposed in the *'In Larger Freedom'*<sup>175</sup> report that the Security Council could draft a resolution on the use of force, setting out the principles for the use of force, including instances of lawful use of force

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<sup>175</sup> *In Larger Freedom, Toward Development, Security and Human Rights for All*, New York, 2005, Annex to the report para 6. Available at <http://www.un.org/largerfreedom/annex.htm> last visited on September 1, 2007.

under Article 51. This proposal was however not endorsed by the World Summit in September 2005.

## 5.6 Conclusion

The controversies and difference of opinions among scholars and academics as well as within the ICJ itself after the *Wall* case imply that there is no clear new development in this case. People are looking at the Court to take a firm stand, and once and for all pronounce on the meaning and scope of Article 51. However, the situation today is different than before when so many attacks are coming from terrorist networks, organised or unorganised. Regretfully, I have to admit that I do not find the Court's judgment in the *Wall* case to give any clearer view on this issue. Why the Court is sidestepping this issue is hard to say but in these times of political disturbance and terrorist attacks and civil wars all around the world, it is more important than ever to have a guiding hand, someone, or something to lead the way. If UN is to succeed as the maintainer of international peace and security, then its highest judicial organ ought to make a stand and show the world the way. Someone needs to take a firm stand, so that the 'grey area', which surrounds the judgement, can be avoided. The world needs a strong Court that dares to make uncomfortable decisions and bring clarity to a world, so often, uncertain of what is legal.

## 6. Final Words

In this chapter, I would like to take the opportunity to add some of my own reflections and personal thoughts on a more general level regarding the situation in the Middle East Region. Obviously the work with this essay has made me thinking of the rules governing the law of self-defence. A pessimistic conclusion is that States would not like a detailed definition of self-defence that would limit their freedom of action and prefer to leave its boundaries underdetermined to exploit opportunities and openings given by this permissible use of armed force.

Given the sensitivity and importance of ICJ pronouncements on the legal rules governing the use of force, it would have been preferable for the Court to follow the examples of the *Nicaragua* or *Oil Platforms* cases, and to address the matter in detail. In the *Wall* case the ICJ should have explored the question, both of proportionality as well as necessity. More generally, the proceedings suggest that self-defence following the restrictive reading confirmed in the Courts' recent jurisprudence, in the *Nicaragua case*, the *Wall case*, and the *Armed Activities* case will simply not be applicable to chaotic "dirty" wars. This is not to suggest that a liberal, more flexible approach to the law of self-defence would solve the many problems raised under this matter. However, it demonstrates that the restrictive interpretation of Article 51 makes the law of self-defence especially difficult to apply in practice. However, I believe that the 'gap' between the interpretation of the Court and State practice is not going to decrease, but most likely, expand in a world where some States seem to disregard the rules applying to the rest of the world.

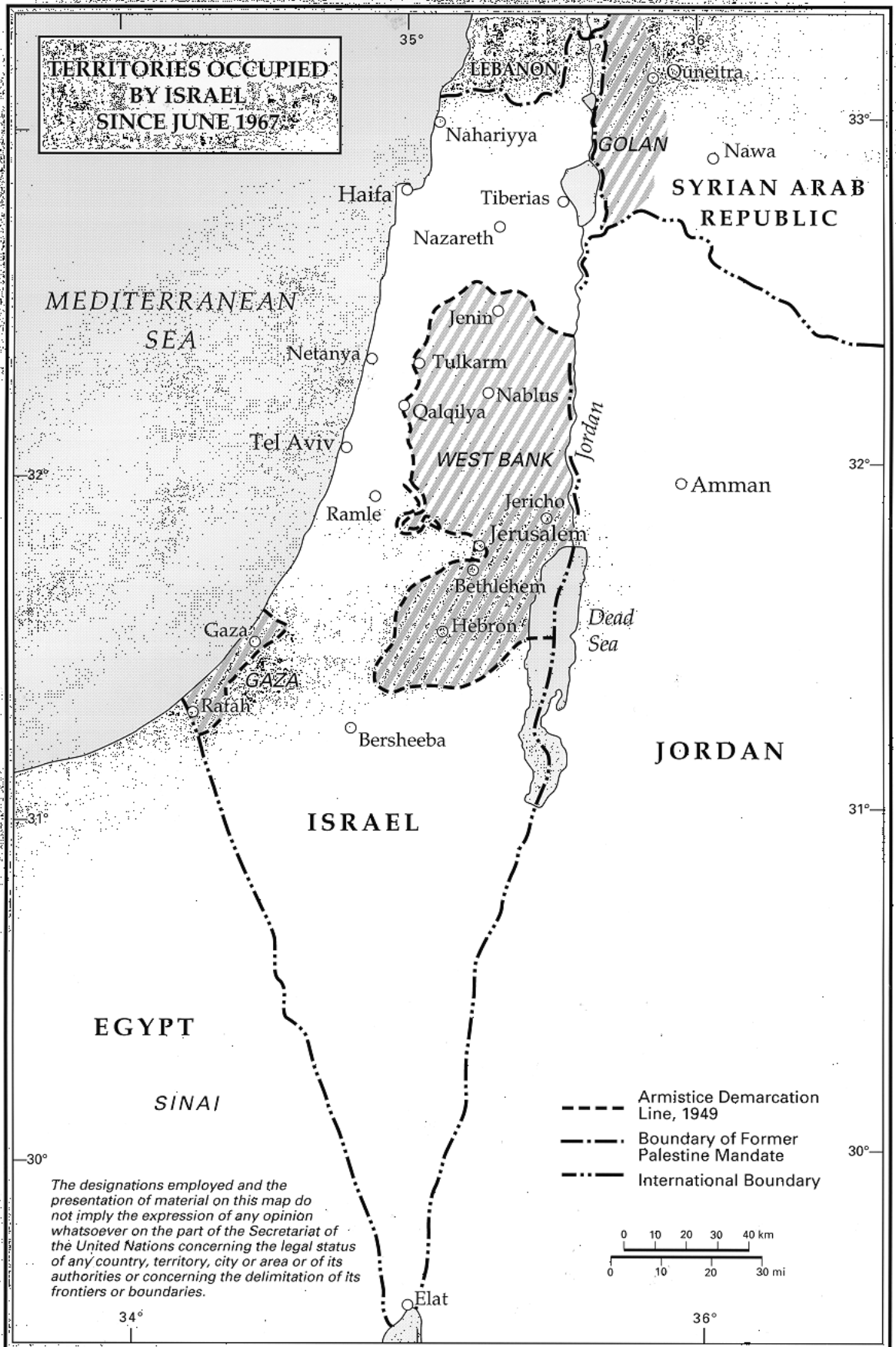
As for the wall, where do the decisions of the ICJ and Israel Supreme Court leave the wall, and more broadly, the Israel-Palestinian conflict? The decision of the ICJ is non-binding, whereas Israel has said it will abide by the decision of its own court. The broader implications are of course difficult to predict. The most likely conclusion is that the wall will make it harder to reach a comprehensive settlement of the conflict. It adds yet one more 'permanent status' issue to an already long list of intractable matters. Israel hopes that the wall will decrease terrorism, and that a less violent atmosphere might actually be more conducive to peace. It is however too early to assess whether the wall has actually achieved its goal of deterring terrorism, although it appears as if the terrorist attacks have decreased somewhat over the past years. Nevertheless, even if the wall does succeed this aim, it will also have enraged a substantial part of the Palestinian population and deprived thousands of farmers of access to their land. The best that can be hoped for is that the anger by the civilians can be curbed through a generous program of compensation in kind, or at least in money, and that mutual trust can be rebuilt over the years and decades to come.

What is the future for the wall? Israel insists it is temporary and will disappear as the terror attacks end. Unfortunately, terrorism is highly unlikely to disappear, certainly not in our lifetime. Furthermore, history has shown us that people generally engaged in battles, wars, and attacks since the day of dawn. On the contrary, the wall argument is likely to become a self-fulfilling prophecy; the more successful is it to suppress terror, the more likely it is to become permanent. And if the terror continues, the result will most likely be to improve the wall, not to tear it down. However depressing this prospect may seem, there is still cause for hope. The impulses that drove the Oslo process have not entirely disappeared. Israel still has an interest in relieving itself of the political, financial and military burdens of occupation, and the Palestinians have an interest in self-government and the benefits of statehood. Moreover, recent peace talks between the two leaders put hope for the future.

# Supplement A

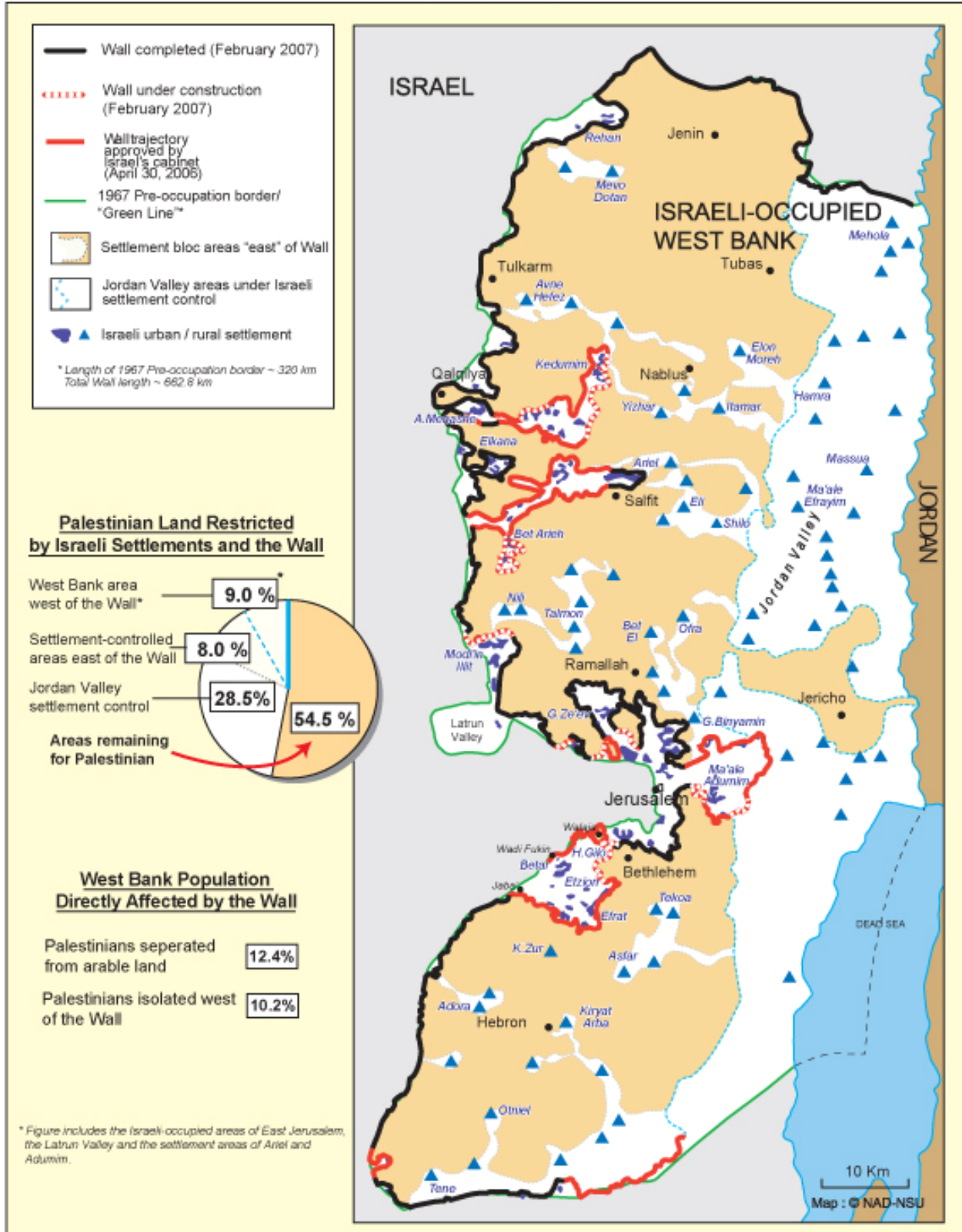






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