
Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case

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Abstract

In its recent Wall Opinion, the International Court of Justice gave rather short shrift to Israel's claims that the construction of the wall could be justified as an act of self-defence in the sense of Article 51 United Nations Charter. This article assesses the Court's approach and places it in the broader context of ICJ pronouncements on the use of force. 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 1986 merits judgment in the Nicaragua case, is difficult to bring in line with modern state practice, and increases the pressure to admit other, non-written, exceptions to Article 2(4) of the UN Charter.

1 Introduction: Use of Force and the Court

When in 1943–1944, the Informal Inter-Allied Committee (the ‘London Committee’) debated the future of international adjudication, it sought to avoid a politicization of the soon-to-be established International Court of Justice (ICJ). One of its main concerns was that ‘[a]ll possibility should be excluded of its being used to deal with cases which are really political in their nature, and which require to be dealt with by means of political decision and not by reference to a court of law.’¹ In the 60

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¹ Cf its report on the ‘Future of the Permanent Court of International Justice’, reproduced at 39 *AJIL* (1945) (Supplement) 17, at para. 56. On the work of the Committee see Marston, ‘The London Committee and the Statute of the International Court of Justice’ in A.V. Lowe and M. Fitzmaurice, *Fifty Years of the ICJ* (1996), at 40.

years following publication of the Committee's report, this concern has been widely echoed, especially in relation to what is commonly considered to be the most politicized of all issues, namely questions involving the use of force in inter-state relations. To give but a handful of examples, litigating states or commentators have argued that questions involving the use of inter-state force are generally outside the Court's jurisdiction;² that the Court is not in a position to handle ongoing conflicts and should therefore not exercise jurisdiction over them (even if it was otherwise established);³ or that armed conflicts fall within the exclusive competence of political bodies.⁴ More cautiously, others have argued that the Court's main contribution to the peaceful settlement of disputes lies in other, technical (allegedly 'non-political') fields of international law, whereas political issues cannot be dealt with appropriately by the ICJ.⁵

This is not the place to discuss in any detail the validity of these assertions, nor to engage with the underlying premise that some classes of disputes are inherently more political than others. Instead, it is worth pointing out that neither traditionally, nor in its more recent jurisprudence, has the Court shied away from pronouncing on disputes involving the legal rules governing the use of force by states.⁶ As a consequence, much of the modern law regulating the use of force by states is a product of the Court's interpretation and application of the United Nations Charter and the rules of customary international law. Furthermore, as Christine Gray has observed in a recent article, there has also been 'no general, principled reluctance by states to submit cases on such controversial subject matter [i.e. cases involving questions concerning

² See, e.g., Iran's argument, in the *Hostages case* [1980] ICJ Rep 3, at 8, para. 10, that the Hostage crisis 'represented only a marginal and secondary aspect of an overall problem ..., which involves 25 years of continual interference by the United States in the internal affairs of Iran ... and numerous crimes perpetrated against the Iranian people, contrary to ... all international and humanitarian norms'. For comment of Greenwood, 'The International Court of Justice and the Use of Force' in Lowe and Fitzmaurice, *supra* note 1, at 373, 374–375.

³ See notably Nigeria's sixth preliminary objection in the *Land and Maritime Boundary case* [1998] ICJ Rep 275, at 317–319, paras 95–102; similarly the United States' fourth preliminary objection in the *Nicaragua case* (Jurisdiction and Admissibility), addressed in paras 99–101 of the Court's judgment [1984] ICJ Rep 392, at 436–438. For a clear analysis of these and other cases see Gray, 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after *Nicaragua*', 14 *EJIL* (2003) 867; Schachter, 'Disputes Involving the Use of Force' in L. Físlér Damrosch (ed.), *The International Court of Justice at Crossroads* (1987), at 223.

⁴ See, e.g., *Nicaragua case*, *supra* note 3, at 431–436, paras 89–98, and 438–441, paras 102–108 (second, third, and fifth preliminary objections of the United States); see also the *Land and Maritime Boundary case*, *supra* note 3, at 304–309, paras 61–73 (Nigeria's third preliminary objection).

⁵ See, e.g., C. de Visscher, *Theory and Reality in Public International Law* (1957), at 331–332; Chayes, 'A Common Lawyer Looks at International Law', 78 *Harvard L Rev* (1965) 1396, at 1409; Baxter, 'The International Court of Justice: Introduction', 11 *Virginia J Int'l L* (1971) 291, at 292. For an assessment (ending on an equally sceptical note) see Sugihara, 'The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues' in A.S. Muller *et al.* (eds), *The International Court of Justice. Its Future after Fifty Years* (1997), at 117.

⁶ For a detailed assessment see the articles by Gray and Schachter, both *supra* note 3. The *Cameroon(Nigeria case* [2002] ICJ Rep 303, may be seen as an exception; in it, the Court did not address the parties' claims based on alleged violations of Art. 2(4) UN Charter; see Gray, *supra* note 3, at 882–884.

the use of force] to the Court'.⁷ From the very beginning of its existence, but increasingly since the 1990s, States have submitted to the ICJ cases bearing, directly or indirectly, on that matter. In the first contentious case of its history, *Corfu Channel*, the Court used the opportunity to underline the absolute scope of the prohibition against the use of force. Contrary to the United Kingdom's assertion in that case,⁸ it clarified that that prohibition not only covered large-scale operations threatening another state's territorial integrity or political independence, but all other uses of force, since these were 'contrary to the objects of the United Nations' in the sense of Article 2(4) UN Charter.⁹ In 1986, the use of force again played a central role in one of the Court's most controversial judgments, namely the *Nicaragua* case. In its judgment of 27 June 1986, the Court elaborated on the matter at some length, *inter alia* clarifying the scope of the customary prohibition on the use of force, confirming a restrictive understanding of the notion of 'armed attack'¹⁰ (triggering a right of self-defence), and opting for an equally narrow approach to the question of 'private force'¹¹ – a matter which will receive further attention below. More recently, in its *Oil Platforms* judgment of 6 November 2003,¹² 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'.¹³ As far as the substance of this re-statement of the law in times of crisis is concerned, the Court notably affirmed one crucial aspect of the *Nicaragua* case by distinguishing between armed attacks in the sense of Article 51 and lesser forms of force not triggering a right of self-defence.¹⁴

Seen against this background, it does not come as a major surprise that the Court, in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (the 'Wall case'),¹⁵ has again used the

⁷ *Ibid.*, at 904.

⁸ *Corfu Channel case*, ICJ Pleading, vol. III, 296. For similar views see A. D'Amato, *International Law: Process and Prospect* (1991), at 57–73; F. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd edn, 1997), at 150–151.

⁹ See [1949] ICJ Rep 4, at 35, where the Court stressed that even temporary infringements of another state's territorial integrity or political independence constituted a violation of Art. 2(4); see further Ranzelzhofer in B. Simma, *The UN Charter – A Commentary* (2nd edn, 2002), at Art. 2(4), marginal note 35; M. Akehurst and P. Malanczuk, *A Modern Introduction to International Law* (7th edn, 1998), at 309–310; Greenwood, *supra* note 2, at 378–379.

¹⁰ [1986] ICJ Rep 14, at 101–104, paras 101–195, where the Court distinguished 'the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'. For comment see Ranzelzhofer, *supra* note 9, at Art. 51, marginal note 4 and 20; for criticism see Y. Dinstein, *War, Aggression and Self-Defence* (3rd edn, 2001), at 173–176; Greenwood, *supra* note 2, at 380–381.

¹¹ *Supra* note 10, at 64–65, para. 115, and 104, para. 195.

¹² [2003] ICJ Rep 161.

¹³ Cf *ibid.*, Separate Opinion of Judge Simma, at 324. The Court's approach in that case has been heavily criticized as it was not necessary to decide the case, and arguably went beyond the Iran's *petitum*: see *ibid.*, Separate Opinion of Judge Kooijmans, at para. 29; Separate Opinion of Judge Buergenthal, at paras 13–14; Separate Opinion of Judge Owada, at paras 14 ff. For further comment see Small, 'The Oil Platforms Case: Jurisdiction Through the – Closed – Eye of the Needle', 3 *The Law and Practice of International Courts and Tribunals* (2004) 113.

¹⁴ *Oil Platforms case*, *supra* note 12, at 186–192, paras 51–64.

¹⁵ 43 ILM (2004), 1009; also available at www.icj-cij.org.

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,¹⁶ it assessed whether Israel's conduct could be justified with reference to the right of self-defence under Article 51 of the UN Charter. Given the influence of its previous statements on the use of force, the Court's answer to this question deserves an in-depth analysis. This article seeks to provide that analysis. The Court's treatment of the matter is outlined in Section 2. The article then analyses the main features of its reasoning in Section 3, evaluates alternatives to the Court's approach in Section 4 and, finally, assesses its implications in Section 5.

2 The Court's Treatment of the Self-defence Issue

Before assessing the persuasiveness of the Court's reasoning, it is necessary to give a proper account of its analysis of the use of force issue in the *Wall* case. This can be done rather briefly, because – unlike in the earlier cases referred to above – the Court treated the matter rather lightly in this case. This may be explained by reference to the lack of argument, in the written and oral hearings, on the use of force.¹⁷ Still, the Court seemed compelled to respond to Israel's claim, made before the UN General Assembly and reproduced in the UN Secretary-General's dossier, that 'the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter', as interpreted in recent resolutions of the UN Security Council.¹⁸

The Court's response to this claim can be found in one single paragraph of its Advisory Opinion (para. 139), which provides:

139. 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 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. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

In addition to Article 51, the Court assessed whether the construction of the wall could be justified by considerations of necessity.¹⁹ In this respect, the question was left

¹⁶ *Ibid.*, paras 115–137.

¹⁷ See below, Section 3C for comment.

¹⁸ UN Doc. A/ES-10/PV.21, at 6.

¹⁹ *Wall* case, *supra* note 15, at para. 140.

open whether necessity could serve at all as a justification for Israel's wrongful acts. Instead, 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,²⁰ were not met, as 'the construction of the wall along the route chosen' was not 'the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction'.²¹ Given that the present comment is intended to focus on use of force issues, to which necessity probably does not apply at all, or at least only in exceptional instances,²² this aspect of the Court's reasoning will be left aside here. It deserves to be noted, however, that the Court, in its discussion of necessity, refrained from making general observations about the state of the law. Instead, rather pragmatically, the Court dismissed necessity *on the facts*, while cautiously avoiding any general position on the availability of necessity.²³

The Court's treatment of self-defence stands in marked contrast; it is characterized by very firm views on the state of the law. This begins with the Court's rather bold observation that Article 51 'has no relevance in th[e] case',²⁴ which goes beyond usual concluding sentences, such as 'as a consequence, self-defence does not justify the construction of a wall' or 'the Court concludes that the requirements of Article 51 are not met'. In addition, three features stand out:

- (1) As regards the substance of its decision, the Court's reasoning seems to be based on two inter-related arguments. First, from the text of Article 51, the Court deduced that self-defence could only be exercised against an 'armed attack by one State against another State'.²⁵ For the sake of simplicity, this may be called the 'State attack argument'. In the circumstances of the case, this reading of Article 51 meant that Israel could not claim to be acting in self-defence because, irrespective of all other problems, terrorist attacks originating within the Palestinian territory did not qualify as 'armed attacks by another State'.
- (2) Secondly, the Court read Article 51 to require an armed attack that 'originates ... outside th[e] territory' of the state claiming to act in self-defence – one might speak of the 'external origin argument'. In its view, attacks on Israel were not

²⁰ 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:

Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and 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:

The international obligation in question excludes the possibility of invoking necessity; or

The State has contributed to the situation of necessity.'

The Arts are annexed to GA Res. 56/83 (2001) and are also reproduced in J. Crawford (ed.), *The ILC's Articles on State Responsibility* (2001).

²¹ *Wall case*, *supra* note 15, at para. 140.

²² See para. 20 of the ILC's commentary on Art. 25, reproduced, e.g., in Crawford, *supra* note 20, at 185.

²³ For further comment on this aspect see below, Section 4.

²⁴ *Wall case*, *supra* note 15, at para. 139.

²⁵ *Ibid.*

sufficiently ‘external’ to trigger a right of self-defence in the sense of Article 51. Instead, they emanated from an area over which ‘Israel exercises control’.²⁶ This in turn served as a basis for distinguishing the *Wall* case from the situation underlying Security Council Resolutions 1368 (2001) and 1373 (2001), in which the Security Council had had to deal with terrorist attacks emanating ‘from outside’, i.e. from an area not controlled by the victim state.

- (3) Lastly, it is interesting that, unlike in other decisions involving use of force issues, the Court did not seem to consider the matter to be of crucial relevance: its reasoning on the law of self-defence is thus contained in one single paragraph comprising no more than 12 lines (three of which reproduce the text of Article 51). The brevity of the Court’s pronouncement presents a third aspect that merits discussion.

3 Critical Comment

In assessing the Court’s treatment of the self-defence issue, it seems helpful to focus on the main features identified in the previous section.²⁷

A ‘External Attacks’

The first of the two substantive arguments referred to by the Court, the ‘external origin argument’, raises important questions about the availability of self-defence in situations not involving inter-state force; or – as the Court put it – situations involving attacks originating within territory over which the state relying on self-defence ‘exercises control’.²⁸ Underlying this argument there would appear to be the Court’s concern to clarify that Article 51 could not be invoked against ‘internal attacks’ or ‘attacks from within’. As Judge Kooijmans observed in very clear terms, the right of self-defence ‘is a rule of international law and thus relates to international phenomena’.²⁹ At some basic level, this concern is of course entirely reasonable: for example, it goes without saying that Article 51 cannot justify responses against armed attacks, whatever their gravity, committed within a state, by that state’s own nationals. The real question, however, is not one of principle, but one of application: Under what circumstances can an armed attack be considered *sufficiently internationalized* to trigger a right of self-defence in the sense of Article 51? Alternatively, in Judge Kooijmans terms, when does an armed attack become an ‘international phenomenon’?³⁰

In this respect, it may seem rather surprising that, in view of the majority, attacks originating within the Palestinian territories should not be sufficiently international to meet the required threshold. Formally, they clearly emanated from outside Israel,

²⁶ *Ibid.*

²⁷ For a fuller treatment of the issues raised in Sections 3A and 3B see Bruha and Tams, ‘Self-Defence Against Terrorist Attacks. Considerations in the Light of the ICJ’s *Israeli Wall* Opinion’ in K. Dicke *et al.* (eds), *Weltinnenrecht. Festschrift für Jost Delbrück* (2005), at 85–100.

²⁸ *Wall* case, *supra* note 15, at para. 139.

²⁹ *Ibid.*, Separate Opinion of Judge Kooijmans, at para. 36.

³⁰ See *ibid.*

i.e. from foreign territory, which introduced an international element. Moreover, throughout the *Wall* proceedings, the Court stressed the international character of the Israeli-Palestinian relations by, for example, stressing the right of the Palestine people to self-determination and Palestine's right to participate in the case³¹ or the applicability of international humanitarian law to the occupied territories.³² Judge Higgins thus seems justified in accusing the majority of 'formalism of an uneven-handed sort'.³³ In her view (shared by Judge Buergenthal³⁴), '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.'³⁵

In the light of these considerations, it seems indeed rather difficult to suggest that attacks originating within the West Bank or the Gaza strip are not 'international phenomena'. Nevertheless, it is submitted that the majority was right in declaring Article 51 inapplicable. The main argument that would seem to support this conclusion, however, has little to do with the internal or international character of the attacks, but concerns the status of the Palestinian territory. In another section of the Opinion, the Court had explained at length that these territories are 'occupied territories', governed by the law of belligerent occupation.³⁶ As Palestine observed in its written pleadings,³⁷ this factor in itself would seem to preclude the application of Article 51. Although occupied territory is evidently 'foreign', the means of defence available to occupying powers seem to be governed exclusively by the law of belligerent occupation. A host of provisions, found in the Fourth Geneva Convention as well as the Hague Regulations, recognize the right (and indeed the duty) of occupants to maintain public order within an occupied territory.³⁸ This, however, has important consequences on the availability of means of defence (such as Art. 51) deriving from the *jus ad bellum*. At least during an on-going occupation, it would be an 'impermissible confusion' (as the counsel for Palestine observed during the oral

³¹ Order of 19 Dec. 2003, available at www.icj-cij.org, at para. 4; *Wall* case, *supra* note 15, at para. 118.

³² *Ibid.*, at para. 101.

³³ *Ibid.*, Separate Opinion of Judge Higgins, at para. 34.

³⁴ *Ibid.*, Declaration of Judge Buergenthal, at para. 6.

³⁵ *Ibid.*, Separate Opinion of Judge Higgins, at para. 34.

³⁶ *Wall* case, *supra* note 15, at paras 89–101.

³⁷ See the Written Observation by Palestine, available at www.icj-cij.org; at para. 534, where Palestine referred to Israel's right, under the *jus in bello*, to take 'forcible measures against civilians', and went on to observe: '[t]hat exhausts the legal rights of an Occupying Power. A State may not use all of its powers under the Fourth Geneva Convention and the Laws of War and then decide that those powers are inadequate and then invoke the more general right of self-defence, which belongs to the *jus ad bellum*'.

³⁸ See in particular Art. 43 of the 1907 Hague Regulations, reproduced in D. Schindler and J. Toman (eds), *The Laws of Armed Conflict* (1988), at 69, pursuant to which the occupant is entitled to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety'. Similar language can be found on in Art. 64 of the Fourth Geneva Convention. Furthermore, Art. 27(4) of the Fourth Geneva Convention, 75 UNTS 287, recognizes the right of conflicting parties to 'take [the necessary] measures of control and security in regard to protected persons'.

As the Court observed in para. 89 of the Opinion, the Hague Regulations (to which Israel was not a party) had acquired customary status.

pleadings)³⁹ to recognize the existence of a general right of self-defence in the sense of Article 51 alongside public order provisions of the *jus in bello*. As the more specific regulation tailored to the situation of belligerent occupation, these derogate from the general rules governing resort to force against armed attacks.

Unfortunately, the majority, having affirmed Israel's status as an occupying power, did not assess the consequences flowing from that status on the law of self-defence.⁴⁰ Had it done so, it would have had to analyse whether the construction of the wall could have been justified under any of the public order provisions referred to above – an assessment which might have brought about helpful clarifications regarding the scope and limits of occupants' rights during long-term occupation.

As far as the law of self-defence is concerned, the preceding considerations suggest that occupying powers cannot rely on self-defence in order to justify public order measures aimed at suppressing attacks originating within the occupied territories. In short, it is submitted that Article 51 was inapplicable not because the Israeli-Palestinian relations did not qualify as 'international phenomena', but because the law of belligerent occupation derogated from it. The majority therefore rightly concluded that Article 51 could not justify Israel's conduct within the Palestinian occupied territories. Its brief treatment of the 'external origin argument', however, touches upon, rather than explores, the underlying conceptual issue.

B 'State Attacks'

The Court's second argument (the 'state attack argument') is considerably more problematic. It would appear evident that any pronouncement by the United Nations' 'principal judicial organ'⁴¹ on the possibility of the use of self-defence against attacks by non-state actors would be extremely topical. Although the underlying question (whether armed attacks by non-state actors can trigger a right of self-defence) had been the subject of intense discussion for a long time,⁴² it has gained prominence in the course of debates on anti-terrorist measures since the late 1990s. In order to appreciate the Court's pronouncements, these debates need to be briefly recapitulated. Two stages of the development of the law can be distinguished.

The *first stage* – one might speak of the traditional approach – is characterized by a restrictive understanding of self-defence, epitomized by the Court's 1986 *Nicaragua* judgment.⁴³ In that case, the Court had noted that armed attacks by non-state

³⁹ CR 2004/1, available at www.icj-cij.org, at 44 (Professor *Abi-Saab*).

⁴⁰ Cf *Murphy*, 'Self-Defense and the *Israeli Wall* Opinion (An *Ipse Dixit* from the Court?', 99 *AJIL* (2005) 62, at 71, for a similar observation.

⁴¹ Cf Art. 92 UN Charter.

⁴² See notably C. Kreß, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater* (1995); and further O'Brien, 'Reprisals, Deterrence, and Self-Defense in Counterterror Operations', 30 *Virginia J Int'l L* (1990) 421; Bowett, 'Reprisals Involving Recourse to Armed Force', 65 *AJIL* (1971) 31; Brownlie, 'International Law and the Activities of Armed Bands', 7 *ICLQ* (1958) 712; Sofaer, 'Terrorism and the Law', 64 *Foreign Affairs* (1986) 901.

⁴³ *Supra* note 10.

actors could, in principle, trigger a right of self-defence. However, for that to be the case, the non-state conduct would have to be imputable to another state. According to the *Nicaragua* test, attribution (as the Court noted when examining Nicaragua's claims) required 'effective control', by another state, of the operations;⁴⁴ in addition (as it observed when dismissing the United States' reliance on self-defence) the mere 'provision of weapons or logistical or other support' was not sufficient to amount to an armed attack.⁴⁵ The judgment, while controversial at the time,⁴⁶ was in line with the general hostility with which the international community responded to assertions, by Israel⁴⁷ or South Africa,⁴⁸ that cross-border incursions in pursuit of terrorists or insurgents could come within the scope of Article 51.⁴⁹

As is well-known, the *Nicaragua* test has been the subject of much discussion since 1986. In its *Tadic* judgment, the ICTY Appeals Chamber famously disavowed it,⁵⁰ for which it was heavily criticized by the ILC in its Articles on State Responsibility.⁵¹ Given the prominence of these inter-institutional quarrels, the fact that neither the ILC nor *Tadic* questioned the traditional, restrictive reading on which *Nicaragua* was based tends to be overlooked. Differences of detail notwithstanding, it seems to have been broadly agreed that the right of self-defence could only be exercised against armed attacks that were either committed by a state, or imputable to it because of its controlling influence over the actual perpetrators.⁵²

⁴⁴ *Ibid.*, at 62, para. 109, and 64–65, para. 115.

⁴⁵ *Ibid.*, at 104, para. 195.

⁴⁶ See, e.g., Judge Schwebel's dissent, *ibid.*, at 348–352, paras 174–181; R. Higgins, *Problems and Process* (1994), at 250–251; Sofaer, *supra* note 42; Rostow, 'Disputes Involving the Inherent Right to Self-Defense', in L. Filsler Damrosch (ed.), *The International Court of Justice at Crossroads* (1987), at 264 (especially at 278–287).

⁴⁷ Cf. e.g., SCOR, 36th year, 2292nd mtg. 17 July 1981, UN Doc. S/PV.2292, at 5, para. 54: 'under international law, if a State is unwilling or unable to prevent the use of its territory to attack another State, that latter State is entitled to take all necessary measures in its own defence' (Mr. Blum, representing Israel). For more detail see S.A. Alexandrov, *Self-Defense against the Use of Force in International Law* (1996), at 174, and Levenfeld, 'Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law', 21 *Columbia J Transnat'l L* (1982/83) 1.

⁴⁸ See, e.g., [1981] UNYB 217; [1980] UNYB 263; and see Alexandrov, *supra* note 47, at 180; Kühn, 'Terrorism and the Right of Self-Defense', 6 *S African Yearbook Int'l L* (1980) 42.

⁴⁹ For a clear assessment see C.D. Gray, *International Law and the Use of Force by States* (2nd edn, 2004), at 160 ff.

⁵⁰ ICTY, Case IT94–1, *Prosecutor v Tadic*, 38 ILM (1999) 1518, at paras 116–145. For scholarly debate on this controversy see, e.g., de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadic* case, and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', 72 *BYIL* (2001) 255; Kreß, 'L'organe *de facto* en droit international public, réflexions sur l'imputation à l'Etat de l'acte d'un particulier à la lumière des développements récents', 105 *RGDIP* (2001) 93. For pertinent observations on why the conflict between *Tadic* and *Nicaragua* should have been avoided see paras 17–24 of Judge Shahabuddeen's Separate Opinion appended to the *Tadic* judgment.

⁵¹ Cf para. (8) of the ILC's explanatory commentary on Art. 8 of its Articles on State Responsibility (reproduced in UN Doc. A/56/10 (2001), at 43).

⁵² According to Judge Kooijmans, the 'traditional understanding' referred to in the text 'ha[d] been the generally accepted interpretation for more than 50 years'; see para. 35 of his Separate Opinion on the *Wall* case, *supra* note 15.

A glance at the legal literature published since the turn of the century suggests that the traditional, restrictive reading has come under strain.⁵³ As regards state practice, a considerable number of states have, since the late 1990s, embraced the broader reading of Article 51 formerly maintained by Israel and South Africa. States that have exercised or asserted a right to exercise self-defence against armed attacks by non-state actors (even if their conduct could not be attributed to another state under the *Nicaragua* or *Tadic* tests) include Iran,⁵⁴ Russia,⁵⁵ and the United States,⁵⁶ while Israel maintained its position.⁵⁷ Crucially, other states have been far more inclined to accept these claims than was the case two decades earlier, when there was near-unanimous rejection of Israel's or South Africa's very similar assertions. With respect, more specifically, to Israel, many states continued to condemn its 2003 anti-terror raids into Syria, but the near-unanimity had begun to fade.⁵⁸

Lastly, and most importantly, confronted with the 9/11 bombings, the international community has expressly confirmed that self-defence could be exercised against armed attacks not attributable (under the traditional restrictive test) to another state.⁵⁹ Summarizing the international response in very clear terms, Antonio Cassese noted: 'It would thus seem that in a matter of a few days, practically all states (all members of the Security Council plus members of NATO other than those sitting on the Security Council, plus all states that have not objected to resort to Art. 51) have come to *assimilate* a terrorist attack by a terrorist organization to an armed aggression *by a State*, entitling the victim state to resort to individual self-defence.'⁶⁰ As Judge Kooijmans expressly observed, the international community's response to

⁵³ For the most detailed assessment see C. Wandscher, *Internationaler Terrorismus und Selbstverteidigungsrecht* (PhD thesis, Kiel, 2005, on file with the author); in addition, see, e.g., Stahn, "'Nicaragua is Dead, Long Live Nicaragua' – the Right to Self-defence Under Art. 51 UN-Charter and International Terrorism' in C. Walter *et al.* (eds), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (2004), at 827; Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law', 12 *EJIL* (2001) 993; Krajewski, 'Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen', 40 *Archiv des Völkerrechts* (2002) 183.

⁵⁴ Cf UN Doc. S/1999/781, where Iran justified its cross-border incursions into Iraq, directed at the MKO movement. For details see Wandscher, *supra* note 53, at 141–142.

⁵⁵ See *ibid.*, at 194, for further information about Russia's assertion of the right to respond extraterritorially, by force, to Islamist terror networks, irrespective of their involvement with state (or at least sub-state official) structures.

⁵⁶ Cf UN Doc. S/1998/780, for the US' invocation of Art. 51 in order to justify the bombing of Al Qaeda bases in Sudan and Afghanistan. For further details see Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan', 24 *Yale J Int'l L* (1999) 537.

⁵⁷ Cf UN Doc. S/7887, at 4, for Israel's reliance on self-defence to justify the anti-terrorist raids into Syria undertaken in Oct. 2003. For summaries of the international response see Gray, *supra* note 49, 174–175; Wandscher, *supra* note 53, at 192–193.

⁵⁸ Cf Gray, *supra* note 49, at 174–175.

⁵⁹ See notably SC Res. 1368 (2001), and 1373 (2001), as well as unanimously adopted resolutions by NATO and OAS member States (reproduced in 40 *ILM* (2001) 1267 and 1273 respectively). For a very clear account of the international community's response to the 9/11 attacks see Murphy, 'Contemporary Practice of the United States Relating to International Law', 96 *AJIL* (2002) 237; for clear analyses cf, e.g., Gray, *supra* note 49, at 159–170; Krajewski, *supra* note 53.

⁶⁰ Cf *supra* note 53, at 996–997.

the 9/11 bombings thus signalled a new approach to Article 51, which could not be brought into line with the restrictive *Nicaragua* approach.⁶¹

As this brief account suggests, the current state of the law regarding self-defence against non-state violence is not easy to assess. It may be premature to assert (as many writers have done⁶²) that Article 51 no longer requires any state involvement, and could be invoked against armed attacks irrespective of the attacker's character. This in particular because such a re-reading would not explain why measures of self-defence directed against non-state perpetrators could incidentally affect the host state's territorial sovereignty.⁶³ However, the least that can be said is that the traditional understanding of self-defence, set out in *Nicaragua*, is now no longer 'generally accepted'.⁶⁴ International practice since the late 1990s rather points towards a more liberal interpretation, pursuant to which Article 51 covers forcible measures directed against terrorist organizations operating on the territory of another state. Compared to other forms of non-state violence, this would mean a stricter standard of imputability, pursuant to which states harbouring terrorist organizations would be legitimate targets of forcible acts of self-defence – a development that would be in line with the more general evolution of the international rules against terrorism since the late 1990s.

The preceding considerations suggest that Israel's self-defence claim could have raised a host of intricate issues. That the Court decided to ignore them completely, and simply quoted the text of Article 51 (from which it purported to deduce its interpretation) is very curious indeed. This in particular because the wording of Article 51 quite obviously 'is not capable of carrying the load the [Court] seek[s] to place on it':⁶⁵ it contains no reference to state involvement in the armed attack, but speaks of an 'armed attack' without any additional qualification. Paradoxically, the open wording of the provision had generally been considered to provide the best support for a broad reading of it.⁶⁶ Had the Court wanted to justify the traditional, restrictive reading of Article 51, it would thus have had to move beyond a grammatical interpretation. But more importantly, it ought to have engaged with the more recent practice supporting a broader understanding of Article 51. As it stands, the majority's reliance on the 'state attack argument' remains a mere assertion.

⁶¹ *Wall case*, *supra* note 15, Separate Opinion of Judge Kooijmans, at para. 35. Cf Stahn, *supra* note 53, at 838: '[i]f there is one certainty after September 11, it is the turnover of the ICJ's "effective control" test in *Nicaragua*'.

⁶² See, e.g., Murphy, *supra* note 40; Krajewski, *supra* note 53; Becker, 'IGH-Gutachten über "Rechtliche Konsequenzen des Baus einer Mauer in den besetzten palästinensischen Gebieten"', 43 *Archiv des Völkerrechts* (2005) 218, at 235–236; Bruha, 'Kampf gegen den Terrorismus als neue Rechtfertigungsfigur für die Anwendung militärischer Gewalt', in T. Bruha, T. Heselhaus, and S. Marauhn (eds), *Legalität, Legitimität und Moral - können Gerechtigkeitspostulate Kriege rechtfertigen?* (2005).

⁶³ Cf Delbrück, 'The Fight Against Global Terrorism: Self-Defense or Collective Security as International Police Action?', 44 *German Ybk Int'l L* (2001) 9, at 18 ff.

⁶⁴ See also *Wall case*, *supra* note 15, Separate Opinion of Judge Kooijmans, at para. 35.

⁶⁵ Cf the Court's statement in *South West Africa* [1966] ICJ Rep 6, at 42, para. 72.

⁶⁶ Cf Becker, *supra* note 61, at 236; Dinstein, *supra* note 10, at 214; Kreß, *supra* note 42, at 207. For critical observations on the Court's 'deduction' see also *Wall case*, *supra* note 15, Separate Opinion of Judge Kooijmans, at para. 35; Declaration of Judge Buergenthal, at para. 6; Separate Opinion of Judge Higgins, at para. 33.

C The ‘Telegraphic Nature’⁶⁷ of the Court’s Statement

One final remark on the length of the Court’s treatment of the question may be in order. It can be relatively brief (although not quite as brief as the Court’s assessment). In the light of the foregoing considerations, it is indeed difficult to disagree with Sean Murphy, who considered the Court’s pronouncement to be ‘startling in its brevity’.⁶⁸ Iain Scobbie, while recognizing the ‘telegraphic nature’⁶⁹ of paragraph 139, has sought to defend the Court’s approach, arguing that the matter was not fully argued by participants and underlining the Court’s discretion in responding to requests for advisory Opinions.⁷⁰ However, this explanation may be overly benevolent. The very existence of paragraph 139 suggests that the Court felt that Israel’s reliance on self-defence merited some response. Clearly, both in contentious and advisory proceedings, the Court is free to emphasize aspects of its decision by setting out the reasoning upon which they are based in more detail. However, the authority of its pronouncements (especially in non-binding advisory proceedings) depends on the cogency of the Court’s reasoning.

In the present instance, it is submitted that the startling brevity of the Court’s pronouncement on the law of self-defence weighs negatively on its authority. If, in the view of the majority, Article 51 had ‘no relevance’ to the case⁷¹ (*i.e.* was *per se* inapplicable), this finding on the state of the law governing self-defence should have been justified by legal argument. If, more particularly, the majority, notwithstanding recent practice to the contrary, wished to emphasize the ‘state attack argument’, one might have expected it to engage with the counter-argument so prominently set out in international documents and the literature, and to explain why they had not led to a broadening of Article 51. More generally, 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. While there may be virtue in clear and succinct expositions of the law, the Court’s treatment of the ‘state attack argument’ is not balanced and fails to appreciate the complexity of the issue.

4 Alternatives

The preceding considerations suggest that the Court’s reasoning on the question of self-defence is highly problematic. This, however, does not mean that the Court was wrong to reject claims based on self-defence. Quite to the contrary, as far as the *result* of its analysis is concerned, it is submitted that the Court was entirely correct to

⁶⁷ Scobbie, *supra* note 17, at 87.

⁶⁸ Murphy, *supra* note 40, at 62. For a similar observation see Khan, ‘Sicherheitszaun oder Apartheidsmauer? Das Gutachten des Internationalen Gerichtshofes vom 9. Juli 2004 zu den israelischen Sperranlagen im Westjordanland’, 79 *Die Friedens-Warte* (2004) 345, 363–364.

⁶⁹ Scobbie, *supra* note 17, at 87.

⁷⁰ *Ibid.*

⁷¹ Cf *Wall case*, *supra* note 15, at para. 139.

conclude that the building of the wall could not be justified on the basis of Article 51. This, in fact, was common ground among an overwhelming majority of judges, notably most of those who expressed concerns about the majority's reasoning, notably Judge Higgins and Judge Kooijmans.⁷²

As noted in the previous section, the Court, in order to justify its holding on Article 51, might have placed greater emphasis on the 'external origin argument', and could have explored the conceptual problem posed by the inter-relation between the *jus ad bellum* and the *jus in bello*.⁷³ In addition, it is submitted that the requirement of proportionality would have provided another (and perhaps more elegant) way of dismissing Israel's self-defence claim without entering into detailed considerations (which the Court evidently did not want to engage in). That measures of self-defence, in order to be justified, have to be proportionate (i.e. necessary and commensurate) is generally accepted; equally, it is beyond doubt that proportionality has to be assessed having regard to concrete circumstances in which the allegedly justified measure has been taken.⁷⁴ On that basis, it would seem that Israel's claim could have been dismissed rather easily. On the basis of the available evidence, it was by no means obvious that Israel, in order to respond to the alleged 'armed attack', had to build a wall. More importantly, as Judge Higgins pointed out in her Separate Opinion, very little suggested that the wall, in order to be effective, had to follow the specific route chosen by Israel, cutting, at least partly, through the occupied territory.⁷⁵ Given the strict limits of the proportionality test, this factor alone might have been sufficient to reject Article 51.

In addition, it deserves to be mentioned that had the Court focused on the question of proportionality, it could have treated claims based on self-defence in precisely the same way in which it had addressed the question of necessity. As noted above,⁷⁶ when rejecting that justification the Court had refrained from general assertions about the state of the law but instead focused on the narrower issue of proportionality.

Had it wanted to avoid a fuller treatment of the problems raised by Israel's self-defence claim, the Court should have avoided, it is submitted, the principled language found in paragraph 139 of the Opinion, and instead addressed the question of proportionality.

⁷² See *ibid.*, Separate Opinion of Judge Higgins, at paras 33–35; Separate Opinion of Judge Kooijmans, at paras 35–36, Judge Buergenthal's position was equivocal: see paras 5–6 of his Declaration.

⁷³ See above, Section 3A.

⁷⁴ Randelzhofer, *supra* note 9, at Art. 51 marginal note 42; Delbrück, 'Proportionality', 3 *EPIL* (1997) 1141. See also Gray, *supra* note 49, at 120: '[a]s part of the basic core of self-defence, all states agree that self-defence must be necessary and proportionate'

⁷⁵ See para. 35 of Judge Higgins' Separate Opinion in *Wall* case, *supra* note 15: 'While the wall does seem to have resulted in a diminution on attacks on Israeli civilians, the necessity and proportionality for the particular route selected, with its attendant hardships for Palestinians uninvolved in these attacks, has not been explained.' In addition, Judge Higgins also questioned whether non-forcible measures (such as the construction of a wall) could at all amount to self-defence, or whether that concept covered only forcible measures (*ibid.*). This, however, seems to be based on an unduly restrictive reading of Art. 51. There is little indication in Art. 51 that measures of self-defence has to involve the use of force; where the defending state seeks to defend itself by measures not involving recourse to force (e.g., blockades), these will *a fortiori* be justified.

⁷⁶ See above, Section 2.

Why the Court decided against this approach, which would have accommodated the concerns of Judges Higgins and Kooijmans, is a matter for speculation. What the previous section suggests is that the Court could have dealt with Israel's claims summarily, if it had opted to reject them on the narrower, factual basis.

5 Implications

The decision of the majority to rely on broader considerations influences the implications of the *Wall* case on the development of the law of self-defence. This in particular because paragraph 139 of the Opinion, in its general approach to Article 51, is in line with the Court's *Oil Platforms* judgment of 15 December 2003.⁷⁷ Taken together, both decisions strongly reaffirm the traditional, restrictive reading of self-defence as set out in the Court's *Nicaragua* judgment. Within less than a year, the Court has now confirmed that judgment's two most controversial holdings on the law of self-defence: the *Oil Platforms* judgment leaves little doubt that, indeed, the prohibition against the use of force can be breached in a 'minor' way, in which case the state victim of that minor breach cannot retaliate by way of self-defence.⁷⁸ The more recent pronouncement in the *Wall* Opinion shows the Court's unwillingness to embrace broader readings of Article 51, which would recognize a right of self-defence against armed attacks by non-state actors not directed and controlled by another state.

From a more general perspective, this has important consequences on the role of Article 51 within the broader spectrum of forcible responses against violence. The restrictive interpretation now confirmed ensures that Article 51 is applicable rather infrequently. States seeking to defend themselves against low-level warfare (the most common form of inter-state force) or private violence not controlled or directed by another state will not be able to rely on self-defence. Borrowing a much-quoted phrase which refers to another famous concept of international law, one might say that self-defence, read restrictively, becomes 'a vehicle that hardly ever leaves the garage'.⁷⁹

Whether this is a positive development seems debatable. Of course, at first glance, a restrictive interpretation of Article 51 further reduces the number of instances in which states are entitled to use force unilaterally. Upon analysis, however, it is much more realistic that states, instead of invoking self-defence, will respond to low-level warfare or private violence by relying on other, non-written justifications. While an expansive reading (indicated by recent practice) might have brought these responses within the scope of Article 51 (and subjected them to the procedural and substantive conditions of that provision),⁸⁰ the restrictive reading confirmed by the Court increases the pressure to recognize further non-written exceptions to Article 2(4).⁸¹

⁷⁷ *Supra* note 12.

⁷⁸ See *supra* note 14 for references; and see Raab, "Armed Attack" after the *Oil Platforms* Case', 17 *Leiden J Int'l L* (2004) 719, for comment.

⁷⁹ Cf Brownlie, 'Comment', in J.H.H. Weiler and A. Cassese (eds), *Change and Stability in International Law-Making* (1988), at 110 (referring to the *ius cogens* concept).

⁸⁰ For further comment on this aspect see Bruha, *supra* note 53.

⁸¹ See Stahn, *supra* note 53, at 842, for a similar observation.

Judge Simma's separate Opinion in the *Oil Platforms* case points in this direction: having dismissed Article 51 due to the lack of an 'armed attack', he examined whether the United States conduct could be justified as a forcible countermeasure directed against Iran's previous use of limited force.⁸² While this may be the correct interpretation to be drawn from an ambiguous passage in the *Nicaragua* judgment,⁸³ it introduces a new exception (and thus new uncertainty) into the legal regime governing the use of force by states.

The pending *Armed Activities* case between Congo and Uganda⁸⁴ (concerning Uganda's military presence in Eastern Congo and its involvement in that country's multiparty civil war⁸⁵) illustrates a further problem. Given the complex facts of that case, and the involvement of many different factions with changing allegiances, it proved extremely difficult for the Court and litigants to establish the degree of effective state control over private violence which Article 51 (pursuant to the Court's restrictive reading) requires. More generally, the proceedings suggest that self-defence (on which both parties relied), following the restrictive reading confirmed in the Court's recent jurisprudence, will often simply not be applicable to chaotic 'dirty' wars like the one in the Congo. This is not to suggest that a liberal, more flexible approach to the law of self-defence would solve the many problems raised by the *Armed Activities* case. However, it illustrates that the restrictive reading of Article 51 makes the law of self-defence all the more difficult to apply in practice. Given that under the Charter regime, Article 51 not only preserves an inherent right, but was intended to function as the main exception to the ban on the use of force, this is a curious development.

6 Concluding Observations

It has been shown in the preceding sections that Israel's reliance on self-defence raised difficult legal problems. If the Court's main concern was to dismiss Article 51 without much discussion, it is submitted that it should have explored the question of proportionality – in line with its treatment of the necessity argument. While the construction of the wall was clearly not proportionate, it was by no means evident (as the Court suggested) that as a matter of law, Article 51 'ha[d] no relevance in this case'. Of the two arguments offered by the Court to dismiss Article 51, one (the external origin argument) would have had to be explored much more fully. More importantly, it has been shown that the Court's second argument (the state attack argument) is very difficult to sustain. The wording of the provision upon which the majority relied does not support the restrictive reading of Article 51. Moreover, this restrictive reading is

⁸² [2003] ICJ Rep 324, at 331–332, para. 12.

⁸³ Cf *supra* note 10, at 105, para. 194, and 127, para. 249. For a detailed analysis of these passages see Kammerhofer, 'Uncertainties of the Law on Self-Defence in the United Nations Charter', 35 *Netherlands Ybk Int'l L* (2005), forthcoming, at section 2.3.

⁸⁴ See Congo's Application of 23 June 1999, available at www.icj-cij.org. Public hearings were held from 11 to 29 Apr. 2005. The transcripts of these hearings, as well as the parties' written pleadings, are also available online.

⁸⁵ For a brief summary see Gray, *supra* note 49, at 60–63 and 70–71.

difficult to reconcile with modern international practice. The majority's failure to engage with this practice seriously affects the persuasiveness of its pronouncement.

While correctly holding that Article 51 did not justify the building of the wall, the Court's treatment of the self-defence issue therefore is one of the most problematic parts of the Opinion as a whole. It is to be hoped that in subsequent judgments the Court will show greater care when addressing highly sensitive use of force issues. The *Armed Activities case* may provide it with an opportunity to do so soon.