

## **NOTE ANALYTIQUE - SWIMMING WITH THE TIDE OR SEEKING TO STEM IT? RECENT ICJ RULINGS ON THE LAW OF SELF-DEFENCE**

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## NOTE ANALYTIQUE - SWIMMING WITH THE TIDE OR SEEKING TO STEM IT? RECENT ICJ RULINGS ON THE LAW OF SELF-DEFENCE

Par Christian J. Tams\*

### I. Introduction

Under Article 51 of the *Charter of the United Nations (Charter)*, states possess an inherent right to exercise self-defence against armed attacks. At the level of principle, the rationale of Article 51 seems hard (if not impossible) to dispute, yet the provision has prompted much discussion, both in the literature and in practice.<sup>1</sup> In particular, recent years have witnessed renewed debates about the temporal and material requirements of Article 51. Faced with assertions of a right to exercise preventive self-defence, culminating in the Bush Doctrine of autumn 2002, a majority of states has confirmed that self-defence could only be lawful if exercised against attacks that are either ongoing or imminent.<sup>2</sup> As regards the material element, the International Court of Justice (ICJ), in its *Oil Platforms Case* of December 2003, affirmed that self-defence could only be used against military attacks of a qualified nature; hence its distinction between armed attacks in the sense of Article 51 and lesser forms of force not triggering a right of self-defence.<sup>3</sup>

The present note is concerned with neither of these hotly-disputed issues, but addresses a more basic problem: that of the identity of the attacker. States can, of course, face military threats from a range of different actors. In the two relevant scenarios, armed attacks against which they might wish to use self-defence may either be conducted by a foreign state (state attacks) or by other non-state actors such as rebels, armed bands or terrorist groups (non-state attacks). Undoubtedly, self-defence is available against state attacks. However, whether it should also be available against

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<sup>1</sup> For comprehensive discussions see Stanimir A. Alexandrov, ed., *Self-Defence Against the Use of Force in International Law* (The Hague: Kluwer International, 1996); Yoram Dinstein, *War, Aggression, and Self-defence*, 4th ed., (Cambridge: Cambridge, 2005) at 219ff; Christine D. Gray, *International Law and the Use of Force*, 2nd ed. (Oxford: Oxford University Press, 2004) at 95ff [Gray, *International Law*].

<sup>2</sup> For comment see e.g. Michael Bothe, "Terrorism and the Legality of Pre-emptive Force" (2003) 14 E.J.I.L. 227; Christine D. Gray, "US National Security Strategy and the New Bush Doctrine of Pre-emptive Self-Defence" (2002) 1 Chinese Journal of International Law 437.

<sup>3</sup> *Case concerning Oil Platforms (Merits) (Iran v. United States)*, [2003] I.C.J. Rep. 161 at 186-192 (para. 51-64); and see the ICJ's *Nicaragua* judgment, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v. United States)*, [1986] I.C.J. Rep. 14 at para. 101 and 110 [*Nicaragua Case*]. Whether states can respond forcibly against such low-level attacks is unclear, cf. Dinstein, *supra* note 1 at 193ff. For comments see Natalie Ocoa-Ruiz and Esther Salamanca-Aguado, "Exploring the Limits of International Law relating to the Use of Force in Self-Defence" (2005) 16 E.J.I.L. 499.

non-state attacks is much discussed.<sup>4</sup> The present note adds to this debate, but does so from a particular angle. It evaluates how the ICJ dealt with the matter in its recent advisory opinion on the *Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of July 9, 2004.<sup>5</sup> In addition, it also takes into account the Court's more recent pronouncements in the case concerning *Armed Activities on the Territory of the Congo* of December 19, 2005,<sup>6</sup> and analyzes the various individual statements by members of the Court. As will be shown, the Court's recent jurisprudence (in which judges' individual statements have been rightly said to form an "integral part"<sup>7</sup>) is not fully consistent, but testifies to a deep division among the judges. Given the importance of the "inherent right" of self-defence protected by Article 51, as well as the influence of previous ICJ pronouncements on the legal regime governing the use of force by states,<sup>8</sup> the different decisions merit detailed assessment; this is the purpose of the present comment. In order to set the stage for the following analysis, it begins with a brief assessment of the current debate surrounding the scope of Article 51 of the *Charter* (I). It then seeks to define the issues involved more clearly (II) and to introduce the main arguments relied upon (III), following which it proceeds to analyze the judges' treatment of the matter in the *Israeli Wall* and *Armed Activities* cases (IV). The last section (V) attempts to put together the pieces of the puzzle and to assess the impact of the Court's pronouncements on the law of self-defence.

## II. The Issue Defined

As noted in the previous paragraph, no one would seriously dispute that states can invoke self-defence against armed attacks by another state. The real question is whether they can only do so if the armed attack emanates from another state. Following a restrictive reading of Article 51 of the *Charter*, this is indeed the case; self-defence is thus construed as a means of defence among actors of equal organizational status, epitomized in classical inter-state wars. Following this restrictive understanding, it does not cover defensive measures taken by states during asymmetric conflicts which oppose state governments to rebels or terrorist groups.<sup>9</sup>

<sup>4</sup> For recent discussions see e.g. Jost Delbrück, "The Fight Against Global Terrorism: Self-Defense or Collective Security as International Police Action?" (2001) *German Yearbook of International Law* 44 at 9; Markus Krajewski, "Selbstverteidigung gegen bewaffnete Angriffe nicht-staatlicher Organisationen" (2002) *Archiv des Völkerrechts* 40 at 183; Thomas Bruha and Christian J. Tams, "Self-Defence Against Terrorist Attacks. Considerations in the Light of the ICJ's *Israeli Wall* Opinion" in *Weltinnenrecht. Liber Amicorum Jost Delbrück* (Berlin: Duncker & Humblot, 2005) 85.

<sup>5</sup> *Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] I.C.J. Rep. 2004 136 [*Israeli Wall Case*].

<sup>6</sup> *Case concerning Armed Activities on the Territory of the Congo (Congo v. Uganda)*, [2005] I.C.J. Rep., online: ICJ <<http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>> [*Armed Activities Case*].

<sup>7</sup> Mohamed Shahabuddeen, *Precedent in the World Court* (Cambridge: Cambridge University Press, 1996) at 196.

<sup>8</sup> For further comment on this aspect see Christian J. Tams, "Light Treatment of a Complex Problem: The Law of Self-Defence in the *Israeli Wall Case*" (2005) 16 *E.J.I.L.* 963 [Tams, "Light Treatment"].

<sup>9</sup> See e.g. Oscar Schachter, "The Lawful Use of Force by a state Against Terrorists in another Country" (1989) 19 *Israel Yearbook on Human Rights* 209 at 216-9, for a very clear assessment.

Before evaluating the restrictive interpretation, it is necessary to clarify that it is not as restrictive as it may seem at first glance. In particular, it does not require the actual attack to have been conducted by members of another state's military or, more generally, official organs of that state.<sup>10</sup> Even adherents to the restrictive approach admit that states can conduct an armed attack by employing non-state actors, thus triggering the right of self-defence. However, in order for this to be the case, the private conduct in question must be attributable to the state concerned.

Unfortunately, much of the debate is overshadowed by sharp disagreements about the requirements of attribution, notably the “degree of dependence [of] [...] and control”<sup>11</sup> over the non-state entity.<sup>12</sup> In the *Nicaragua Case*, a majority of ICJ held that the financing and equipping of armed bands were in themselves insufficient to constitute an armed attack by another state within the meaning of article 51 and that effective direction and control over the relevant conduct were required.<sup>13</sup> In its *Tadic* judgment, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) seemed to go further in accepting that a general degree of control was sufficient for the purposes of attribution.<sup>14</sup> The strong language with which the ICTY criticized the ICJ's previous holdings obscures the fact that both tribunals in fact agreed on the basic issue.<sup>15</sup> Both accepted and did not seriously question that *some* degree of direction and/or control was necessary, whereas mere inaction would not suffice. Put differently, while adopting different standards of attribution, both agreed that self-defence could only be invoked against armed attacks that could be attributed to another state.

This position has not gone unchallenged. For example, states as well as commentators have argued for a more liberal interpretation of Article 51, which would allow states to invoke self-defence under less stringent conditions. Although liberal interpretations come in different shapes and sizes, the two most relevant approaches can be described as follows :

(i) Some commentators adopt a stricter standard of imputability. Pursuant to this interpretation, armed attacks by non-state actors can be qualified as “state attacks” even if the regular conditions for attribution are not met. Notably, attacks by

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<sup>10</sup> See e.g. Albrecht Randelzhofer, “Comment on Article 51” in Bruno Simma, ed., *The Charter of the United Nations – A Commentary*, 2nd ed., (Oxford: Oxford University Press, 2002) at para. 30ff.

<sup>11</sup> *Nicaragua Case*, *supra* note 3 at p. 62.

<sup>12</sup> For scholarly discussions see e.g. André 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” (2001) 72 *Brit. Y.B. Int'l L.* 255; Claus Kress, “L'organe *de facto* en droit international public, réflexions sur l'imputation à l'État de l'acte d'un particulier à la lumière des développements récents” (2001) 105 *R.G.D.I.P.* 93.

<sup>13</sup> *Nicaragua Case*, *supra* note 3, at 103, para. 195.

<sup>14</sup> *Prosecutor v. Tadic* (July 15<sup>th</sup> 1999), Case IT-94-1 (International Criminal Tribunal for the Former Yugoslavia) at para. 116-45. For pertinent observations on why the ICTY ought to have avoided the conflict in the first place, see judge Shahabuddeen's separate opinion appended to the *Tadic* judgment, *Ibid.*, at para. 17-24.

<sup>15</sup> See also Dinstein, *supra* note 1 at 204, where it is observed: “[n]otwithstanding the disagreement between the two international tribunals, it must be appreciated that both actually agree on the fundamental thesis”.

armed bands or terrorists are imputed to host states if the state harbours them or fails to take decisive action against them.<sup>16</sup>

(ii) Others take a more radical position and completely discard the requirement of attribution to another state. Following this understanding, an armed attack can be conducted by state actors as well as by non-state actors, without there being any need to discuss standards of attribution.<sup>17</sup>

### III. The Main Arguments

The different readings just sketched out have a long tradition. Disputes about the correct interpretation of Article 51 began shortly after the San Francisco Conference and many arguments have been rehearsed time and again. In order to evaluate the Court's recent pronouncements, these arguments must be briefly summarized. For reasons of clarity, they will be presented according to the five traditional canons of interpretation codified in Articles 31 to 33 of the *Vienna Convention on the Law of Treaties*.<sup>18</sup>

(i) Text: In its pertinent part, the first sentence of Article 51 provides: "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." As critics of the restrictive approach do not fail to point out, the language of Article 51 itself supports a broad interpretation of the right to exercise self-defence – or at least offers very little to sustain restrictive readings.<sup>19</sup> The wording does not suggest that self-defence could only be invoked against armed attacks by special types of actors, such as states. Instead, the provision is phrased openly, without qualifying the identity of the attacker.

(ii) Systematic Context: In contrast, the context of Article 51 provides some, although not unequivocal, support for a more restrictive interpretation. In particular, the justification of Article 51 can be read in line with the prohibition against the use of force as set out in Article 2 (4) of the *Charter*. This prohibition, however, is worded in much narrower terms, expressly outlawing the *inter-state* use of force.<sup>20</sup>

<sup>16</sup> See e.g. Randelzhofer, *supra* note 10 at para. 34; Christian Tietje and Karsten Nowrot, "Völkerrechtliche Aspekte militärischer Maßnahmen gegen den internationalen Terrorismus" (2002) *Neue Zeitschrift für Wehrrecht* 1 at 14; Anne-Marie Slaughter and William Burke-White, "An International Constitutional Moment" (2002) 43 *Harv. Int'l L. J.* 1.

<sup>17</sup> Krajewski, *supra* note 4 at 183ff; Sean D. Murphy, "Self-Defense and the *Israeli Wall* Opinion - *An Ipse Dixit* from the Court?" (2005) 99 *A.J.I.L.* 62 [Murphy, "Self-Defense"]; Sean D. Murphy "Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter" (2002) 43 *Harv. Int'l L.J.* 41 [Murphy, "Terrorism"].

<sup>18</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980). On methods of interpretation, see Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, (Amsterdam: North-Holland, 1995) s.v. "Interpretation in International Law".

<sup>19</sup> See e.g. Murphy, "Self-Defense", *supra* note 17; Murphy, "Terrorism", *supra* note 17 at 50; Dinstein, *supra* note 1 at 204.

<sup>20</sup> Cf. e.g. Georges Abi-Saab, "The Proper Role of International Law In Combating Terrorism" in Andrea Bianchi, ed., *Enforcing International Law Norms against Terrorism* (Portland: Hart, 2004) at xviii; Schachter, *supra* note 9 at 216; Thomas Bruha, "Kampf gegen den Terrorismus als neue

Given that self-defence in the *Charter* system is intended to function as the main exception to the ban on the use of force, it seems reasonable to read the state-to-state requirement of Article 2(4) into Article 51 as well. Although others have argued that Article 51 was deliberately phrased in more open terms,<sup>21</sup> this contextual argument carries some weight, especially because the drafters envisaged self-defence as the flip side of the Article 2 (4) coin. In contrast, a contextual reading supports a restrictive analysis of Article 51.

(iii) Object and Purpose: Matters become more complex when considering teleological arguments which seek to identify the object and purpose of Article 51. In this respect, it seems difficult to draw any firm conclusions. On the one hand, despite recent arguments to the contrary, the *Charter's* ban on the use of force in principle is intended to be comprehensive, which may warrant a narrow construction of exceptions. Of course, a restrictive analysis of Article 51, which only permits self-defence against armed attacks by states, would reduce the number of instances in which states can employ military force. In this respect, it could be said to be more in line with the *Charter's* object and purpose. On the other hand, this may be too schematic an argument, which does not fully appreciate the "inherent" character of the right of self-defence. When taking into account the status of Article 51 as the main exception to the *Charter's* ban on the use of force, purposive readings might equally support broader constructions of self-defence. Notably, one might be tempted to ask why an inherent right should depend on the formal organizational structure (state or non-state) of the attacker,<sup>22</sup> or inquire whether the restrictive reading would not merely increase the pressure to admit other non-written exceptions to Article 2(4).<sup>23</sup> Therefore, as it is often the case, it is extremely difficult to draw any firm conclusions from a purposive reading of Article 51.

(iv) Historical Intent: Equally inconclusive are attempts to explore the drafters' historical intent. The *travaux préparatoires* reveal very little about the scope of Article 51. In particular, the question of non-state attacks does not seem to have been discussed. At a general level, one might assume that in 1945 the drafters would have been mainly concerned with inter-state conflicts, although this assumption is difficult to sustain.

(v) Subsequent Practice: Given the inconclusiveness of other arguments, much depends on the practice of states and United Nations organs in applying Article 51. Of course, it is beyond the scope of the present comment to give a detailed

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Rechtfertigungsfigur für die Anwendung militärischer Gewalt" in Oscar Schachter, Sebastian Heselhaus and Thilo Marauhn, ed., *Legalität, Legitimität und Moral - können Gerechtigkeitspostulate Kriege rechtfertigen?* [forthcoming] [Bruha, "Kampf gegen den Terrorismus als neue Rechtfertigungsfigur für die Anwendung militärischer Gewalt"].

<sup>21</sup> Murphy, "Self-Defense", *supra* note 17 at 64.

<sup>22</sup> Cf. e.g. Bruha, "Kampf gegen den Terrorismus als neue Rechtfertigungsfigur für die Anwendung militärischer Gewalt", *supra* note 20.

<sup>23</sup> See Tams, "Light Treatment", *supra* note 8 at 976-7.

account of the relevant instances of its application.<sup>24</sup> However, it is worth pointing out that, rather frequently, individual states have indeed claimed a right to exercise self-defence against attacks by non-state actors. Between the 1960s and 1980s, Portugal, Israel and South Africa were the main supporters of a broader reading of Article 51 covering the extraterritorial use of military force against rebels and terrorist groups whose conduct could not be attributed to any other state. However, by and large, this broad interpretation was rejected by a majority of the international community. Notably, this led to United Nations resolutions dismissing, *inter alia*, Israel's attacks against the Palestinian Liberation Organization headquarters in Tunis, in 1985,<sup>25</sup> and South Africa's "anti-guerrilla" incursions into Front Line states.<sup>26</sup>

As it has been noted at the outset,<sup>27</sup> in its *Nicaragua* judgment of June 27, 1986 the ICJ accepted the restrictive understanding informing these documents and declared it to be the state of the law. It should also be noted that while many aspects of the judgment were received unfavourably, the Court's "direction and control" test, at least as a matter of principle, was largely accepted.<sup>28</sup> However, matters began to change in the 1990s. Summarizing the developments, it seems fair to say that the restrictive reading of Article 51 has increasingly come under strain. It is not necessary to engage in a detailed examination of the reasons which have led states to view forcible extraterritorial responses against non-state attacks in a more favourable light. Suffice it to say that in a number of instances, states have expressly or implicitly accepted that Article 51 covers retaliatory measures adopted against armed attacks which are not imputable to any other state,<sup>29</sup> as the following examples illustrate:

The international response against the Al-Qaeda bombings on September 11, 2001 forms the most prominent, but not only, case in point: within days of the attacks the North Atlantic Treaty Organisation, Organization of American states and Security Council members expressly recognized that the attacks - perpetrated by a non-state group not controlled by, but possibly controlling, another state - triggered a right of self-defence.<sup>30</sup> While some states subsequently voiced concern about the scope of this

<sup>24</sup> For a detailed assessment see Gray, *International Law*, *supra* note 1 at 108ff; Alexandrov, *supra* note 1 at 165ff; Christiane Wandscher, *Internationaler Terrorismus und Selbstverteidigungsrecht* (D. Jur. Thesis, Kiel University, 2005) [not published].

<sup>25</sup> *Security Council Resolution on an Israeli Raid over Tunisia*, SC Res. 1985/573, UN SC 1985/573, 40th Sess., No supp., UN Doc. S/; and further Gray, *International Law*, *supra* note 1 at 111-2.

<sup>26</sup> See e.g. *Security Council Resolution on South Africa's Military Activities Against Botswana*, SC Res. 1985/568 (1985), UN Doc. S/1985/568; and further Michael F. Higginbotham, "International Law, the Use of Force in Self-Defence, and the South-African Conflict" (1986-1987) 25 *Colum. J. Transnat'l L.* 529, especially at 568ff.

<sup>27</sup> See *supra* section II.

<sup>28</sup> In his separate opinion in the *Israeli Wall Case*, Judge Kooijmans noted that the restrictive understanding of article 51 "has been the generally accepted interpretation for more than fifty years" at para. 35, *Israeli Wall Case*, *supra* note 5.

<sup>29</sup> For a detailed treatment of the various instances see Wandscher, *supra* note 24 at 174ff.

<sup>30</sup> See *Security Council Resolution on Threats to International Peace and Security Caused by Terrorist Acts*, SC Res. 2001/1368, UN SC, 2001, UN Doc. S/1368 (2001) and *Security Council Resolution on Threats to International Peace and Security Caused by Terrorist Acts*, SC Res. 2001/1373, UN SC, 2001, UN Doc. S/1373 (2001) (both affirming the United States' right to use self-defence); and various NATO and OAS resolutions reproduced in (2001) 40 *I.L.M.* 1267 and 1273 respectively.

right, for example, questioning whether it would cover a year-long occupation of Afghanistan,<sup>31</sup> its existence as such was not seriously disputed.<sup>32</sup>

Given the extraordinary scale of the September 11 attacks, it is crucial to note that there are further indications pointing towards a broader reading of Article 51. Already in 1998, the United States claimed to act in self-defence when justifying the bombardment of alleged Al-Qaeda bases in Sudan and Afghanistan.<sup>33</sup> The official justification implies that there was very little evidence suggesting that the Sudanese or Afghan governments had been substantially involved in Al-Qaeda activities and therefore the conduct of these states clearly could not, even from a U.S. point of view, be said to be attributable to them in the sense of the *Nicaragua* or *Tadic* tests.<sup>34</sup> Furthermore, between 1999 and 2004, states other than the U.S. similarly relied on self-defence in order to justify the extraterritorial use of force against non-state attacks. For example, Israel and Iran, in 1999 and 2003, conducted anti-terrorist raids into Syria and Iraq respectively, both claiming self-defence.<sup>35</sup> Likewise, in 2004, Russia proclaimed a right to respond extraterritorially against Islamist terror networks irrespective of their involvement with state or at least sub-state official structures.<sup>36</sup>

This is not to suggest that these assertions of a right to invoke self-defence against non-state attacks met with general approval. Many states, for example, continued to criticize Israel's conduct, although the near-unanimity of previous condemnations had begun to fade.<sup>37</sup> Still, it would be hard to mistake the trend towards a more expansive interpretation of Article 51 and a greater willingness on the part of states to accept self-defence as an appropriate response against "private" armed attacks, even where the perpetrators of these attacks were not directed or controlled by another state.

(vi) Interim Conclusion: To sum up on this point, the restrictive approach to self-defence, which requires attacks to be attributable to another state, was once clearly based on a defensible interpretation of Article 51 and widely shared. However, it is increasingly being questioned. Adherents to more expansive readings can notably rely on the open wording of the provision, as well as recent developments in state practice.

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<sup>31</sup> Cf. e.g. Olivier Corten, and François Dubuisson, "Opération liberté immuable: une extension abusive du concept de légitime défense" (2002) 106 R.G.D.I.P. 51.

<sup>32</sup> For further comment on this point see e.g. Antonio Cassese, "Terrorism Is also Disrupting Some Crucial Legal Categories of International Law" (2001) E.J.I.L. 12, 993; Carsten Stahn, "International Law at a Crossroads? The Impact of September 11" (2002) 62 ZaöRV 183; Dinstein, *supra* note 1 at 207-8.

<sup>33</sup> Cf. Lobel, "The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan" (1999) 24 Yale J. Int'l L. 537.

<sup>34</sup> United States could merely claim to have made "repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down".

<sup>35</sup> Cf. Security Council, Press Release, UN Doc. SC/7887, "Security Council Meets in emergency Session Following Israeli Air Strike Against Syria" (5 October 2003) at p. 4, for Israel's reliance on self-defence to justify the anti-terrorist raids into Syria and Wandscher, *supra* note 24 at 192-3, for comment on Iran's conduct.

<sup>36</sup> For further information cf. Wandscher, *supra* note 24 at 194 of the manuscript.

<sup>37</sup> For summaries of the international response see Gray, *International Law*, *supra* note 1 at 174-5.



## IV. The Court's Recent Pronouncements

Given this background, any court asked to pronounce on matters involving self-defence against armed attacks by non-state actors faces a difficult task. As noted at the outset, the ICJ was confronted with this unenviable duty twice in the last two years, namely, in the *Israeli Wall*<sup>38</sup> and the *Armed Activities* cases.<sup>39</sup> Its position(s) will be assessed in the subsequent sections addressing the two majority decisions, followed by a summary of the diverse separate opinions and declarations appended to the decisions by individual judges.

### A. *Israeli Wall* case (Majority Opinion)

The *Israeli Wall* case was the first to present the ICJ with an opportunity to pronounce on claims of self-defence in response to armed attacks by non-state actors. At the outset, it should be noted that in the course of proceedings this issue played a rather marginal role. Not only did Israel decide not to appear in The Hague, but its written statement submitted to the Court focused largely on questions of jurisdiction and admissibility.<sup>40</sup> The question of self-defence thus was not fully argued before the Court. Nevertheless, Israel relied on self-defence in statements made out of Court, in particular in a letter to the United Nations General Assembly. This letter formed part of the Secretary General's dossier,<sup>41</sup> on which the Court relied heavily. In it, Israel argued that the construction of the barrier was fully in line with states' inherent right of self-defence, since it served to protect Israel against armed attacks by terrorist groups operating from within the occupied territories: "the fence is a measure wholly consistent with the right of states to self-defence enshrined in Article 51 of the *Charter*."<sup>42</sup> For the sake of completeness, it should also be noted that Israel had specifically cited Security Council Resolutions 1368 and 1373 in order to support its interpretation of Article 51.<sup>43</sup>

There is very little to suggest that Israel's self-defence argument was defensible. Notwithstanding the private character of the armed attacks in question (on which below), it seemed clear that, in any event, Israel's response did not respect the requirement of proportionality limiting the exercise of self-defence.<sup>44</sup> Israel did not

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<sup>38</sup> *Israeli Wall Case*, *supra* note 5.

<sup>39</sup> *Armed activities Case*, *supra* note 6.

<sup>40</sup> This focus is indicated by the title of the document "Written statement of the Government of Israel on Jurisdiction and Propriety" (29 January 2004), *Israeli Wall Case*, *supra* note 5.

<sup>41</sup> *Israeli Wall Case*, *supra* note 5, "Documents relating to the Question on which an Advisory Opinion is requested by General Assembly resolution ES-10/14 of 8 December 2003, transmitted to the International Court of Justice by the Secretary-General of the United Nations in accordance with Article 65, paragraph 2, of the Statute of the Court" (19 January 2004).

<sup>42</sup> Cf. UNGAROR, 2001, 21th, UN Doc. A/ES-10/PV.21 at p. 6.

<sup>43</sup> *Ibid.*

<sup>44</sup> On proportionality limiting the right of self-defence see Rudolf Bernhardt (ed.), *Encyclopedia of International Law* (Amsterdam: North-Holland, 1997) s.v. "proportionality"; Gray, *supra* note 1 at 120ff.

establish that in order to respond against attacks from within the occupied territories it had to build a wall. More importantly, it seemed beyond doubt that even if a wall had to be built, it could, and should, have followed the Green Line rather than cutting through occupied territory.<sup>45</sup> Self-defence therefore was bound to fail for lack of proportionality.

The Court of course was aware of this proportionality argument, as can be observed from the fact that it relied on considerations of proportionality in its discussion of necessity, a possible alternative defence.<sup>46</sup> However, a clear majority of ICJ judges chose to reject Israel's claim based on self-defence in a more straightforward manner. Rather than evaluating whether the construction of the wall could have been proportionate, these judges found self-defence to be entirely inapplicable. Their reasoning can be found in a single paragraph of the opinion, which runs as follows:

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.<sup>47</sup>

A careful reading shows that the Court considered self-defence to have "no relevance" because of two arguments. Firstly, the attacks in question originated from within the occupied territory over which Israel exercised control; they were not sufficiently "external" to trigger a right of self-defence. Secondly, they were not imputable to a foreign state, but were perpetrated by non-state actors. Only the latter of these two arguments is relevant here.<sup>48</sup>

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<sup>45</sup> See Judge Higgins' separate opinion in the *Israeli Wall Case*, *supra* note 5 at para. 35: "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".

<sup>46</sup> *Israeli Wall Case*, *supra* note 5 at para. 140, where the Court noted that "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".

<sup>47</sup> *Ibid.* at para. 139.

<sup>48</sup> For much more on the "external origin argument", see Bruha and Tams, *supra* note 4 at 89ff.

In this respect, it is curious how little attention the majority paid to the ongoing debate sketched out in section III of this comment. Rather than analyzing the *travaux préparatoires*, the relationship between Article 51 and other *Charter* provisions or state practice, the Court merely reproduced the wording of Article 51, from which it purported to deduce that self-defence was simply unavailable in this case.<sup>49</sup> In light of the above discussion, this “deduction” is very difficult to sustain; as various judges observed, the open phrasing of Article 51, if anything, should have been seen as a strong argument for a more liberal interpretation of the provision. What is more, it is hardly persuasive for the Court to refer to Security Council Resolutions 1368 and 1373, but to ignore their relevance as state practice pointing towards a broader concept of self-defence. Of course, one might argue that these resolutions refer to singularly grave instances of non-state attacks and that the underlying legal position, no longer requiring the attack to be imputable to a foreign state, could not be generalized. However, this would have had to be spelled out rather than merely asserted.

For these and other reasons, the majority’s treatment of the self-defence issue in the *Israeli Wall* case, in particular the “extremely succinct” reasoning, as Judge Simma described it in his separate opinion appended to the *Armed Activities* case<sup>50</sup> – has been received rather unfavourably in the literature.<sup>51</sup> For the present purposes, it is crucial to note that the Court, by declaring self-defence to be of “no relevance”, dismissed all inclinations towards a broader reading of Article 51.

## **B. *Armed Activities Case* (Majority Judgment)**

Issues of self-defence played a more prominent role in the *Armed Activities* case brought by the Democratic Republic of Congo (DRC) against Uganda. Unlike the *Israeli Wall* opinion, this case centred on questions involving the use of force and its possible justifications. In its judgment, the Court was able to address a number of controversial issues: amongst other things, it clarified that a state that had initially consented to the presence of foreign troops on its territory could withdraw that

<sup>49</sup> For similarly critical observations see e.g. Murphy, “Self-Defense”, *supra* note 17 at 62 (“startling in its brevity”); or Daniel-Erasmus Khan, “Sicherheitszaun oder Apartheidmauer? Das Gutachten des Internationalen Gerichtshofes vom 9. Juli 2004 zu den israelischen Sperranlagen gegenüber dem Westjordanland” (2004) 79 *Die Friedens-Warte* 345 at 363-4 (“of little help” [“wenig hilfreich”]).

<sup>50</sup> *Armed Activities Case*, Separate Opinion of Judge Simma, *supra* note 6 at para. 10.

<sup>51</sup> See e.g. Murphy, *supra* note 17; Iris Canor, “When *Jus ad Bellum* Meets *Jus in Bello*: the Occupier’s Right of Self-Defence Against Terrorism Stemming from Occupied Territories” (2006) 19 *Leiden J. Int’l L.* at 129; Robert A. Caplen, “Mending the ‘Fence’: How Treatment of the Israeli-Palestinian conflict by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense” (2005) 57 *Fla. L. Rev.* 717; Ruth Wedgwood, “The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-defense” (2005) 99 *A.J.I.L.* 52; Khan, *supra* note 48; Tams, “Light treatment”, *supra* note 8. In fact, even those favourably receiving the judgment have apparently felt the need to go beyond the Court’s five-paragraph-reasoning. Ian Scoobie, for example, defended the Court’s analysis, but recognised its “telegraphic nature”, Iain Scoobie, “Words My Mother Never Taught Me – In Defence of the International Court” (2005) 99 *A.J.I.L.* 99 76 at 87.

consent without any formal requirements<sup>52</sup> and that the pursuit of security interests could not in itself justify an otherwise illegal use of force.<sup>53</sup>

In addition, the Court and some of its members took the opportunity to pronounce on questions of self-defence. The issue had arisen because Uganda had sought to justify its military presence in the DRC by, *inter alia*, asserting a right to exercise self-defence against cross-border raids by Ugandan rebels operating from Congolese territory. In a number of respects, Uganda's claim and its handling by the Court, raised issues very similar to those that had arisen in the *Israeli Wall* case. Three similarities are particularly striking:

(i) Like Israel's reliance on Article 51 in the *Israeli Wall* case, Uganda's argument was highly unlikely to succeed. Whatever the position on the availability of self-defence as a matter of law, it seemed evident that Uganda had gone well beyond the limits of proportionality. Even if it could have invoked Article 51, this could not have justified its occupation of large parts of DRC territory over prolonged periods of time. The majority did not dispute this view, but treated it as a secondary issue which it did not address fully.<sup>54</sup>

(ii) As in the *Israeli Wall* case, the majority gave short shrift to the legal argument based on self-defence. It began by rightly observing that Uganda had not been attacked by Congolese armed forces, but rather by the Allied Democratic Forces (ADF).<sup>55</sup> As regards the relationship between the ADF and the DRC government, the Court stressed the independence of the rebel movement. As it explained at some length in its assessment of the relevant facts, Uganda had not established that the ADF attacks could be attributed to the DRC.<sup>56</sup> Interestingly, this concluded the majority's legal evaluation on the matter. Having decided against attribution, the Court held that the "legal and factual circumstances for the exercise of a right to self-defence by Uganda against the DRC were not present."<sup>57</sup>

(iii) Lastly, and most importantly, just as in the *Israeli Wall* case, the majority's response to the self-defence argument seemed strangely incomplete. Assuming that, indeed, ADF's conduct could not be imputed to the DRC, this was not necessarily the end of the story. In particular, one might have expected the Court to clarify whether Uganda could have responded against the ADF's attacks *irrespective* of their attribution to the DRC. This would have required the Court to take a position on the question of self-defence against non-attributable attacks by rebel movements. The majority, and this may be yet another similarity to the *Israeli Wall* case, of course was aware of this problem. Nevertheless, it deliberately chose to avoid taking any stance on the matter or, rather, expressly reserved its position. Having found that the legal and factual circumstances of Article 51 were not met, it observed: "Accordingly, the Court has no need to respond to the contentions of the Parties as to whether and

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<sup>52</sup> *Armed Activities case*, *supra* note 6 at para. 42ff.

<sup>53</sup> *Ibid.* at para. 148.

<sup>54</sup> *Ibid.* at para. 147.

<sup>55</sup> *Ibid.* at para. 146.

<sup>56</sup> *Ibid.* at paras. 131-135, 146.

<sup>57</sup> *Ibid.* at para. 147.

under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.”<sup>58</sup>

However, this was a rather curious way of responding to Uganda’s claim. In fairness, it must be admitted that the submissions only required the Court to assess the legality of Uganda’s military actions against the DRC. Still, the Court’s decision to avoid the question of self-defence against armed attacks by independent rebel movements is disappointingly formalistic. As Judges Kooijmans and Simma pointed out,<sup>59</sup> the Court did not do justice to Uganda’s assertions that its conduct was justified – whether the ADF’s conduct was imputable or whether it provided Uganda with an independent right to respond extraterritorially. In particular, the majority ignored the fact that both parties had, during oral proceedings, expressed diverging views on whether the “direction and control” test as set out in *Nicaragua* was still valid. Unsurprisingly, Uganda had argued that it was not, instead asserting that host states tolerating armed rebel bands on their territory “were under a super-added standard of responsibility.”<sup>60</sup> Equally unsurprisingly, the DRC did not accept such a “super-added standard of responsibility”, but applied the traditional rules of attribution to conclude that the ADF’s conduct was not imputable to it.<sup>61</sup> Surprisingly, the majority did not feel the need to reply to these contentions, but deliberately reserved its view.

The question remains as to what to make of this reservation. According to Judge Kooijmans, the majority implicitly rejected Uganda’s view that host states could be under a “super-added standard of responsibility.”<sup>62</sup> Indeed, had the majority merely dismissed self-defence, this implication would have been hard to avoid. Still, any attempt to filter out the implied meaning of the majority’s brief statement must also take account of the express reservation immediately following it. As it has been shown, that reservation may have been based on false premises. Nevertheless, it clearly expresses the majority’s wish not to take any position on the scope of Article 51. Read properly, the saving clause therefore bars all attempts to read the majority judgment as an affirmation of the restrictive analysis of self-defence. As it made clear, the majority in the *Armed Activities Case* simply wanted to avoid the question on which it had taken a firm view only one year earlier.

### C. Views of Individual Judges

It has already been observed that the Court’s positions have not gone unquestioned. In fact, while the *Israeli Wall* and *Armed Activities* cases were carried by large majorities, the specific issue of self-defence against non-state attacks prompted considerable comment. For the purposes of the present paper, it seems helpful to distinguish between two types of criticism.

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<sup>58</sup> *Ibid.* at para. 147.

<sup>59</sup> *Ibid.*, Separate Opinion of Judge Kooijmans at para. 25 and Separate Opinion Of Judge Simma at para. 6-8.

<sup>60</sup> *Ibid.*, “Oral Argument of Ian Brownlie” (18 April 2005) CR 2005/7 at p. 30, para. 80.

<sup>61</sup> *Ibid.*, “Oral Argument of Pierre Klein” (25 April 2005) CR 2005/12 at p. 26, para. 6.

<sup>62</sup> *Ibid.*, Separate Opinion of Judge Kooijmans at para. 22 and 28.

(i) At a first level, a number of judges criticized the reasoning on which the majority's decisions were based without openly disagreeing with their legal analyses. For example, in *Israeli Wall* this applied to the separate opinions of Judges Kooijmans and Higgins. Both were rightly critical of the Court's reliance on the wording of Article 51 and clearly exposed the weaknesses of the majority's reasoning.<sup>63</sup> Judge Kooijmans also referred to Security Council Resolutions 1368 and 1373 which he viewed (again, it is submitted, correctly) as evidence of a new trend in state practice. Notably, Judge Higgins clarified that:

[T]here is, with respect, nothing in the text of Article 51 that *thus* stipulates that self-defence is available only when an armed attack is made by a state. *That* qualification is rather a result of the Court so determining in *Military and Paramilitary Activities in and against Nicaragua*.<sup>64</sup>

However, despite their criticisms, both judges seemed to accept the restrictive approach affirmed by the majority *de lege late*. Notwithstanding her reservations, already famously put in her book *Problems and Process*,<sup>65</sup> Judge Higgins "accept[ed], as I must, that [the majority's view] is to be regarded as a statement of the law as it now stands."<sup>66</sup> Judge Kooijmans was more reserved, but equally admitted that "the legal implications of [recent trends in state practice] cannot as yet be assessed."<sup>67</sup>

(ii) Other judges went beyond critique of the reasoning and openly challenged the restrictive interpretation of Article 51. In the *Israeli Wall* case, Judge Buergenthal was most outspoken on the matter. To him, neither the *Charter* nor recent resolutions by the Security Council "make [self-defence] dependent upon an armed attack by *another state*."<sup>68</sup>

A year later, in the *Armed Activities* judgment, Judges Kooijmans and Simma put forward the same view. As it has been noted, both criticized the majority for not having discussed whether Uganda could have responded militarily against attacks by the ADF rebels, even if those attacks could not be attributed to the DRC.<sup>69</sup> Unlike the majority, and more in line with Uganda's contentions, both inquired further into the matter. Eventually, both found Uganda to have violated the requirement of proportionality and therefore concluded that its military response was not justified.<sup>70</sup> But while this result seemed relatively evident, both judges also took an equally clear position on a more controversial matter: both affirmed the position of

<sup>63</sup> *Israeli Wall Case*, *supra* note 5, Separate Opinion of Judge Higgins at para. 33; *Ibid.*, Separate Opinion Kooijmans at para. 35.

<sup>64</sup> *Ibid.*, Separate Opinion of Judge Higgins at para. 33.

<sup>65</sup> Rosalyn Higgins, *Problems and Process. International Law and How We Use It* (Oxford: Clarendon Press; New York: Oxford University Press, 1994) at pp. 250-1.

<sup>66</sup> *Israeli Wall Case*, *supra* note 5, Separate Opinion Of Judge Higgins at para. 33.

<sup>67</sup> *Ibid.*, Separate Opinion of Judge Kooijmans at para. 35.

<sup>68</sup> *Ibid.* Declaration of Judge Buergenthal at para. 6.

<sup>69</sup> *Supra* section IV.2.

<sup>70</sup> *Armed Activities Case*, *supra* note 6, Separate Opinion of Judge Kooijmans at para. 33-4; *Ibid.*, Separate Opinion of Judge Simma at para. 14.

Judge Buergenthal. In the words of Judge Simma: “if armed attacks are carried out by irregular forces from such territory against a neighbouring state, these activities are still armed attacks even if they cannot be attributed to the territorial state.”<sup>71</sup> Similarly, Judge Kooijmans found it “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>72</sup>

For present purposes, it is important to note that these statements are interpretations of the *lex lata*, rather than expressions of how the law *should* develop.

(iii) To conclude on this point, individual pronouncements by judges provide clear evidence of dissatisfaction with the majority decisions in the *Israeli Wall* and *Armed Activities* cases. Insofar as judges were unconvinced by the respective majorities’ reasoning, the previous discussion suggests that their criticisms are fully justified. For present purposes, it is more important to note that three judges have openly come out in favour of a broader reading of Article 51 and that some of their colleagues are likely to share this more expansive interpretation.

## V. Implications and Comment

The question that remains is what to make of these pronouncements of the Court and its members, made since mid 2004. Clearly, the different positions have to be seen against the background of an evolving state practice supporting expansive readings of Article 51, as outlined in section III. If that evolving practice is visualized as a slowly mounting tide, then the majority’s decision in the *Israeli Wall* case may be seen as an attempt to build a dam or even a wall, for that matter. As their statements suggest, judges such as Judge Buergenthal, Kooijmans and Simma are unwilling to join in the construction of the dam; in their view, the Court probably ought to swim with the tide. Finally, the *Armed Activities* majority, in expressly reserving its position, seemed aware of the mounting tide, but appeared to react with indifference.

At the level of principle, there is nothing of course wrong with a court seeking to stem the tide, to swim with it or sometimes even pretending to be indifferent, although it may be preferable to settle on one course rather than attempting to do all three at the same time. However, a proper assessment of the ICJ’s recent jurisprudence must go on to assess which of the different approaches is preferable, not as a matter of principle, but in terms of modern international law. In this respect, it is submitted that the restrictive position adopted in the *Israeli Wall* majority opinion is the least convincing. In terms of method, the majority simply asserted a certain view, without supporting it with persuasive legal argument. Instead, the one argument it seemed to put forward, citing the wording of Article 51, was rather difficult to accept.

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<sup>71</sup> *Ibid.*, Separate Opinion of Judge Simma at para. 12.

<sup>72</sup> *Ibid.*, Separate Opinion of Judge Kooijmans at para. 30.

In terms of substance, matters are not quite as clear. It is of course easy to criticize the majority for simply ignoring modern state practice and thus failing to appreciate the new complexity of the matter. It is much more difficult to assess whether recent developments have already led to a broadening of Article 51, covering self-defence against non-state attacks. As it has been noted, any court that is in a position to assess that question is in an unenviable position. Recent state practice may be considered either sufficient to have achieved a broadening of Article 51, or as yet inadequate; whether the glass is already half-full or still half-empty may simply be a question of perspective and both views are defensible. In our view, the better arguments suggest that the glass is already half-full and that the restrictive analysis of Article 51 no longer accurately reflects the state of modern international law. To support this view, three arguments may be briefly reconsidered:

Firstly, it is crucial to note that, even prior to the 1990s, there had been debates about self-defence against non-state attacks. While most states accepted restrictive readings of Article 51 (requiring the non-state conduct to be attributable to another state), the matter was not beyond doubt. Contrary to common perceptions in the literature, recent claims by states of a right to exercise self-defence against non-state attacks are therefore not revolutionary.

Secondly, it is submitted that when considering the scope of Article 51, the role of state practice can hardly be overestimated. As it has been shown, other methods of interpretation – context, object and purpose, historical intent – do not produce any clear result and thus do not warrant any particular reading. The wording of the provision is equally open and inconclusive. If anything, it weakens the restrictive interpretation and, in any event, it clearly does not preclude broader readings. Given this lack of clear guidance, state practice assumes a crucial role.

Thirdly, given the almost exclusive focus on the international community's response to the September 11 attacks, it is crucial to underline that modern state practice supporting a broader reading is much more sustained than is usually admitted. In addition to the near-unanimous acceptance of the United States' right to invoke self-defence in 2001, it involves the conduct or claims of a considerable number of other states – Israel, Russia, and Iran<sup>73</sup> – as well as tacit approval by states that, unlike in the 1970s or 1980s, have not rejected these states' broad construction of the right of self-defence.<sup>74</sup>

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<sup>73</sup> For analysis and references see *supra*, section III(v).

<sup>74</sup> See *Ibid.* To give but one example, it is interesting to note that while states condemned Israel's 2003 anti-terror raids into Syria, the international criticisms seemed guarded compared to the storms of protest that same country had to weather when claiming a right to use self-defence against PLO terrorists in the 1980s, not to mention Apartheid South Africa's claims that self-defence would provide a basis for its cross-border raids into Front Line states. By way of example, Bostwana-South Africa, SC Res. 1985/568 (rejecting South Africa's view of Article 51) and *Israel-Tunisia*, SC Res. 1985/573 (condemning Israel's response against the PLO) may be mentioned; for further references see e.g. Barry Levenfeld, "Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law" (1982-3) 21 Colum. J. Transnat'l L. 1; T.M. Kühn, "Terrorism and the Right of Self-Defence" (1980) 6 S.A.Y.B. Int'l L. 42.



In light of these arguments, it is submitted that, indeed, modern international law recognizes the right of states to use self-defence against non-state attacks, even if these attacks cannot be attributed to another state pursuant to the *Tadic* or *Nicaragua* tests. This implies a right to use force extraterritorially; that is, on the territory of another state which is unwilling to stop the non-state attacks from occurring. Considering the recent jurisprudence discussed in section IV, we must admit that this interpretation, although accepted by a number of judges, has thus far not been adopted by a majority of the ICJ. Still, the sequence of judgments suggests that the Court is beginning to accept it. In particular, the majority's deliberate decision not to decide in the *Armed Activities* case appears to signal a move away from its previous holdings. With some delay, the mounting tide of state practice seems to have reached the Court, with an increasing number of judges supporting the trend towards a broader reading of Article 51. Consequently, we anticipate that following the largely critical reaction to the *Israeli Wall* opinion's findings on self-defence, future panels of the ICJ will indeed show greater care when applying Article 51. The majority's attempt in *Israeli Wall* to stem the tide has thus been short-lived and the dam it sought to construct appears to have been washed away rather quickly.