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Ipse Dixit at the I.C.J.

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IPSE DIXIT AT THE I.C.J.

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

[A] security fence has proven itself to be one of the most effective non-violent methods for preventing terrorism in the heart of civilian areas. The fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter. International law and Security Council resolutions, including resolutions 1368 (2001) and 1373 (2001), have clearly recognized the right of States to use force in self-defence against terrorist attacks, and therefore surely recognize the right to use non-forcible measures to that end.¹

Ambassador Gillerman noted that the factual and legal basis for Israel's position had "been set forth in numerous Israeli statements before the [Security] Council and this Assembly, in countless letters to the Secretary General and in a variety of publicly available materials and official statements."²

¹ UN Doc. A/ES-10/PV.21 at 6 (Oct. 21, 2003).

² *Id.*

In its advisory opinion of July 2004, the International Court considered and disposed of this legal basis for the construction of the Israeli barrier in a single paragraph. After quoting Article 51 of the UN Charter,³ the Court stated:

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

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

Consequently, the Court concludes that Article 51 has no relevance in this case.⁴

³ Article 51 provides in part: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.” UN CHARTER Art. 51.

⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, para. 139 (July 9, 2004), *reprinted in* 43 ILM 1009 (2004) [hereinafter Legal Consequences Advisory Opinion].

The position taken by the Court with respect to the *jus ad bellum* is startling in its brevity and, upon analysis, very unsatisfactory. At best, the position represents imprecise drafting, and thus calls into question whether the advisory opinion process necessarily helps the Court “to develop its jurisprudence and to contribute to the progress of international law.”⁵ At worst, the position conflicts with the language of the UN Charter, its *travaux préparatoires*, the practice of states and international organizations, and common sense. In addition to the lack of cogent analytical reasoning, the Court’s unwillingness to pursue a serious inquiry into the facts underlying Israel’s legal position highlights a disquieting aspect of the Court’s institutional capabilities: an apparent inability to grapple with complex fact patterns associated with armed conflict. Overall, the Court’s peremptory style in addressing the *jus ad bellum* reflects an unfortunate *ipse dixit* approach to judicial reasoning; the Court apparently expects others to accept an important interpretation of the law and facts simply because the Court says it is so.

I. THE SCOPE OF UN CHARTER ARTICLE 51

The Court’s finding that “Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State” might be regarded as ambiguous. The Court did not expressly state that Article 51 *only* recognizes self-defense by a state against another state. Perhaps the Court was simply recognizing that a state may

⁵ Speech by H.E. Judge Shi Jiuyong, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, The Advisory Function of the International Court of Justice (Nov. 5, 2004), at <<http://www.icj-cij.org>>.

self-defend against another state as one type of self-defense that arises under Article 51.⁶ To the extent that any further implication is drawn from the language, one might just ascribe such implication to imprecise drafting on the part of the Court.

There are two problems, however, with such an interpretation of the Court's finding. First, Israel directly asserted that it was invoking a right of self-defense as permitted under Article 51 against non-state terrorist attacks, and in the paragraph prior to its finding, the Court recognized that assertion.⁷ This context thus strongly indicates that the Court considered the Israeli position that it was engaging in self-defense under Article 51 against a non-state actor and rejected that position on the ground that Article 51 only contemplates self-defense by a state against another state. Second, the Court was well-aware that its position would be interpreted as excluding self-defense against non-state actors, since two of the judges objected to the Court's position on that basis. In her separate opinion, Judge Higgins interpreted the Court as saying that "self-defence is available only when an armed attack is made by a State."⁸ In his declaration in dissent, Judge Buergenthal stated that the Court's position was problematic because Article 51, in affirming the inherent right of self-defense, "does not make its exercise dependent upon an armed attack by another State."⁹

Assuming that these views were made known to the Court in the course of the Court's

⁶ See Separate Opinion of Judge Kooijmans, para. 35, Legal Consequences Advisory Opinion, *supra* note 4 ("Although this statement is undoubtedly correct, as a reply to Israel's argument it is, with all due respect, beside the point.").

⁷ Legal Consequences Advisory Opinion, *supra* note 4, para. 138.

⁸ Separate Opinion of Judge Higgins, para. 33, Legal Consequences Advisory Opinion, *supra* note 4.

⁹ Declaration of Judge Buergenthal, para. 6, Legal Consequences Advisory Opinion, *supra* note 4.

deliberations, as would normally be the case, the Court was well-aware of how its language was going to be interpreted and nevertheless chose to adopt that interpretation.¹⁰ Unfortunately, the Court provided no analysis of *why* Article 51 was restricted to armed attacks by states even though, for several reasons, analysis was merited.

The ordinary meaning of Article 51. First, there is nothing in the language of Article 51 of the Charter that requires the exercise of self-defense to turn on whether an armed attack was committed directly by, or can be imputed to, another state. Article 51 speaks of the right of self-defense by a “Member of the United Nations” against an armed attack without any qualification as to who or what is conducting the armed attack. Looking at the “ordinary meaning” of the terms of Article 51,¹¹ there is no basis for reading into the text a restriction on who the attacker must be.

¹⁰ The Court obviously was unwilling to regard Palestine as a “state” for purposes of Article 51, which is consistent with the fact that Palestine is not a member of the United Nations. However, the Court’s treatment of Palestine throughout the proceedings (allowing it to make written and oral submissions), and in much of the Court’s *jus in bello* analysis, appears to regard Palestine as the functional equivalent of a state. Thus, the Court was comfortable regarding the West Bank and Gaza strip as sufficiently close to being territory of a foreign state for purposes of applying the Fourth Geneva Convention, going so far as to note that the territory was part of Jordan at one time and that Jordan and Israel were parties to the Geneva Conventions when the 1967 armed conflict broke out. *See* Legal Consequences Advisory Opinion, *supra* note 4, para. 101. Yet the Court refrained from regarding such territory as sufficiently close to being the territory of a foreign state for purposes of applying a different treaty, the UN Charter, to which Jordan and Israel were also parties as of 1967. Only with respect to the *jus ad bellum* argument does Palestine’s formal position as a non-state seem to become a dispositive factor for the Court.

Giving Palestine a quasi-state status for purposes of appearing before the Court and for purposes of applying certain treaties that operate as between states, but not for other treaties, results in an unexplained double-standard. If Palestine were regarded as the functional equivalent of a state for purposes of Article 51, Israel presumably *would* impute many of the terrorist attacks to that “state.” *See* Written Statement of Israel, para. 3.76 (Jan. 29, 2004), Legal Consequences Advisory Opinion, *supra* note 4 (stating that the “evidence of attribution, of commission and omission, [of terrorist acts to Palestine] is great”).

¹¹ *See* Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31(1), 1155 UNTS 331, 340 [hereinafter VCLT] (“A treaty shall be interpreted in good faith in accordance with the

Indeed, reading the language in context¹² leads to the same conclusion. If one compares the language used in Article 2(4) of the Charter (which speaks of a use of force *by* one “Member” *against* “any state”),¹³ one finds that the same construct is not repeated in Article 51. Rather, Article 51 is silent on who or what might commit an armed attack justifying self-defense.

Certainly the reasoning underlying this paragraph could not have been that the Charter only regulates relations among states. The Charter expressly speaks to the relations of states to non-state actors¹⁴ and the Security Council has repeatedly found that the conduct of non-state actors can be a threat to international peace and security under Chapter VII of the Charter.¹⁵ The Court itself saw Article 2(4) (which speaks expressly of action by states against states) as “relevant” law with respect to Israel’s conduct in the “Occupied Palestinian Territory,”¹⁶ even though the Court saw no such relevance for Article 51 (which is not expressly limited to states) with respect to the exact same Israeli conduct.

ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”). The Court has invoked this provision of the Vienna Convention on many occasions, including in its advisory opinion. *See* Legal Consequences Advisory Opinion, *supra* note 4, para. 94.

¹² VCLT, *supra* note 11, Art. 31(1).

¹³ UN CHARTER Art. 2(4).

¹⁴ UN CHARTER pmb., Arts. 55-56.

¹⁵ *See* S.C. Res. 1540, pmb. (Apr. 28, 2004) (acting under Chapter VII to address terrorism “and the risk that non-State actors” may acquire weapons of mass destruction); S.C. Res. 1566, para. 1 (Oct. 8, 2004); S.C. Res. 1373, pmb. (Sept. 28, 2001); S.C. Res. 1377, annex, pmb. (Nov. 12, 2001); *see also* S.C. Res. 1070, pmb. (Aug. 16, 1996); S.C. Res. 731, pmb. (Jan. 21, 1992). The Security Council has defined a “non-State actor” as an “individual or entity, not acting under the lawful authority of any State” S.C. Res. 1540, *supra*, at footnote.

¹⁶ Legal Consequences Advisory Opinion, *supra* note 4, paras. 86-87.

The “inherent right” of self-defense. Second, to understand the full meaning of “self-defense” in Article 51 requires looking beyond the language of Article 51 alone. As the Court itself has recognized, Article 51 did not create a right of self-defense; rather, it preserved an *inherent* right of self-defense, one that existed in customary international law prior to enactment of the Charter in 1945.¹⁷ The Court has repeatedly stated that we must look to this customary international law rule to ascertain the full content of Article 51. Thus, in determining that the principles of necessity and proportionality apply to the exercise of the right of self-defense under Article 51, the Court has relied upon the existence of those principles in customary international law, since they do not appear anywhere in the text of Article 51.¹⁸

Yet when considering the principles of necessity and proportionality under customary

¹⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 ICJ 14, para. 193 (Judgment of June 27) [hereinafter *Nicaragua Judgment*] (“Article 51 is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter.”).

¹⁸ *See id.*, para. 176; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 66, para. 41 [hereinafter *Nuclear Weapons Advisory Opinion*]; *Oil Platforms (Iran v. U.S.)*, 2003 ICJ 161, para. 51 (Nov. 6) [hereinafter *Oil Platforms Judgment*] (“The United States must also show that its actions were necessary and proportional to the armed attack made on it”).

international law, the precedent that immediately comes to the mind of states,¹⁹ scholars,²⁰ and presumably International Court judges²¹ is the 1837 *Caroline* incident. In that clash between the United States and the United Kingdom, the two governments settled upon the basic contours of the right of self-defense,²² contours that remain today the touchstone for most discourse on the subject. On its facts, the *Caroline* incident concerned self-defense *as a reaction to attacks by non-state actors* (in that case, support by U.S. nationals for a rebellion in Canada).²³ Governments prior to the UN Charter invoked the right of self-defense against the acts of individuals in numerous cases, such as

¹⁹ See, e.g., Memorial Submitted by the Islamic Republic of Iran, para. 4.18 (June 8, 1993), Oil Platforms Judgment, *supra* note 18 (“This condition of lawful self-defence was reflected in the statement by U.S. Secretary of State Webster, in the celebrated *Caroline* case, regarded as the *locus classicus* of the customary right of self-defence.”); Counter-Memorial and Counter-Claim Submitted by the United States of America, paras. 4.43-4.44 (June 23, 1997), Oil Platforms Judgment, *supra* note 18 (“Webster’s analysis established the requirements of necessity and proportionality as cornerstones of the legal doctrine of self-defense.”).

²⁰ See, e.g., MALCOLM SHAW, INTERNATIONAL LAW 1024 (5th ed. 2003) (“The traditional definition of the right of self-defence in customary international law occurs in the *Caroline* case.”); CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 120 (2d ed. 2004) (“The requirements of necessity and proportionality are often traced back to the 1837 *Caroline* incident”).

²¹ See, e.g., Nicaragua Judgment, *supra* note 17, at 362, para. 200 (dissenting opinion of Judge Schwebel).

²² See 29 BRITISH & FOREIGN STATE PAPERS 1226, 1137-38 (1857); 30 BRITISH & FOREIGN STATE PAPERS 193, 195 (1858) (exchange of letters between the United States and United Kingdom); see R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AJIL 82, 89 (1938).

²³ The incident involved a U.K. assertion that its attack in U.S. territory on the schooner *Caroline* was permissible self-defense because the schooner had previously been used (and might be used again) to ferry supplies across the border to Canada to rebels who were fighting U.K. rule in Canada. In support of his views, Webster cited to eminent scholars of international law regarding the status of international custom, including Grotius, Pufendorf, and Vattel.

seizure of vessels engaged in smuggling.²⁴

This inherent right of self defense is preserved under Article 51 “if an armed attack occurs.” In the *Nicaragua* case, the Court found that, in establishing that an “armed attack” has occurred, the state invoking a right of self-defense must establish that it has been the target of a large-scale use of force, such as an invasion or a bombardment or other “most grave forms of the use of force.”²⁵ Moreover, the Court found that such force could occur either through the use of regular armed forces or by “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries.”²⁶ However, if a state simply provides weapons or logistical support to a non-state actor, which in turn uses force against a second state, such action does not constitute an “armed attack” by the first state within the meaning of Article 51, and therefore the second state has no right to self-defend against the first state.²⁷ The Court did not directly address whether the second state could engage in “counter-intervention,”²⁸ nor whether the second state could regard the actions of a non-state actor as an

²⁴ See, e.g., C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 R.C.A.D.I. 455, 464-66 (1952-II).

²⁵ See *Nicaragua Judgment*, *supra* note 17, para. 191 (“it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”); *Oil Platforms Judgment*, *supra* note 18, para. 51; see also I THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 796 (Bruno Simma, ed. 2d ed. 2002) (noting that “armed attacks” must be “military actions [that] are on a certain scale and have a major effect, and are thus not to be considered mere frontier incidents”); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 173-74 (3d ed. 2001) (“There is no doubt that, for an illegal use of force to acquire the dimensions of an armed attack, a minimal threshold has to be reached. . . . In the absence of an armed attack, self-defence is not an option available to the victim State . . .”).

²⁶ See *Nicaragua Judgment*, *supra* note 17, para. 195.

²⁷ *Id.*

²⁸ *Id.*, paras. 210-11.

“armed attack,” nor clarify whether it makes a difference if the non-state actor operates solely within the second state.²⁹

The Court’s finding in *Nicaragua* was criticized at the time by members of the Court³⁰ and remains controversial today,³¹ since it suggests that what states cannot do directly (send military forces into another state), it can do indirectly by providing weapons and other assistance to non-state actors who it knows will pursue the same objective. The Court’s advisory opinion appears to take this restrictive interpretation of Article 51 to a further level, by expressly stating that the second state cannot regard the actions of the non-state actor as an “armed attack” justifying a use of force against the non-state-actor’s camps or hide-outs located across a border. While the Court’s opinion would allow such a defensive response if the non-state actor’s conduct can be “imputed” to the first state,

²⁹ In the *Nicaragua* case, El Salvador asserted to the Court, among other things, that Nicaragua was providing “houses, hideouts and communication facilities” to the insurgents (“terrorists”) that were attacking El Salvador. *Nicaragua Judgment*, *supra* note 17, para. 132. The Court found that until early 1981, “an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador” without reaching any specific findings as to how much insurgent activity was occurring in Nicaragua as opposed to El Salvador. *Id.*, para. 160.

³⁰ *See, e.g.*, Jennings Dissenting Opinion, *Nicaragua Judgment*, *supra* note 17, at 544 (“it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.”).

³¹ THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 25, at 801 (commentary by Professor Albrecht Randelzhofer that “[t]aking into consideration modern practice of international terrorism, today I am of the opinion that the statement of the ICJ is much too sweeping. . . and needs further differentiation. Otherwise it would lead to the result that States are not sufficiently protected by Article 51 of the Charter against force committed by other states in an indirect manner, thus eroding the very purpose of the Charter. ”); ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 250-51 (1994) (“That finding has occasioned a torrent of criticism, the critics contending that it is an encouragement for low-grade terrorism because the state at whom it is directed cannot use self-defence against it.”).

the Court (per *Nicaragua*) apparently does not regard the provision of weapons or logistical support (for example, the use of communications facilities) by the first state to the non-state actor as resulting in imputation, nor regards imputation as arising by the first state simply tolerating the presence of the non-state actor.³² In the event that the first state lacked capacity to stop the non-state actor, and was unwilling to receive assistance from the second state in stopping the non-state actor (perhaps for internal political reasons), *Nicaragua* implies that this, too, apparently would be a situation where the non-state actor's conduct could not be imputed to the first state.

If this is what the Court means by "imputed" in its advisory opinion, then the upshot of the Court's present jurisprudence appears to be that under the UN Charter (1) a state may provide weapons, logistical support, and safe haven to a terrorist group; (2) that group may then inflict violence on another state of any level of gravity, even with weapons of mass destruction; (3) the second state has no right to respond in self-defense against the first state because the first state's provision of such assistance is not an "armed attack" within the meaning of Article 51; and (4) the second state has no right to respond in self-defense against the terrorist group because its conduct cannot be imputed to the first state, absent a showing that first state "sent" the terrorist group on its mission. Such a legal construct, if intended, seems unlikely to endure.

A conceivable explanation might be that the requirement of "necessity" embedded within Article 51 as a matter of customary international law requires that, before resorting to self-defense, a state must satisfy itself that the state in which the non-state actor is located is unwilling or unable to take steps necessary to remove the threat caused by the non-state actor. Under this interpretation,

³² By analogy, it would seem that the second state also could not engage in "counter-intervention" against the first state (in other words, could not take measures that intervene in the first state's internal affairs that fall short of a use of force).

the finding would not be that Article 51 “has no relevance” to self-defense against an attack by a non-state actor but, rather, that the necessity of defending cannot be established if there is still a possibility that another state could terminate the threat. Such an interpretation would be consistent with other decisions of the Court regarding the exercise of self-defense, which at times have asked whether there were peaceful alternatives available, such as pursuing diplomatic efforts.³³ But under such a position, the focus is less on whether a prior armed attack can be *imputed* to a state, than on whether that state is capable of preventing further attacks and is willing to do so.³⁴ In the context of the Court’s consideration of Israel’s conduct, it is unclear why this standard of necessity is not met. Either there is no other state capable of, or willing to, end the terrorist attacks against Israel, or there is such a “state” in the form of the nascent Palestine that, despite repeated efforts of the Israeli government, has proven unwilling or unable to end such attacks.

State practice under Article 51. Third, whatever might have been the original meaning of

³³ See, e.g., Oil Platforms Judgment, *supra* note 18, at para. 76 (“In this connection, the Court notes that there is no evidence that the United States complained to Iran of the military activities of the platforms, . . . which does not suggest that the targeting of the platforms was seen as a necessary act.”)

³⁴ That approach would be consistent with the Court’s decision in the *Corfu Channel* case, 1949 I.C.J. 4, 22 (Merits), which notes “every State’s obligation not to knowingly allow its territory to be used for acts contrary to the rights of other states.” In that case, the Court never established who had laid the mines that damaged the U.K. warships; rather, it placed an evidentiary burden on Albania to disprove its involvement given Albania’s control over the territory in which the mines were laid. When Albania did not do so, the Court held that Albania was responsible. Such an obligation is embedded more generally in the doctrine of *sic utere tuo ut alienum non laedas* (one must use his own so as not to injure others), which in turn has strongly influenced developments in the field of international environmental law. See *Trail Smelter Case*, 3 R.I.A.A. 1911; Rio de Janeiro Declaration on Environment and Development, principal 2, UN Doc. A/CONF.151/5 (1992), *reprinted in* 31 ILM 874 (1992).

Article 51, subsequent state practice³⁵ appears to support the ability to respond in self-defense to an attack by a non-state actor, just as occurred in the *Caroline* incident. The most dramatic example of invoking Article 51 in response to the attack of a non-state actor arose with respect to the terrorist attacks of September 11, 2001. The next day, the Security Council passed Resolution 1368, which affirmed—in the context of such terrorist attacks—“the inherent right of individual and collective self-defense in accordance with the Charter” and the need “to combat by all means” the “threats to international peace and security caused by terrorist acts.”³⁶ Shortly thereafter, similar language appeared in Security Council Resolution 1373.³⁷

There is certainly no language in these resolutions indicating a belief by the Security Council that terrorist acts must first be imputed to a state in order to trigger a right of self-defense under Article 51. Indeed, as of September 12, the United States had made no claim that the September 11 attacks were to be imputed to any particular state, nor did the Secretary-General or any of the Security Council members make such an assumption.³⁸ This practice by the Security Council presumably should have been probative for the Court’s Article 51 finding in the *Israeli Wall* opinion since, when interpreting the UN Charter previously, the Court has regarded relevant state practice

³⁵ Subsequent practice by states in the application of a treaty is regarded as relevant in some circumstances for purposes of interpreting the treaty. *See* VCLT, *supra* note 11, Art. 31(3)(b), 1155 UNTS at 340.

³⁶ SC Res. 1368, pmb. (Sept. 12, 2001).

³⁷ SC Res. 1373, pmb. (Sept. 28, 2001).

³⁸ *See, e.g.*, U.N. Doc. S/PV.4370 at 2 (Sept. 12, 2001) (statement by Secretary General that “[a]ll of us condemn [the attack] and those who planned it—whoever they may be—in the strongest possible terms.”).

as including actions of states when operating as members of a UN organ.³⁹ As Judge Kooijmans noted in his separate opinion:

Resolutions 1368 and 1373 recognize the inherent right of individual or collective self-defence *without making any reference to an armed attack by a State*. . . . This new element is not excluded by the terms of Article 51 since [Article 51] conditions the exercise of the inherent right of self-defence on a previous armed attack without saying that this armed attack must come from another State even if this has been the generally accepted interpretation for more than 50 years. The Court has regrettably by-passed this new element, the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence.⁴⁰

The Security Council's interpretation of the meaning of Article 51 in respect of a non-state

³⁹ See, e.g., *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16, 22 (June 21) (using such practice to interpret the voting requirements of UN Charter article 27(3)); *Competence of the General Assembly for Admission of a State to the United Nations*, 1950 I.C.J. 4, 9 (Mar. 3) (looking to the practice of the Security Council and General Assembly when interpreting UN Charter provisions on admission of states to the United Nations).

⁴⁰ See *Separate Opinion of Judge Kooijmans, Legal Consequences Advisory Opinion*, *supra* note 4, para. 35 (emphasis added); see also THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* 54 (2002) (Resolution 1368 “clearly confirms the right of victim states to treat terrorism as an armed attack . . .”); Gray, *supra* note 20, at 165 (“[I]t seems clear from the international reaction at the time that the members of the Security Council were in fact willing to accept the use of force in self-defence by the USA in response to the terrorist attacks.”); Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EJIL 993, 996 (2001) (finding that the “events of 11 September have dramatically altered the [self-defense] legal framework”).

threat appears to have been shared by all the members of the North Atlantic Treaty Organization⁴¹ and of the Organization of American States.⁴² In viewing the September 11 incident as an “attack” triggering collective defense obligations, neither alliance asserted that responsibility for the incidents must first be imputed to a foreign state.⁴³ Thereafter, on October 7, the United States notified the UN Security Council in accordance with Article 51 that the United States was deploying forces into Afghanistan in the exercise of its inherent right of self-defense.⁴⁴

⁴¹ On September 12, 2001, the North Atlantic Council agreed that, if it was determined that the September 11 incidents were directed from abroad against the United States, “it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.” NATO Press Release No. 124, Statement by the North Atlantic Council (Sept. 12, 2001), <<http://www.nato.int>>; *see* North Atlantic Treaty, Apr. 4, 1949, Art. 5, 63 Stat. 2241, 34 UNTS 243 (expressly referring to the exercise of self-defense “recognized by Article 51 of” the UN Charter). On October 2, after being briefed on the known facts by the United States, the North Atlantic Council determined that it was “clear and compelling” that “the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty” NATO, Statement by NATO Secretary General Lord Robertson (Oct. 2, 2001), <<http://www.nato.int>>. Even at this stage, there was no attribution by NATO of the attacks to a foreign state.

⁴² O.A.S. Doc. RC.24/RES.1/01, OEA/Ser.F/II.24 (Sept. 21, 2001) (resolution of OAS ministers of foreign affairs that “these terrorist attacks against the United States of America are attacks against all American states” triggering the reciprocal assistance provisions under the Rio Treaty).

⁴³ As Malcolm Shaw notes, “[a]ccordingly, the members of both these alliances accepted that what happened on 11 September constituted an armed attack within the meaning of Article 51 of the Charter.” SHAW, *supra* note 20, at 1028. The reactions of NATO and the OAS may be of particular interest, in that Article 51 was incorporated into the Charter at the 1945 San Francisco conference principally as a means of accommodating the resort to self-defense by regional organizations. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 270 (1963).

⁴⁴ The United States did assert that Al Qaeda was “supported by the Taliban regime in Afghanistan” and that the attacks were “made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by [Al Qaeda] as a base of operation.” Letter dated 7 October 2001 from the Permanent Representative of the United States of America

The Court's only effort to address Security Council resolutions 1368 and 1373 comes in the second part of its Article 51 finding. The Court states that those resolutions are not relevant because "the threat which [Israel] regards as justifying the construction of the wall originates within, and not outside," territory under Israeli occupation. The implication of this finding is that, in the case of the September 11 attacks, the threat originated outside territory under U.S. control, and therefore the Security Council resolutions concerned a situation different that faced by Israel. Why such a factual difference is material for the application of Article 51, however, is left unexplained by the Court. Moreover, why the Court saw a factual difference between September 11 and the attacks against Israel is also not obvious. The September 11 attacks were committed by nineteen men resident in the United States by seizing aircrafts in the United States and crashing them into buildings in the United States.⁴⁵ In at least an immediate sense, the threat "originated" in territory under U.S. control.⁴⁶ The nineteen men did receive training, instructions, and funds from outside the United States (although even today the issue of funding remains cloudy), but the Court does not explain why that constitutes a threat originating outside the United States. Conversely, while the Court states without citation that

to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946 (Oct. 7, 2001). Yet there is nothing in the U.S. report to the Security Council, nor in the views of other states at the time, reflecting a belief that imputation of the attacks to the state of Afghanistan was necessary prior to acting upon such a right of self-defense. *See* GRAY, *supra* note 20, at 166 ("Both [the United States and United Kingdom] thus left uncertain what degree of involvement, if any, by Afghanistan was necessary to justify the use of force against its territory.")

⁴⁵ *See generally* THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004) (providing an account of the events leading up to and including the terrorist attacks of September 11, 2001).

⁴⁶ The Court spoke of where the terrorist *threat* originated, whereas Judge Kooijmans spoke of where the terrorist *acts* originated. Separate Opinion of Judge Kooijmans, para. 36, Legal Consequences Advisory Opinion, *supra* note 4 (emphasis added).

Israel itself regards the threat against it as originating within occupied territory,⁴⁷ Israel clearly stated to the Court in its written submission that the terrorist attacks *had* significant foreign connections. Israel identified four principal Palestinian terrorist organizations, and described attacks committed by each group against Israel. Israel stated that one of them, the Popular Front for the Liberation of Palestine, “receives logistical support from, and safe haven in, Syria,”⁴⁸ while another, Palestine Islamic Jihad, “receives support, sponsorship and safe haven from Syria, Lebanon and Iran”⁴⁹ The Court left unexplained why such support nevertheless means that the threat to Israel only originated in territory under Israeli control.

Any assumption that these two Security Council resolutions alone are the only relevant state practice—and Judge Kooijman’s view that prior to 2001 there was a “generally accepted” interpretation of Article 51 calling for only self-defense against state action⁵⁰—would be debatable and would merit further explanation. Although not always cast in terms of a right of self-defense, some state practice since 1945 evinces a belief that states may act against non-state actors in the exercise of a right of protection against threats, such as against stateless vessels on the high seas. For example, in 1985, U.S. military aircraft intercepted an Egyptian aircraft over the Mediterranean Sea and forced it to land in Italy so that alleged terrorists on board the craft could be seized and

⁴⁷ Legal Consequences Advisory Opinion, *supra* note 4, para. 139.

⁴⁸ Written Statement of Israel, para. 3.59 (Jan. 29, 2004), Legal Consequences Advisory Opinion, *supra* note 4.

⁴⁹ *Id.*, para. 3.61.

⁵⁰ Separate Opinion of Judge Kooijmans, para. 35, Legal Consequences Advisory Opinion, *supra* note 4.

prosecuted.⁵¹ While such actions occur outside the territory of any state and therefore may be distinguishable from typical situations of self-defense by a state, arguably those precedents are of particular relevance with respect to the West Bank and Gaza strip, areas not regarded at present as formally within the territory of any recognized state. Moreover, there are various incidents of practice prior to September 11 in which self-defense was invoked against non-state actors operating within foreign states, whether they be terrorists or insurgents that threaten the defending states. The United States, Israel, and South Africa have all invoked a right of self-defense to enter the territory of other states to attack terrorist camps or other facilities.⁵² Similar invocations of Article 51 may be found when states have attacked insurgents by crossing into neighboring states, such as Senegal's incursion into Guinea-Bissau, Thailand's incursion into Myanmar (Burma), and Tajikistan's incursion into Afghanistan, all in the 1990's.

Whether such practice evinces an emergent norm under Article 51 requires serious analysis of such incidents, including the legal justification stated by the allegedly defending state and the response of the global community to that justification. Many scholars view such incidents as unlawful deviations from the *jus ad bellum*,⁵³ while others detect an emerging norm in response to

⁵¹ For a discussion of the *Achille Lauro* affair, see ANTONIO CASSESE, *TERRORISM, POLITICS AND THE LAW: THE ACHILLE LAURO AFFAIR* (S.J.K. Greenleaves trans., 1989).

⁵² Invoking a right of self-defense under Article 51, Israel crossed into the Sinai in 1956 in pursuit of Palestinian terrorists and attacked Palestinian camps in Lebanon during 1970-83 and in Tunisia in 1985. During 1976-85, South Africa attacked camps of the Southwest Africa People's Organization (SWAPO) in Angola, and made similar raids into Lesotho, Swaziland, and Zambia.

⁵³ See, e.g., CASSESE, *supra* note 51, at 66-67 (finding the 1985 interception of the aircraft containing the *Achille Lauro* terrorists unjustifiable under Article 51); Cassese, *supra* note 38, at 996 (finding that a majority of states prior to September 11 did not accept recourse to self-defense by the targeting terrorist bases in a host country).

the rise in global terrorist activity. Thus, Thomas Franck suggests there may be emerging in the Security Council and General Assembly “a greater tolerance for states that carry their wars with terrorists and insurgents across borders to strike at safe havens.”⁵⁴

An example of that tolerance may be seen with respect to the 1998 Al-Qaeda-sponsored bombings of U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, which killed nearly 300 people (including twelve Americans). The United States invoked its “right of self-defense confirmed by Article 51”⁵⁵ and launched cruise missiles against training camps in Afghanistan and against a Sudanese pharmaceutical plant allegedly serving as a chemical weapons facility. Perhaps the U.S. attacks were unlawful, but the global reaction to the attacks suggests a measure of acceptance. While some states condemned the attacks, others supported them, including Australia, France, Germany, Japan, Spain, and the United Kingdom.⁵⁶ Neither the General Assembly nor the Security Council condemned the attacks. The League of Arab States condemned the attack on the Sudan, but was silent regarding the attack on Afghanistan.⁵⁷ Perhaps the U.S. attacks were lawful because Al Qaeda’s conduct was “imputed” to the Sudan and Afghanistan. If so, that would suggest a fairly broad (and perhaps meaningless) standard for finding “imputation” of conduct. No Sudanese

⁵⁴ FRANCK, *supra* note 40, at 65.

⁵⁵ Letter Dated 20 August 1998 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/780 (1998).

⁵⁶ See William Drozdiak, *European Allies Back U.S. Strikes: Japan Says It Understands*, WASH. POST, Aug. 21, 1998, at A20.

⁵⁷ See Letter Dated 21 August 1998 from the Chargé d’Affaires A.I. of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/789 (1998).

or Afghan government organs were involved in the attacks on the U.S. embassies, or controlled or directed such attacks, and neither government acknowledged and adopted the attacks as their own. The most that the United States could claim was that it had made “repeated efforts to convince the Government of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down”⁵⁸

The tolerance of such cross-border incursions, however, likely has less to do with the idea of imputing conduct to a state, and more with the objectionable conduct arising with some consistency in an identifiable territory outside the territory of the victim-state.

It is becoming clear that a victim-state may invoke Article 51 to take armed countermeasures in accordance with international law and UN practice against any territory harboring, supporting or tolerating activities that culminate in, or are likely to give rise to, insurgent infiltrations or terrorist attack. That much is becoming cognizable as applicable law.⁵⁹

Under such a standard, Israel is entitled as a legal matter to invoke Article 51 as the basis for acts against terrorist attacks from outside Israel’s borders although, of course, it might be established as a factual matter that the terrorist attacks were not grave enough to trigger a right of self-defense, or that Israel’s response was unnecessary or disproportionate.

Article 51's negotiating history. Fourth, if resort to the *travaux préparatoires* of the UN

⁵⁸ Letter Dated 20 August 1998, *supra* note 55.

⁵⁹ FRANCK, *supra* note 40, at 67.

Charter is appropriate,⁶⁰ it reveals some evidence that Article 51 was not limited to self-defense by states against other states. The drafts of what became Article 51 were initially developed within the delegation of the host country for the San Francisco Conference, the United States. The early U.S. drafts on May 10-11, 1945, contained language that recognized the right of a member state to defend against an attack *by another state*.⁶¹ Such limiting language was then dropped in the course of accommodating U.K. and French concerns, even though in doing so the U.S. delegation noted that it “opened very widely the field for the exercise of the right of self-defense.”⁶² The accommodation was not focused on allowing states to defend against non-state actors; it was prompted by a desire to ensure that states could self-defend even in the absence of a regional arrangement. Nevertheless, the language was changed so as to broaden the scope of the right of self-defense recognized under Article 51, with no state insisting on the retention of language that would restrict self-defense to attacks only by other states.

⁶⁰ The Court reverted to the *travaux préparatoires* of the 1949 Geneva Conventions in the course of its advisory opinion. *See* Legal Consequences Advisory Opinion, *supra* note 4, para. 95. Treaty interpretation, however, only calls for recourse to the *travaux* if the initial interpretation leads to an ambiguous or obscure meaning, or to an absurd or unreasonable result. *See* VCLT, *supra* note 11, Art. 32, 1155 UNTS at 340. Further, there is some authority for the proposition that, when interpreting the text of the constitution of an international organization—such as the UN Charter—the original intention of the drafters of the constitution should not be emphasized, since the parties may increase or change, and because such a constitution, by its nature, should not be viewed as static. *See, e.g.*, Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), 1962 ICJ 151, 185 (July 20) (separate opinion of Judge Spender).

⁶¹ *See* Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYOMING L. REV. 663, 693, 695-97, 699-700 (2003).

⁶² *Id.* at 702-05 (quoting U.S. delegate Harold Stassen).

II. FACTS AND THE *JUS AD BELLUM*

The Palestinian delegation to the Court did not urge the Court to find that Article 51 was inapplicable because it only concerns a state attacking another state. Rather, Palestine's arguments were more sophisticated: (1) the acts of violence committed against Israel did not rise in gravity to the level of being an "armed attack" within the meaning of Article 51;⁶³ (2) since Article 51 does not allow self-defense against a future armed attack, the construction of the "wall" cannot be justified as a means of preventing such an armed attack;⁶⁴ (3) self-defense under Article 51 must be proportionate to the actual or imminent harm, and the construction of the "wall" is not;⁶⁵ and (4) Israel's rights to use force within the occupied territory are governed exclusively by the *jus in bello* as *lex specialis*, such that any rights existing under Article 51 are displaced and cannot be invoked.⁶⁶

To consider and dispose of these arguments, the Court would have had to grapple with the facts associated with Israel's assertion that it was the victim of repeated terrorist attacks. The Court could not find that those attacks failed to rise to a level of an "armed attack" without systematically reviewing the nature and gravity of the terrorist attacks against Israel. The Court could not find that Israel was acting in preemptive self-defense without determining that an "armed attack" had not yet occurred by virtue of the thousands of Israelis that Israel told the Court were killed and injured over

⁶³ Written Statement Submitted by Palestine, para. 531 (Jan. 30, 2004), Legal Consequences Advisory Opinion, *supra* note 4.

⁶⁴ *Id.*, para. 532.

⁶⁵ *Id.*, para. 533.

⁶⁶ *Id.*, para. 534; Provisional Verbatim Record, Legal Consequences, CR 2004/1, at 44-45 (Feb. 23, 2004) (statement of Professor Georges Abi-Saab).

the past four years.⁶⁷ The Court could not assess whether the construction of a barrier was a proportionate response to the threat of attack without engaging in a serious review of Israel's allegations about that threat.

The final Palestinian argument that the *jus ad bellum* (including Article 51) is set aside in occupied territory may or may not be correct as a legal matter. Many scholars see a linkage between the *jus ad bellum* and the *jus in bello* (such as with respect to their respective use of customary rules on necessity and proportionality) without seeing one body of law as wholly displacing the other.⁶⁸ As a hierarchical matter, rights and obligations arising under the UN Charter would seem to trump those arising in the Hague Regulations or Geneva Conventions, or for that matter in human rights conventions.⁶⁹ To the extent that the Court had viewed Article 51 as displaced by (or perhaps subsumed within) the *jus in bello*—or had simply found that a state in exercising a right of self-defense must always comply with the *jus in bello*—then the Court could have completely avoided issuing its dubious interpretation of Article 51. Yet the Court still would have needed to confront much more directly the myriad aspects of the *jus in bello* which accord to a belligerent—including an occupying power—the ability to defend itself, and to apply the facts on the ground to that law. For example, the Court would have needed to grapple with Article 27 of the Fourth Geneva Convention, which provides that the occupying power may take “measures of control and security as may be necessary as a result of the war.” Such measures may include, according to the Pictet

⁶⁷ Written Statement of Israel, *supra* note 48, para. 0.2.

⁶⁸ See, e.g., Christopher Greenwood, *The Relationship Between Ius Ad Bellum and Ius in Bello*, 9 REV. INT'L STUD. 221 (1983).

⁶⁹ See UN CHARTER Art. 103.

commentary, “prohibition of access to certain areas” or “restrictions of movement.”⁷⁰

As it happened, the Court’s opinion reveals no effort to consider any of the facts that might have justified Israeli defensive measures, even to discount those facts as inadequate. The Court’s *jus in bello* analysis, along with its discussion of human rights law, recounts in some detail (to the point of repeated reference to statistics) the harm to the Palestinian people from the construction of the barrier, but evinces no analysis *whatsoever* of the threat that, according to Israel, justified the creation of the barrier. The Court simply makes two vague statements that, “in light of the material before it,” the Court “is not convinced” that Israel’s actions were necessary,⁷¹ and finds that the barrier “could well become permanent” (notwithstanding Israel’s assurance that it would not), and thus was unlawful.⁷² But *why* was the Court not convinced that Israel’s actions were necessary? What facts raised by Israel in its Written Statement—or in any of the numerous Israeli reports and statements to the United Nations over the past four years—did the Court find unconvincing? Did the Court believe that terrorist attacks were not occurring, or that they were occurring but not at a level sufficient to justify construction of a barrier, or that a barrier was justified but that the route selected by Israel was not tailored narrowly to address the threat? And exactly what “material” was the Court looking at in reaching its sweeping statements? It is no surprise that Judge Buergenthal, in his

⁷⁰ ICRC COMMENTARY PUBLISHED UNDER THE GENERAL EDITORSHIP OF JEAN S. PICTET, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS 207 (1958).

⁷¹ Legal Consequences Advisory Opinion, *supra* note 4, para. 135 (“on the material before it, the Court is not convinced that the destructions carried out . . . were rendered absolutely necessary by military operations”); *id.* para. 140 (“In light of the material before it, the Court is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction.”)

⁷² *Id.*, para. 121.

dissenting declaration, called the Court to task for failing “to ascertain all relevant facts bearing directly on issues of Israel’s legitimate right of self-defence, military necessity and security needs, given the repeated deadly attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected”⁷³

The Court may have failed to confront these facts from a belief that such facts were not before it. The principal sources of information relied upon by the Court appear to have been an eleven-page report by the Secretary-General⁷⁴ and a fifteen-page report of a Special Rapporteur of the Commission on Human Rights,⁷⁵ plus a dossier of materials compiled for the Court by the Secretary-General.⁷⁶ Neither report undertook a serious factual analysis of the terrorist threat to Israel, or whether a barrier was a necessary and proportionate response to that threat. The Secretary-General’s report stated that the Israeli cabinet approved the construction of the “wall” after “a sharp rise in Palestinian terror attacks in the spring of 2002,” and devoted two sentences in an annex to Israeli victims from suicide bombers entering Israel from the West Bank,⁷⁷ but did not recount any other facts relating to such attacks, nor whether the “wall” would likely stem the attacks. The Special

⁷³ Declaration of Judge Buergenthal, para. 3, Legal Consequences Advisory Opinion, *supra* note 4.

⁷⁴ Report of the Secretary-General Prepared Pursuant to General Assembly Resolution ES-10-13, UN Doc. A/ES-10/248 (Nov. 24, 2003).

⁷⁵ Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, UN Doc. E/CN.4/2004/6 (Sept. 8, 2003).

⁷⁶ Dossier, Materials Compiled Pursuant to Article 65, Paragraph 2, of the Statute of the International Court of Justice (Jan. 19, 2004), Legal Consequences Advisory Opinion, *supra* note 4 [hereinafter Dossier].

⁷⁷ UN Doc. A/ES-10/248, *supra* note 74, at para. 4 & Annex I, para. 6.

Rapporteur's report simply stated that "[p]ossibly, the Wall will assist in the achievement of the Government's publicly declared goal—to prevent suicide bombers from reaching Israeli territory," but that this is "doubted by some."⁷⁸ The lack of attention to such issues is no fault of the reporters; their mandate was not to analyze factually or legally Israel's right of self-defense but, rather, to report on whether Israel was stopping construction of and dismantling the "wall" (the Secretary-General's report) or on whether there were violations of human rights in the "Occupied Arab Territories" (the special rapporteur's report). The dossier prepared by the Secretary-General also contained no documents directed specifically at informing the Court regarding Israel's claim of self-defense, although some verbatim records of meetings before the General Assembly and the Security Council touched upon the issue,⁷⁹ particularly those containing Israel's representations.⁸⁰

Of course many facts relating to Israel's arguments regarding the need for a barrier were readily available in the public domain, as the Court itself acknowledged.⁸¹ In addition to Israel's myriad statements before United Nations,⁸² the Israeli Foreign Ministry had issued various statements regarding terrorist attacks on Israel and the need for such a barrier to stem those attacks,

⁷⁸ UN Doc. E/CN.4/2004/6, *supra* note 75, para. 8.

⁷⁹ *See, e.g.*, Dossier, *supra* note 76, Doc. 46, at 3 (statement on October 21, 2003, of UN Undersecretary General for Political Affairs to the Security Council stating that "[w]e recognize Israel's right to defend itself against terrorist attacks.").

⁸⁰ *Id.*, Doc. 40, at 5-10 (statement of Israeli Ambassador Dan Gillerman to the General Assembly, referred to *supra* note 1); *id.*, Doc. 44, at 7-12 (statement of Israeli Ambassador Gillerman to the Security Council).

⁸¹ *See* Legal Consequences Advisory Opinion, *supra* note 4, para. 57.

⁸² Israel's statements to the United Nations, many of which are not contained in the Secretary-General's dossier, can most easily be accessed through Israel's mission in New York. *See* < <http://www.israel-un.org> >.

including statistics on attacks and the effectiveness against terrorism of a similar barrier constructed around the Gaza Strip.⁸³ In these statements and in various proceedings before Israeli courts, the Israeli government argued that the placement of the barrier, depending on the location, was driven by various concerns, such as population density, environmental effects, topography (for example, the need to allow for adequate observation from the barrier's patrol road), providing sufficient time to locate persons who have crossed the barrier before they can reach an area of safe refuge, and minimization of harm to cultivated farmland (for example, placing the barrier along an existing road).⁸⁴ At the same time, the Court could have considered Israeli government documents that were adverse to its position. The Israeli Knesset "watchdog" comptroller's office found in July 2002 that, since the beginning of the second *intifada* in 2000, most of the suicide terrorists and the car bombs crossed the "green line" into Israel through porous checkpoints, suggesting that strengthening of existing checkpoints rather than construction of a new barrier was the necessary response.⁸⁵ In its

⁸³ See, e.g., Israel Foreign Ministry Press Release, Saving Lives: Israel's Anti-Terrorist Fence—Answers to Questions (Jan. 1, 2004). Such documents may be found at <www.securityfence.mfa.gov.il> For Israel Ministry of Defense documents concerning the barrier, see <www.securityfence.mod.gov.il/Pages/ENG/>.

⁸⁴ For an example of an Israeli government pleading in Israeli courts addressing, among other things, the placement of a portion of the barrier (filed at approximately the time of the International Court's receipt of written pleadings for the advisory opinion), see Preliminary Response on Behalf of the Respondents (Jan. 2004), HaMoked: Center for the Defense of the Individual v. State of Israel, H.C.J. 9961/03, at <http://www2.colman.ac.il/law/concord/separation_barrier/articles/petition3827.pdf>. For a listing of cases in Israeli courts regarding the barrier, see *id.*, paras. 25-26.

⁸⁵ See Israeli State Comptroller, Audit Report on the Seam Area 35 (July 2002) (in Hebrew), discussed in B'tselem, Behind the Barrier: Human Rights Violations as a Result of Israel's Separation Barrier 26 (Mar. 2003), at <http://www.btselem.org/Download/2003_Behind_The_Barrier_Eng.pdf> (position paper by Israeli human rights group). The comptroller's report was issued a month after the Israeli government's decision to erect the barrier.

advisory opinion, the Court made no explicit reference to such statements, nor to the widely-known history of Israel's vulnerability in the Middle East, which has entailed repeated armed conflicts with neighbors and an enduring exposure to terrorist attack, particularly since the second *intifada* broke out.

One might argue that the Court is not in a position to pull together such information on its own, but the Court does have mechanisms at its disposal for independent fact-finding.⁸⁶ In one of the first cases to come before the Court—one that involved important factual questions on the use of military force—the Court appointed a committee of three experts to make an independent study of the facts in dispute between the two parties.⁸⁷ After receiving a first report from the committee, the Court instructed the committee to conduct an on-site visit to verify and, if necessary, modify its findings. The committee then provided a second report to the Court, and the Court held a session for the purpose of the judges asking questions directly to the committee members.⁸⁸ The same avenue

⁸⁶ Article 50 of the Court's statute provides that "[t]he Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion." Statute of the International Court of Justice, June 26, 1945, Art. 50, 59 Stat. 1055, T.S. No. 993 [hereinafter ICJ Statute]. Article 67 of the Court's rules of procedure elaborate on this mechanism in the context of contentious cases. International Court of Justice Rules of Court, as amended Dec. 5, 2000, Art. 67, at <www.icj-cij.org> [hereinafter ICJ Rules of Court]. While the mechanism has not yet been used in the advisory opinion context, the Court's statute and rules provide that, in advisory opinions, the Court shall be guided by the provisions of the statute and rules "which apply in contentious cases to the extent to which it recognizes them to be applicable." ICJ Statute, Art. 68; ICJ Rules, Art. 102; see III SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996*, 1733 (3d ed. 1997) ("the Court has a broad discretion with regard to the procedure to be followed" in advisory opinions).

⁸⁷ *Corfu Channel*, *supra* note 34, at 9.

⁸⁸ *Id.* For the committee's reports, see *id.* at 142, 152. In the same case, the Court also appointed two experts at the compensation stage to evaluate the damage sustained by the United Kingdom. See *Corfu Channel*, 1949 ICJ 244, 247 (Compensation).

lay open to the Court in this advisory opinion.⁸⁹

Since Israel's written statement to the Court—which focused on whether the General Assembly's question was properly before the Court—did not engage in a systematic analysis of the facts relating to the threat to Israel, nor why the a barrier was a necessary and proportionate response to that threat, it might be argued that there was no need for the Court to undertake one. If so, then Israel's failure to plead in detail on this issue may have led the Court to adopt *sub silentio* a certain burden⁹⁰ or presumption⁹¹ against Israel's position. However, while resort to such a burden or presumption might be appropriate in the context of a contentious case before the Court, doing so in an advisory opinion is dubious. The Court's statute is quite clear that in contentious cases, the failure

⁸⁹ Resort to such fact-finding would have delayed for some period of time the Court's opinion, but perhaps only by a matter of a few weeks or months, such that the opinion could still have been rendered within a year of the General Assembly's request. The Court's rules call upon the Court to accelerate its procedures when the opinion is requested on an urgent basis, ICJ Rules of Court, *supra* note 86, Art. 103, as was the case in this advisory opinion. However, in the past the Court has taken as long as a year to issue an advisory opinion that had been requested at "an early date." *See* S.C. Res. 284 (July, 29, 1970) (requesting advisory opinion relating to Namibia at "an early date"); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16 (advisory opinion of June 21).

⁹⁰ *See, e.g., Corfu Channel, supra* note 34, at 17 ("the burden of proof rests upon him who asserts the affirmative of a proposition that if no substantiated will result in a decision adverse to his contention."); *Military and Paramilitary Activities in an Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility*, 1984 I.C.J. 11, para. 101 (Nov. 26) ("it is the litigant seeking to establish a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved . . .").

⁹¹ *See, e.g., Corfu Channel, supra* note 34, at 18 (recognizing that indirect evidence and certain presumptions may be appropriate where evidence is under the exclusive territorial control of a state who declines to furnish such evidence).

of a party to defend its case may result in a finding by the Court in favor of a claimant state,⁹² but no such provision exists in the advisory opinion context. Unlike in a contentious case, Israel was under no obligation to file *any* pleadings with the Court, written or oral, let alone address particular factual issues in those pleadings. As Shabtai Rosenne notes, “since there are normally no ‘parties’ in advisory cases, the role of the States and of international organizations is—or should be—limited to that of an *amicus curiae* nature.”⁹³ In such circumstances, there does not appear to be any basis for reaching factual conclusions based on a failure of Israel to present facts to the Court. Perhaps the subject matter of the advisory opinion looked similar to that of a contentious case, but the Court itself characterized the matter before it as one that was *not* bilateral in nature and one that had a “much broader frame of reference than a bilateral dispute.”⁹⁴ Moreover, in the Permanent Court’s *Eastern Carelia* advisory opinion, the Court refused to answer the question in part because the Court found that Russia’s refusal to take part in the case meant that the Court would not have before it the materials necessary to arrive at a judicial conclusion on the questions of fact;⁹⁵ the Court was not of

⁹² ICJ Statute, *supra* note 86, Art. 53(1). Moreover, even in a contentious case, the “non-appearance” of a state does not relieve the Court of its obligation to get the facts right. Even then, the Court is obligated to “satisfy itself . . . that the claim is well founded in fact and law.” ICJ Statute, *supra* note 86, Art. 53(2). The Court has interpreted this obligation as implying “that the Court must attain the same degree of certainty as in any other case that the claim of the party appearing is sound in law, and, so far as the nature of the case permits, that the facts on which it is based are supported by convincing evidence.” Nicaragua Judgment, *supra* note 17, at para. 29.

⁹³ ROSENNE, *supra* note 86, at 1733.

⁹⁴ Legal Consequences Advisory Opinion, *supra* note 4, paras. 49-50.

⁹⁵ Status of Eastern Carelia, 1923 PCIJ, Ser. B, No. 5, at 28 (finding that it “appears now to be very doubtful whether there would be available to the Court materials sufficient to enable it to arrive at any judicial conclusion upon the question of fact . . .”). The Court separately declined to answer the question for a different reason—that Russia had not consented to the Permanent Court’s jurisdiction and was not even a member of the League of Nations. *Id.* at 27-28.

the view that it could simply find against Russia based on a failure to produce such materials.

A second reason why the Court declined to engage in such a factual analysis may be that it is institutionally ill-equipped to do so. Whether sitting under its contentious or advisory jurisdiction, the Court operates as a court of first instance, called upon to decide difficult issues of international law at the same time that it must develop and test a detailed factual record. The Court may or may not receive assistance from states in developing that record, but even if it does, the Court has few means for testing evidence and for resolving direct conflicts between evidence. Witness testimony is possible, but discouraged by the Court, which seems uncomfortable when operating outside the stolid environment of government lawyers or familiar academics making scripted presentations. The judges rarely ask questions of the states who appear before it, and when they do, the responses virtually never entail presentation of additional evidence. As noted above, there are some mechanisms available to the Court for independent fact-finding, but the Court has fallen into a habit of not resorting to such mechanisms, in part because states typically prefer to keep control of the evidence placed before the Court. If detailed factual findings are later proven wrong, the Court's reputation will suffer, such that there are benefits to reaching vague factual conclusions, even if this, too, has reputational consequences. In reaching its decisions, the Court must cope with the potentially differing views of fifteen judges (sometimes more if additional ad hoc judges are appointed), and in trying to achieve a great a consensus as possible, findings on both fact and law often appear to be watered down or anodyne.

While these difficulties are problematic in any case where there are factual disagreements between states who come before the Court, they become especially so when dealing with *jus ad bellum* issues. Judgments concerning the *jus ad bellum* can strike at the heart of states' national

security interests, and determining whether states have engaged in an unlawful use of force or lawful self-defense often will require especially careful and sophisticated analysis of state conduct where relevant evidence is conflicting, secretive, and confusing. The stakes are high for the states who are implicated in the Court's finding, so much so that states may resist appearing before the Court, such as occurred in the merits phase of the *Nicaragua* case and, to a certain extent, in this advisory opinion. Moreover, the stakes are high for the Court as well; labeling a state as an aggressor is serious business, and could lead to further conflict if not handled carefully. Though the Court has addressed *jus ad bellum* issues only rarely, so far the Court appears extremely reluctant to find that a resort to military force is lawful. While it is possible that, by self-selection, the only cases that come before the Court are those where the alleged use of force is unlawful, it may also be that the judges of the Court are simply uncomfortable indicating that *any* use of force is lawful, and instead believe that states should always find means to resolve disputes pacifically.

One way around these institutional difficulties in dealing with facts would be for the Court, at least when rendering advisory opinions relating to the *jus ad bellum*, to focus on legal interpretations and stay away from application of the law to facts. While the Court claimed that it was engaged in an analysis no different than it had undertaken in the past, such as in the *Nuclear Weapons* advisory opinion,⁹⁶ in fact the Court was going well beyond the abstract legal analysis that has characterized most of its advisory opinions so as to apply the legal analysis in a very sweeping fashion to a complicated set of fact-based issues. The Court was not opining broadly on a legal question without reference to any particular state's conduct (such as the status of nuclear weapons under international law), nor narrowly applying the law to a very discrete set of legal facts (such as

⁹⁶ Legal Consequences Advisory Opinion, *supra* note 4, para. 38.

the commencement of lawsuits against a UN special rapporteur). Instead, the Court was opining broadly on the permissibility of a barrier extending hundreds of kilometers without any consideration of whether placement of the barrier was permissible in some areas (due to security considerations and minimal effects on civilians) while in other areas it was not.

If the Court was unwilling or incapable of analyzing and deciding upon such a complex fact pattern, it would have been much better for the Court to have avoided an Article 51 analysis entirely, such as by finding that a state in exercising a right of self-defense must always comply with the *jus in bello*. If the Court had to address the *jus ad bellum*, the Court should have either considered and discussed in detail the facts relating to Israel's position for why it was engaging in self-defense, or should have written its advisory opinion so as to set forth the legal framework relevant to this issue without definitively applying the framework to the facts.⁹⁷

⁹⁷ An advisory opinion simply discussing the *jus ad bellum* legal framework might have found that: (1) construction of a barrier within one's own territory along a border does not violate the *jus ad bellum*; (2) construction of a barrier in occupied territory as a general matter violates the necessity prong of the *jus ad bellum*, but might be justified as a matter of self-defense if there is a threat to the occupying power that rises to a level of an "armed attack," and if the barrier is a necessary and proportionate response to that threat; (3) in the context of a threat from terrorist suicide bombers, an "armed attack" only arises when [the threat can be imputed to a foreign state] [the threat originates from outside the occupied territory] [the threat has a gravity comparable to a large-scale use of force by a state] [other] ; (4) in the context of such an "armed attack," a barrier is necessary only if there is no other alternative means of addressing the attack and is proportionate only if the barrier is designed in a manner that is directed at the threat and no other objective; and (5) the Court does not have before it sufficient facts to apply these principles to the construction of the Israeli barrier. Of course, such an approach may have had a collateral effect on the ability of the Court to reach definitive factual conclusions regarding the *jus in bello* as well.

III. CONCLUSION

Judge Higgins' lament regarding the Court's analysis of the *jus in bello* seems equally applicable to its analysis of the *jus ad bellum*: "It might have been expected that an advisory opinion would have contained a detailed analysis, by reference to the texts, the voluminous literature and the facts at the Court's disposal, as to"⁹⁸ why Israel could not invoke Article 51. "Such an approach would have followed the tradition of using advisory opinions as an opportunity to elaborate and develop international law."⁹⁹ Likewise, Judge Buergenthal's lament regarding the Court's unwillingness to pursue serious factual analysis relating to the *jus ad bellum* is fully justified.

The Court would do well to heed these concerns. The Court currently has on its docket a series of cases relevant to the *jus ad bellum*, including those brought by Serbia for the NATO attacks relating to Kosovo, and those of the Democratic Republic of the Congo against Rwanda and Uganda. They are opportunities for the Court not only to decide concrete cases, but to help clarify in a cogent and thoughtful way the status of international law in its most critical area. States are only willing to yield power to an international court of fifteen individuals when they believe that the court's findings reflect higher levels of deliberation than exist within any one state's machinery. Peremptory findings that lack deep levels of reasoning, that fail to take account of and to rebut divergent lines of thinking, are not salutary qualities for any court, let alone one that holds itself out as the "supreme arbiter of international legality".¹⁰⁰

⁹⁸ Separate Opinion of Judge Higgins, para. 23, Legal Consequences Advisory Opinion, *supra* note 4 .

⁹⁹ *Id.*

¹⁰⁰ Separate opinion of Judge Koroma, para. 10, Legal Consequences Advisory Opinion, *supra* note 4 .