# *THE ADVISORY OPINION OF THE INTERNATIONAL COURT OF JUSTICE "A WALL IN PALESTINE" AND THE EVOLUTION OF LEGITIMATE SELF-DEFENCE IN PUBLIC INTERNATIONAL LAW*

## (Summary)

This thesis will deal with the issue of the legitimacy of the Security Fence –the so-called "wall"-, which Israel built in the Occupied Palestinian Territory (OPT), calling upon the principle of legitimate self-defence. Despite being an implicit recognition of a dual-State solution for Palestine, and therefore representing the relinquishment of the idea of a "Great Israel", the wall constitutes a major impediment for peace talks between the Government of Israel and the Palestinian National Authority (PNA). Its admissibility has been questioned not only from an ethical and political perspective, but also from a legal one.

Israel has justified its actions by claiming to be acting in compliance with art. 51 of the UN Charter. Yet the question concerning whether the construction of a 670km-long wall not respecting the provisional international border (*Green Line*) can be considered "consistent with the legitimate right of self-defence" is controverted.

Israel's objective to protect its population from a terrorist threat, which is deemed continued and lethal, is lawful; nonetheless it is to be demonstrated that art. 51 includes measures such as the ones that Israeli government took. Deeming Israeli actions to be illegal, in 2003 the X Special Session of the General Assembly decided to bring the case before the International Court of Justice, asking for an advisory opinion on the "legal consequences" of the construction of the Palestinian wall. The Court accepted to reply, and the following year released its advisory opinion entitled *Legal consequences of the construction of a wall in the Palestinain occupied territory* (July 9th, 2004). In order to decide whether the wall could be justified as a measure of self-defence, the Court had to deal with the problem of the relation between art. 51 and the definition of "aggression": which features should an armed attack have to authorize a military reaction by the attacked State in compliance with art 51?

As a matter of fact, the notion of "armed attack" in art. 51 is quite confusing, and it has long been disputed by the doctrine. Some authors have reached the conclusion that its meaning has to be sought in the contemporary *opinio iuris* of international law. Following this statement, three kinds of armed aggression can be distinguished:

1. "Traditional armed aggression", as defined in letters *a), b), c),* and *d)* of the definition of armed aggression in GA res. 3314 (XXIX). Invasions by land forces, aerial or naval bombardments, blockades of harbours, and any other military intervention on a vast scale by a State against the territory of another may be assimilated to this case.

2. "Indirect aggression", showing the same features as described in letter *g)* of the above document. In this case the aggressors are non-State actors, acting with foreign support, assistance, and supervision (for instance, mercenaries or insurgents harboured by a State).
3. Indirect aggression by a non-State actor acting against the will of the territorial sovereign, whose illegal conduct cannot be imputed to the State where it operates.

The third case is the closest to Israel's situation, since there was no proof of ties between the Palestinian terroristic organizations and the PNA. In its findings, the Court decided against the applicability of art. 51 to the wall, stating that "[it] recognizes the existence of an inherent right of self-defence [only] in the case of armed attack *by one State against another State*" (par. 139). This position, however, has been refused by the majority of the doctrine, including three judges of the same Court – Higgins, Kooijmans, and Buergenthal – who, in their separate opinions, expressed their dissatisfaction for the restrictive interpretation of art. 51. The reasons for the general hostility towards the conclusions is the topic of this thesis.

The first chapter will present an overview of the limits and modalities for the exercise of self-defence by States. The principle traces back to the failure of the security system envisaged in artt. 43 and 47 of Chapter VII of the UN Charter, which urges the States to rely on their sole forces or on regional organizations for collective self-defence (e.g. NATO, Warsaw Pact) to counter aggressions. Nevertheless, throughout the years this principle has undergone a progressive enlargement, due to the demands of the States – mostly Western ones – to include situations that did not correspond to its original content. Preventive self-defence and reaction against indirect attacks have been by far the most notable and discussed interpretations of what the characterization of self-defence as an "inherent right" should entail.

Since the objective of the thesis is a rebuttal of the interpretation of art. 51 within the advisory opinion, the evolution of the Court's thought will be followed with regard to self-defence against State and non-State actors. This will be done by analysing two pivotal verdicts, the first being *Case concerning military and paramilitary activities in and against Nicaragua* (1986). In that case, the Court had to deal with guerrilla actions against Nicaragua carried out by the United States, both through the hiring of mercenary personnel and the financing of *contras* militia. The US government claimed that it had acted in collective self-defence, for Nicaragua had supported insurgencies in El Salvador. This was the first chance in which the Court could express itself on the application of self-defence against an indirect armed attack. Indirect aggressions had already been equated (with conditionality) to traditional ones in General Assembly in its 1974 resolution; however, the Court refused to consider Nicaragua's activities tantamount to the description of "armed attack" given by the General Assembly and classified them as a "minor use of force" in breach of the principle of non-intervention.

After the advisory opinion on the wall, in 2005 the Court was presented with a second judicial case concerning the same subject of the 1986 sentence. In *Case concerning armed activities on the territory of the Congo*, the judges had to establish whether Uganda had the right to conduct military actions on the territory of the Congo to counter anti-Ugandan insurgents. In contrast with the denial of the applicability of self-defence provided by the two previous cases of 1986 (*Nicaragua v. United States*) and 2004 (*a wall in Palestine*), this time

the verdict was ambiguous: Uganda had invoked self-defence against the Congo because it asserted that this State had previously agreed with Sudan to support Ugandan rebels, so the judges limited themselves to state that there was no sufficient evidence to impute the deeds of the insurgents to the Congo. Nevertheless, it is noteworthy that in this occasion the Court appeared to leave the door open to a pronunciation in favour of self-defence applied to non-State aggressions.

After this preliminary discussion on art. 51 in the international law, in Chapter II the advisory opinion as a whole will be examined. As above mentioned, it was the X Special Session of the GA to ask the Court for a pronunciation. Res. ES-10/13 of October 27th, 2003, questioned the Court on the "legal consequences" of the wall, with respect to the rules and principles contained in general international law and in the main acts and multilateral treaty (Fourth Geneva Conventions, etc.). Israel refused to participate in the proceedings, appealing to the lack of jurisdiction and property of the Court. Nevertheless, the Court refused to exercise its discretionary power, and recognized the applicability of the Fourth Geneva Convention (1949), The Hague Regulations (1907), the Pacts on civil and political rights and social, economic and cultural rights (1966) and the Convention on the Rights of the Child (1989).

At this point, the Court turned to consider which rules of customary and treaty law Israel had effectively violated in erecting the wall. First of all, by including 80percent of Israeli illegal settlers, the pattern of the barrier is likely to create a *fait accompli* on the ground, which would breach the right of self-determination of the people as well as art. 49(6) of the Fourth Geneva Convention. Moreover, not respecting the obligations to assure an adequate standard of living to the inhabitants of an occupied territory, as imposed by human rights law and humanitarian law, means that Israel is also in breach of artt. 46 and 52 of the Hague Regulations and art. 53 of the IV Geneva Convention. Finally, limiting the freedom of movement and access to work, health, and education constitutes a violation of the aims of the two Pacts and the Convention on the Rights of the Child. With regard to this violations, Israel cannot appeal either to military necessity, or to self-defence.

In the final paragraph of the opinion, the Court enumerates the legal consequences for Israel, third States, and the UN. Judges Higgins, Buergenthal, and Kooijmans spoke against some of thosefindings in their separate opinions. The first voted in favour of all the subparagraphs, but following a different reasoning; the second voted against every point, since he did not believe that the Court had sufficient information, so that it should have refused to judge; the latter voted only against subparagraph 3(D), on the legal consequences for other States.

Having considered the whole advisory opinion, the last Chapter will finally address the matter of self-defence applied to the wall. First, the critical opinions of the dissenting judges will be re-examined, this time only in regards to their view on self-defence. Despite the differences in their points of view, all three judges agree that the analysis of the Court is biased because it does not consider violations of international law by Palestinian terrorist organizations. The evaluation of the Court results even less credible since Israeli position on the merits remains unknown. It is also arguable that Israel cannot invoke self-defence against an armed threat stemming from an occupied territory.

At the end of the chapter/thesis, it will be examined Israeli claim to self-defence from terrorist aggressions. Terrorist actions against Israeli population cannot be equated to the World Trade Centre facts, since the latter represented, for size, number of deaths, and careful planning, an *unicum* for which the applicability of self-defence was immediately recognizable. It will therefore be important to find out whether Israel is entitled, as a matter of principle, to rely on art. 51 for the kinds of attacks it is undergoing.

Once ascertained that the international community agrees on the problem of day-to-day security for the Israeli State, this dissertation will end highlighting what the flaws of this particular use of self-defence are. Notably, it is likely that the wall, even if in compliance with the principle of self-defence, would not pass the proportionality and necessity tests, which are considered the benchmarks of the "inherent right" in customary law.

Although the opinion of this writing is in favour of the applicability of self-defence against an armed attack untied to the political will of a State has been grounded in a sound analysis of sources and documents, it is clear that it is but an opinion, and as such overt to confutation. On the other hand, it appears evident that the gap between art. 51 as it was originally conceived and today has widened throughout the years. The reality of international relations does not seem to recognize itself in the interpretation given by the Court in its verdicts of 1986 and 2004. The old idea of indirect armed attack that underlay this way of thinking was doubtlessly coherent with the then state of law – as exposed in the 1974 definition of "aggression"; but it appears too narrow in order to effectively face the contemporary threats to international peace and security. New and previously unthinkable menaces have to be countered, and to this end States have been compelled to conceive a modern interpretation of art. 51, as proved by res. 1368 and 1373 (2001) of the Security Council. Hence, *vis-à-vis* the changed *opinio iuris*, it is at least plausible that, with regard to a future case of non-State aggressions, the Court will reach radically different conclusions from the opinion *a wall in Plaestine*.