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When *Jus ad Bellum* Meets *Jus in Bello*: The Occupier's Right of Self-Defence against Terrorism Stemming from Occupied Territories

IRIS CANOR*

Abstract

Can an occupier invoke the right of self-defence against terrorism stemming from territories which it occupies? In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the International Court of Justice responded to this question in the negative. This article critically analyses the reasoning presented by the Court concerning the specific question of the right of self-defence, not least in the light of the fact that it was harshly criticized by a number of judges in their individual opinions and by the Supreme Court of Israel in the subsequent *Mara'abe* (*Alfei Menashe*) case. It is also suggested that the issues discussed in this article, such as state responsibility for an armed attack, the principle of effective control, and the interplay between *jus ad bellum* and *jus in bello*, loom beyond the scope of the concrete question and concern more theoretical issues of international law.

Key words

Advisory Opinion on the *Wall*; effective control; International Court of Justice; *jus ad bellum*; *jus in bello*; self-defence

1. Introduction

Among numerous questions which have arisen recently in the field of international law, the most recurrent one is whether it is well equipped to face the challenges posed by terrorism. Short of any intention to undertake a comprehensive investigation into the possible national and international legal responses to terrorism, this article attempts to provide some insights into a much more specific issue concerning the right of self-defence and the fight against terrorism stemming from occupied territories.

Although at first sight this might be seen as a narrow question which relates only to very limited terror activity, it merits discussion for several reasons.[1] First, time and again alarm is being voiced that terrorism may bring about the disruption of some crucial legal categories of international law,[2] such as the long-standing dichotomy

* Senior Lecturer, School of Law, The College of Management, Academic Studies Division, Israel.

1. T. Burha and C. J. Tams, 'Self-Defence against Terrorist Attacks. Considerations in the Light of ICJ's "Israeli Wall" Opinion', in K. Dicke et al. (eds.), *Weltinnenrecht Liber Amicorum Jost Delbrück* (2005), 85.
2. G. Abi-Saab, 'The Proper Role of International Law in Combating Terrorism', in A. Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (2004), xiii.

of *jus ad bellum* and *jus in bello*. Partly, this concern is provoked by the popular slogan encapsulated in the catchphrase 'the war against terrorism', given the fact that it is questionable whether a victim state has a right under international law to use force in order to defend itself from a terror attack. This concern can be best examined through the assessment of the specific question, raised above, as it touches upon the most basic divisions known to international lawyers, namely the distinction between the rules of international law which apply to starting a war, and the rules of international law which apply during the state of war. International lawyers have worked hard for many years to keep these two worlds apart. Yet the very issue posed above draws them dangerously close. Therefore this article will investigate whether they should remain separate or could (and should?) be brought together and applied in an overlapping manner.[3]

Second, the legal and theoretical significance of the occupier's right to self-defence against terrorism stemming from occupied territories was exposed in the conflicting views expressed by several judges of the International Court of Justice (ICJ, or the Court) in their Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and the separate and dissenting opinions attached thereto,[4] and by the Supreme Court of Israel judgment in the *Mara'abe* (*Alfei Menashe*) case.[5]

Finally, this issue has major ramifications given the rising interest in occupation since the invasion of Iraq by the Coalition, and the growth of terror actions stemming from those occupied territories. Hence it is of great importance to both Israel and the United States, two of the most enduring fighters against terrorism, and therefore could not possibly be classified as insignificant to the international community as a whole.

2. The opinion of the Court

Admittedly, an excellent opportunity for choosing between the different methods of interpretation suggested for the exercise of the right of self-defence, at a time of divergent political appreciations of the role of law in combating terrorism, fell into the lap of the Court when it was called on to decide on the construction of the separation barrier by Israel in the occupied territories. Israel has justified its deeds

3. In order to deal only with this very precise question it will be assumed throughout this article that all the other prerequisites enumerated in Art. 51 which need to be fulfilled in order for the right of self-defence to be invoked, are fulfilled. Namely, it will be assumed that a terror attack launched by private groups from the occupied territories may amount in its scale and effects to an 'armed attack' and may be of a magnitude which is comparable to the attack referred to in Art. 51 of the UN Charter. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits 27 June 1986, [1986] ICJ Rep. 14, at 110, para. 210.
4. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep., 136 (see also www.icj-cij.org).
5. HCJ 7954/04 *Mara'abe et al. v. The Prime Minister of Israel et al.* (not yet published), from 23 Sept. 2005, http://www.court.gov.il, para. 23: 'The Advisory Opinion of the International Court of Justice at the Hague determined that the authority to erect the fence is not to be based upon the law of self defense. . . . We find this approach of the International Court of Justice hard to come to terms with'.

as yet another attempt to fight non-state terrorism while relying on the right of self-defence, enshrined in Article 51 of the UN Charter.[6]

As is well known, the right of self-defence is embodied in Article 51 of the UN Charter.[7] Clearly, this article is one of the Charter's most pivotal articles, since it symbolizes the main exemption from the idea of the prohibition of war which is the essence of modern international law, and is the only legal foundation for justifying a state's unilateral use of force.[8] The exceptional nature of Article 51 has been underlined by its strict construction[9] and its literal interpretation. However, given the current unprecedented reality of massive terrorist violence perpetrated by non-state actors, it has been recurrently suggested that the scope of Article 51 should be reconsidered and that it should be interpreted expansively.[10] However, others,[11] who fear that such an expansive reading will imply the devastation of the whole international system of minimizing the prevalence of war, argue that the existing international law provides the attacked state with enough means to combat terrorism, from the security point of view, without totally giving up the notion of justice.[12]

While ruling on the interpretation of Article 51, the ICJ rejected Israel's plea, stating 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. 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.[13]

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6. Israeli permanent representative Dan Gillerman, 'Address to the UN General Assembly?', UN Doc. A/ES-10/PV.21 (2003), 6.
7. Art. 51 of the UN Charter reads: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security . . .'. The right of self-defence is not only regulated by Art. 51, but also by norms of customary international law, as recognized by the Court in the *Nicaragua* case, *supra* note 3.
8. This was recently confirmed by the ICJ in the *Case concerning Oil Platforms* (*Iran v. United States of America*), Judgment of 6 Novem 2003, www.icj-cij.org/. This case was interpreted to imply 'a recognition that there is no other lawful possibility for a state to resort to force outside self-defence . . . smaller scale use of force . . . would not entitle the victim state to resort to armed force', N. Ochoa-Ruiz and E. Salamanca-Aguado, 'Exploring the Limits of International Law Relating to the Use of Force in Self-defence', (2005) 16 EJIL 499, at 509.
9. B. O. Bryde, 'Self Defence', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (2000), IV, 361, at 362.
10. R. Grote, 'Between Crime Prevention and the Laws of War: Are the Traditional Categories of International Law Adequate for Assessing the Use of Force against International Terrorism?', in C. Walter et al. (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (2004), 951, at 954.
11. M. J. Glennon, 'Military Action against Terrorists under International Law: The Fog of Law: Self-Defence, Inherence, and Incoherence in Art. 51 of the United Nations Charter', (2002) 25 Har. J. L. & Pub. Pol'y 539, at 540, 557.
12. A. Randelzhofer, 'Art. 51', in B. Simma (ed.), *The Charter of the United Nations* (2002), 788, at 792, who states that 'being caught in the "dilemma between security and justice" the UN Charter deliberately gave preference to the former'.
13. See *Legal Consequences of the Construction of a Wall, supra* note 4, para. 139.

It concluded that Article 51 has no relevance in this case. Though it is not my intention to review the methodological issues raised throughout the legal opinion, I would state that the ICJ's insufficient factual examination,[14] its disinclination to present a more comprehensive analysis, its inadequate reasoning and its unwillingness to contextualize the scholarly debate over the conditions and limits of the use of force in international relations to the political reality of occupation, have left its addressees with an array of unsolved issues in an era in which occupiers have to deal with ever growing popular resistance and terrorism emerging from occupied territories.

However, it will be argued below that despite the ICJ's thin treatment of the right of self-defence, it nevertheless related to two aspects of statehood in relation to Article 51. The first concerned the legal personality of a state, the ICJ ruling that the right of self-defence can only be exercised when one state's military attacks another state, while excluding non-state actors (the ICJ did not regard the Occupied Palestinian Territory from which the terrorism against Israel stemmed as a foreign *state*). The second aspect concerned the exercise of effective control and state responsibility (the ICJ reasoned that the terrorist attacks cannot be imputable to an occupied entity since Israel exercises control in the Occupied Palestinian Territory). I will argue that the ICJ was wrong in valuing highly the first aspect but was justified in emphasizing strongly the second one.

It should be noted that Judges Buergenthal, Higgins, and Kooijmans commented unfavourably on the content of this paragraph.[15] So did the Supreme Court of Israel.[16]

3. Self-defence against non-state actors?

3.1. The state nexus

One need not read too much in between the lines of the ICJ's opinion to reach the conclusion that although the ICJ does not state that Article 51 only recognizes self-defence by one state against another state, it was well aware that its position would be interpreted as excluding self-defence against non-state actors. At least this is a possible interpretation.[17] It seems that the Court was unwilling to expand the scope

14. This was suggested by the Supreme Court of Israel to be the main reason for the different conclusions which the ICJ and the Supreme Court of Israel have reached concerning the legality of the fence. Hence the Supreme Court of Israel stated that 'the ICJ's conclusion, based upon a factual basis different than the one before us, is not *res judicata*, and does not oblige the Supreme Court of Israel to rule that each and every segment of the fence violates international law', *Mara'abe case*, *supra* note 5, para 74.

15. See *Legal Consequences of the Construction of a Wall*, Advisory Opinion, *supra* note 4 (Judge Buergenthal, Declaration), paras. 5–6. Judge Buergenthal dissented from the Court's ruling, although on totally different grounds. Judge Higgins, Separate Opinion, paras. 33–35. Judge Kooijmans, Separate Opinion, paras. 31–33.

16. *Mara'abe case*, *supra* note 5, para. 23.

17. This is the interpretation suggested by S. D. Murphy, 'Self-Defense and the Israeli *Wall* Advisory Opinion: An *Ipse Dixit* at the ICJ?', (2005) 99 AJIL 62, at 63. R. 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 *Florida Law Review* 717, at 764. A different interpretation is certainly possible. It could be argued that the second part of the quoted paragraph of the Opinion, in which the Court mentions Security Council resolutions, is referring to cases where self-defence against non-state actors is possible, although the Court did not accept that for the case under review. This is the way in which the Supreme Court of Israel

of Article 51, maintaining that recourse to self-defence requires an armed attack launched by another state.[18]

Admittedly, there is no unanimity in the prevailing literature as to whether self-defence was contemplated as an option to combat non-state-sponsored forms of terrorism. Article 51 was designed in a world where the use of force primarily involved attacks by one state against the territory of another state.[19] Indeed, in the past, 'Only very few commentators have been willing to apply Article 51 directly to particularly violent acts committed by private groups, without requiring any substantial involvement of a state in the preparation or commission of the terrorist acts'.[20] Such submission was considered to be a qualitative change in the scope of application of Article 51, because it broke with the concept of Article 51 as a state-centred norm.[21]

Nevertheless, over the years there were more and more occasions when the literature was willing to relax the requirement of a nexus between the terrorist act and a state entity. Hence, for example, the emergence of the criterion of 'attributability',[22] expanding the right of self-defence under Article 51 against any state harbouring, supporting, or tolerating activities that give rise to terrorist attacks against another state. This concept is nowadays used, in its widest sense, to include states which are failing to impede terrorist acts and are reluctant to impede terrorist activity.[23] Implicitly, Security Council resolutions which were adopted after the attacks of 11 September directed from abroad against the United States played a role in broadening the regime for the fight against terrorism.[24]

Today one cannot seriously identify the phenomenon of terrorist armed attacks as stemming only from a state.[25] There are at least three situations in which one

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understood the Advisory Opinion, stating that according to the Advisory Opinion of the International Court of Justice, 'Nor does the right of a state to self defense against international terrorism authorize Israel to employ the law of self defense against terrorism coming from the *area*, as such terrorism is not international, rather originated in territory controlled by Israel by belligerent occupation'. *Mara'abe case*, *supra* note 5, para. 23.

18. A. Bianchi, 'The ICJ's Advisory Opinion and Its Likely Impact on International Law', (2004) 47 *German Yearbook of International Law* 343, at 375. A. Cassese, *International Law* (2005), 355. Attention should be drawn to the fact that the ICJ did not resort to Israel's right of self-defence which is based on customary international law and which is regarded as being less rigid. Put differently, the approach according to which the use of military force is permissible even in the absence of an armed attack, given the fact that Art. 51 does not create an exclusive legal right to self-defence but recognizes the existence of an inherent right to self-defence including instances in addition to an armed attack, was not endorsed by the Court. The Court has preferred to narrow the grounds for the unilateral use of force under the Charter.
19. A. M. Slaughter and W. Burke-White, 'An International Constitutional Moment', (2002) 43 *Harvard International Law Journal* 1.
20. See Grote, *supra* note 10, at 965.
21. Grote has expressed caution in an article which was published before the ICJ gave its opinion, saying that 'it is far from certain, however, that such dramatic changes affecting the very structure of the international security architecture would really meet with the universal approval which they need for their implementation'. Ibid., at 951.
22. '[I]f attributable to a State, [large-scale acts of terrorism] are an armed attack in the sense of Article 51', see Randelzhofer, *supra* note 12, at 802.
23. C. Meiser and C. von Buttlar, *Militärische Terrorismusbekämpfung unter dem Regime der UN-Charta* (2005), forthcoming.
24. S/RES/1368 (2001) of 12 Sept. 2001; UN Doc. S/RES/1373 (2001) of 28 Sept. 2001; UN Doc. S/RES/1566 (2004) of 8 Oct. 2004; UN Doc. S/RES/1611 (2005) of 7 July 2005.
25. But see Randelzhofer, *supra* note 12, at 802: 'Acts of terrorism committed by private groups or organizations as such are not armed attacks in the meaning of Art. 51 of the UN Charter'.

can say that attacks do not stem from a state but still may qualify as armed attacks, namely attacks launched from the high seas, from failed states, or from territories governed by de facto regimes.

Facing this reality, I side with those who argue that the framers of the Charter drafted the wording of Article 51 broadly enough to allow for the use of self-defence against acts emanating from non-state actors.[26] Article 51 requires simply an 'armed attack' and not an 'armed attack by a state'. This choice of words suggests, according to some commentators, that the drafters of the Charter 'intended to cover all modes of attack as long as it was armed'.[27] Nothing in the Charter indicates that 'armed attacks' can only emanate from states. This argument could be strengthened by looking at Article 2(4).[28] Article 2(4) forbids members (states) to use force, Article 51 allows members (states) to defend themselves against the use of force. Both articles might be seen as two sides of the same coin. However, while Article 2(4) expressly forbids members to use force against 'any state', Article 51 does not refer to the term 'any state' while relating to the author of the armed attack against which members are allowed to defend themselves. Indeed, in contrast to Article 2(4), reference to 'any state' by Article 51 would have been made to qualify the author and not the victim of the force used; however, to the extent that Article 51 should be considered the mirror image of Article 2(4), this discrepancy does not subtract from this literal argument. Quite to the contrary: it is thus reinforced. Be that as it may, Article 51 does not explicitly identify the author of the armed attack.[29] It follows that, under Article 51, an armed attack need not be launched by a foreign state.

This textual argument is nowadays praised, by some, as the great wisdom of the Charter.[30] Moreover, a teleological reading of Article 51 supports an interpretation according to which the impact of the attack is considered to be more decisive than its public or private origin.[31] 'To limit the right of states in this way would amount to granting a privilege to private actors to carry out large-scale pseudo-military acts across the border; in other words, it would give license to terrorists'.[32] Therefore

26. T. Bruha, 'Neuer Internationaler Terrorismus: Völkerrecht im Wandel?', in H. J. Koch (ed.), *Terrorismus – Rechtsfragen der äußeren und inneren Sicherheit* (2002), 75. For a different view see C. Tietje and K. Nowrot, 'Völkerrechtliche Aspekte militärischer Maßnahmen gegen den internationalen Terrorismus', (2002) 44 *Neue Zeitschrift für Wehrrecht* 1, at 6; G. Stuby, 'Internationaler Terrorismus und Völkerrecht', (2001) 46 *Blätter für deutsche und internationale Politik* 1331.
27. R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), at 200.
28. Y. Dinstein, 'Comments on the Presentations by Nico Krisch and Carsten Stahn', in Walter et al., *supra* note 10, 915, at 921.
29. S. D. Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter', (2002) 43 *Harvard International Law Journal* 41 at 50.
30. J. A. Frowein, 'Der Terrorismus als Herausforderung für das Völkerrecht', (2002) 62 *Heidelberg Journal of Interantional Law* 879.
31. C. Stahn, '"Nicaragua Is Dead, Long Live Nicaragua" – The Right to Self-defence under Article 51 UN Charter and International Terrorism', in Walter et al., *supra* note 10, 827, at 848.
32. R. Wolfrum, 'The Attack of September 11, 2001, the Wars against the Taliban and Iraq: Is there a Need to Reconsider International Law on the Recourse to Force and the Rules of Armed Conflict?', (2003) 7 *Max Planck United Nations Year Book* 1, at 36; C. Tomuschat, 'Der 11. September 2001 und seine rechtlichen Konsequenzen', (2001) 28 *Europäische Grundrechte-Zeitschrift* 535, at 540; See Murphy, *supra* note 29, at 49.

what is of relevance is not which group carries out an action, but whether the action is on a scale equivalent to the military actions referred to in Article 51.[33]

Like Stahn I believe that the decisive factor for establishing whether a terrorist attack comes within the scope of Article 51 should be based on the question of whether the attack presents an *external link* to the state victim of the attack.[34] Article 51 should not apply to forms of domestic violence. The location from which a terrorist attack stems will determine whether a state can act in self-defence. The requirement for an external link is met if the terrorist activity is carried out by terrorists operating from outside the territory of the targeted state. It is also met when the attack has been launched and directed from the territory of the targeted state by foreign nationals.

In their dissenting and separate opinions three judges commented against the formalistic view expressed by the Court. Judge Buergenthal observed that the terms of Article 51 do not make self-defence dependent on the existence of an armed attack by another state.[35] Judge Higgins stated that the *Nicaragua* case still links the armed attack by irregular forces to the question of whether 'these forces were sent by or on behalf of a state', though she concludes by saying, 'while accepting, as I must, that this is to be regarded as a statement of the law as it now stands, I maintain all the reservations as to this proposition that I have expressed elsewhere'.[36] Judge Kooijmans tags the non-attributibility component as a new element introduced by the Security Council resolutions, adding that this new element is not excluded by the terms of Article 51, and notes that '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'.[37]

3.2. Terrorism stemming from occupied territories

What implications would such a reading bring to bear on terrorism stemming from occupied territories? Though the terror activity which emerges from occupied territories usually concerns the fight for self-determination and hence is not considered by everyone as terror activity,[38] whoever supports the view that such activity qualifies as terrorism still has to consider whether the requirement of an 'external link'

33. NATO also introduced an interesting new formula when determining whether the 11 September attacks amounted to 'armed attacks'. It did not expressly inquire whether the attacks were 'attributable' to the Taliban or Afghanistan, but used a different test, asking whether 'the attack against the United States on 11 September *was directed from abroad*' and could 'therefore be regarded as an action covered by Article 5 of the Washington Treaty', NATO press release 124/2001 (emphasis added).
34. See Stahn, *supra* note 31, at 850; R. Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense', (2005) 99 AJIL 52, at 59: 'In and of itself, the originating locus of the attack does not diminish a right of self-defense'.
35. See *Legal Consequences of the Construction of a Wall*, Advisory Opinion, *supra* note 4, (Judge Buergenthal, Declaration), para. 6.
36. Ibid. (Judge Higgins, Separate Opinion), para. 33, referring to R. Higgins, *Problems and Process: International Law and How We Use It* (1994), at 250.
37. See *Legal Consequences of the Construction of a Wall*, Advisory Opinion, *supra* note 4, (Judge Kooijmans, Separate Opinion) para. 35.
38. On the definition of terror see C. Walter, 'Defining Terrorism in National and International Law', in Walter et al., *supra* note 10, 23, at 39. See, in general, B. Saul, 'Attempts to Define "Terrorism" in International Law', (2005) LII *Netherlands International Law Review* 57.

is satisfied. Clearly, in the specific context of the Israeli–Palestinian conflict, Israel denies that the Occupied Palestinian Territory possesses the qualifications needed to become a state. Therefore Israel could not argue that terrorism coming from the Occupied Palestinian Territory is an armed attack stemming from a state. Surely the ICJ ruling according to which the authority to erect the wall is not to be based upon the law of self-defence could be strictly interpreted as referring only to the specific Israeli–Palestinian conflict. Yet it seems to me that a more general appraisal can be attributed to the Court's Advisory Opinion, according to which terrorism stemming from occupied territories is not imputable to a foreign state.[39]

At the outset one should note that contrary to this implicit ruling more often than not terrorism stemming from occupied territories will satisfy the requirement of an armed attack stemming from a foreign state. The prevailing situation is normally one in which a state occupies the territory of another state. As is well known, 'a state does not cease to exist as a legal entity even if its entire territory is occupied by the enemy'.[40] Belligerent occupation clearly does not affect statehood: the occupant *ex hypothesi* does not displace the territorial sovereign. Hence, for example, terrorism which stems from the Iraqi territory occupied by the Coalition should be regarded as having its source in and origin from the Iraqi state. Clearly, it is a completely different question whether such terrorism 'stemming from' an occupied state triggers also its responsibility. This depends on the amount of control (still) exercised by the authorization of the occupied state. This aspect will be dealt with below.[41] However, at this stage one can state that terror which emerges from occupied territories will often satisfy Article 51's strict interpretation.

In a way the Israeli occupation is unique. While the drafters of international treaties relating to occupation considered it to be a temporary situation, the Israeli occupation was prolonged much beyond the time limits perceived in these treaties. The time factor led to ambiguity concerning the Palestinian Occupied Territory. It does not fit easily into defined categories of international status. This uncertainty arises, in part, because the occupied territories are recognized as a separate and distinct entity that simultaneously lacks, to an undefined extent, sovereignty. Hence the source of the flow of activities which are derived from these territories, which are dangerously close to Israeli borders, cannot be traced to a state. At the most it is a nation in the midst of transforming into a sovereign state. Yet the terrorists' armed struggle is targeted against the Israeli civilian population. This scenario raises

39. The ICJ first insisted that Art. 51 recognizes the right of self-defence in case of armed attack by *one state* against another . . . and then added that Israel did not claim that the attacks against it are imputable to a foreign state. It can be argued that at this stage of its reasoning the Court wished to emphasize the statehood element, and not the imputability, as it dealt with the latter in the following paragraph, considering it as an additional argument. The Supreme Court of Israel read the Advisory Opinion in this vein, stating that 'The Advisory Opinion of the International Court of Justice at the Hague determined that §51 of the Charter of the United Nations recognizes the natural right of self defense, when one state's military attacks another state. Since Israel is not claiming that the cause of the attack upon her is a foreign state, there is no application of this provision regarding the erection of the wall'. *Mara'abe case*, *supra* note 5, para. 23.

40. M. Bothe, 'Occupation, Belligerent', in Bernhardt, *supra* note 9, III, 763, at 764. D. Alonzo-Maizlish, 'Where Does it End? Problems in the Law of Occupation', in R. Arnold and P. A. Hildbrand (eds.), *International Humanitarian Law and the 21st Century's Conflicts. Changes and Challenges* (2005) 97, at 109.

41. See *infra* text next to note 66.

questions about the accurate international legal rules which should be applicable to this type of struggle.

However, even when examining the specific contours of the Israeli occupation, which according to Israel's narrative has to do with territories which were 'free-for-all' and therefore territories in respect of which no other states could show a better title,[42] there are at least two ways to see terror attacks stemming from such territories as 'armed attacks' fulfilling the 'external linkage' criteria, in the above-mentioned sense:

1. If one adheres to the view justifying a complete separation between the occupying state and the occupied territories given the absolute ban on the occupier to annex the territories, then one can say that a terrorist attack which stems from the occupied territories emanates from another (foreign) territory rather than the targeted (occupying) state.

2. If one does not believe in the complete separation between the occupying state and the occupied territories, then one can say that it qualifies as an armed attack which is launched and directed from the territory of the targeted state by foreign nationals. The foreign nationality of the offender establishes the necessary external link for invoking the right of self-defence. As Dinstein puts it, 'Clearly Utopia is entitled to employ force within its own territory, so as to extirpate all hostile armed bands or terrorists (wherever they come from)'.[43] Indeed, the problem is that such attacks come very close to mere domestic forms of violence.

Therefore the important question now to be examined is no longer whether terror stemming from occupied territories is originating from an 'external link' to the attacked state, but whether there are other reasons which would prevent the attacked state from exercising its prima facie right of self-defence vis-à-vis occupied territories.

4. Measures taken against terrorism stemming from territories lacking full statehood qualifications

4.1. Independent territories not enjoying full statehood qualifications

What are the countermeasures which the victim state can take against armed attacks which are not attributable to a foreign state? Obviously the ICJ, which was not taken by the broadness of the text of Article 51, and signalled caution with regard to a wide interpretation of the right to self-defence, was not required to face this issue. It did

42. Y. Blum, 'The Missing Reversioner', (1968) 3 *Israel Law Review* 294. It seems that the Court subscribes to this view when dealing with the question of self-defence, although when it dealt with the question of the entry into force of the Fourth Geneva Convention over the Occupied Territories it chose to mention the fact that Jordan has also been a party to the Convention, *Legal Consequences of the Construction of a Wall*, Advisory Opinion, *supra* note 4, para. 91.

43. Y. Dinstein, *War, Aggression and Self-Defence* (2001), 213; R. J. Beck and A. C. Arend, '"Don't Tread on Us": International Law and Forcible State Responses to Terrorism' (1994) 12 *Wisconsin International Law Journal* 153, at 218: 'force might be employed by a victim state if the terrorist actor were located in that state's jurisdiction or in an area beyond the jurisdiction of any state'.

not subscribe to the view that acts of terrorism carried out by independent private actors which are totally detached from a foreign state fit within the parameters of Article 51. Nevertheless, given the above criticism, such an analysis is required.

> Franck is of the opinion that
> It is becoming clear that a victim-state may invoke Article 51 to take armed countermeasures in accordance with international law . . . *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.[44]

Emphasizing the territorial ingredient, as opposed to sovereignty, allows a victim state to invoke, as a legal matter, Article 51 to justify its activities in all the above-mentioned situations. However, it seems to me that there is a need to qualify the various possible 'territories' from which terrorism which is not attributable to a foreign state might stem.

It would be relatively unproblematic to apply the right of self-defence against terror attacks stemming from zones lacking state control such as the high seas,[45] given the absence of territorial sovereignty there.[46] Most likely such terror activity will be carried out by using ships without nationality.[47] Indeed interference with such an activity depends on the fact that there is no state that can claim the right of non-interference against other states.[48] Countermeasures taken by the victim state would occur outside the territory of any state and therefore should be easily distinguishable from other circumstances.

More complicated is the situation concerning failed states. Indeed, failed states are increasingly seen as one of the most imminent concerns the international community is currently facing, given the fact that these 'no-law zones' are sometimes identified as safe havens for terrorist organizations. There are those who hold the opinion that a failed state, despite its inability to perform any state functions whatsoever, remains a sovereign state, at least in so far as sovereignty is understood as preserving the *domaine réservé* from outside interference.[49] On the basis of such a view it would be impossible to argue in favour of the use of force against a failed state without creating an exception to the idea of sovereign integrity. Others believe, and I will subscribe to their view, that the right of self-defence exists in 'failed states' scenarios in which the organizational structure of the territory has collapsed.[50] To the extent that one supports the view according to which failed states' sovereignty is suspended one can argue for the legitimacy of unilateral self-defence, or even say that this is not a 'use of force' prohibited under Article 2(4) and thus requiring justification. Hence, for example, Randelzhofer identifies this problem and concedes

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44. T. M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002), 67 (emphasis added).
45. T. Treves, 'High Seas', in Bernhardt, *supra* note 9, II, at 705.
46. Beck and Arend, *supra* note 43, at 218.
47. Art. 110(1)(d), 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3; 21 ILM 1261 (1982).
48. Treves, *supra* note 45, at 707.
49. H. Steinberger, 'Sovereignty', in Bernhardt, *supra* note 9, IV, at 500; R. Geiss, 'Failed States – Legal Aspects and Security Implications', (2004) 47 *German Yearbook of International Law* 499.
50. G. M. Travailio, 'Terrorism, International Law, and the Use of Military Force', (2000) 18 *Wisconsin International Law Journal* 145, at 153; R. Koskenmäki, 'Legal Implications Resulting from State Failure in Light of the Case of Somalia', (2004) 73 *Nordic Journal of International Law* 1.

that 'although such terrorist acts are not attributable to that state, the state victim of the acts is not precluded from reacting by military means against the terrorists within the territory of the other state. Otherwise the so-called failed state would turn out to be a safe haven for terrorism'.[51] Herdegen pledges to a broad teleological reduction of the prohibition of the use of force according to which the victim state does not need to rely on Article 51 altogether in such situations, since a state which failed to evade the creation of a 'sovereignless sphere' from which the terror attack stemmed lost its right of non-forceful intervention.[52] Be that as it may, the overriding view is that the victim state has the right to exercise force against terrorism emerging from such failed states.

As far as de facto regimes are concerned, Frowein has already argued, in 1968, that the applicability of the prohibition on using force according to Article 2(4) of the Charter cannot depend on the recognition of the author of the act as a state.[53] Clearly, a de facto regime bears the responsibility if it has acted in violation of Article 2(4) and the state so aggrieved can justly invoke Article 51.[54] Attention should be drawn to the fact that Frowein[55] reaches this conclusion while drawing an analogy with the ICJ's Advisory Opinion on *Namibia*, which stated, 'Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of state liability for acts affecting other states'.[56] Namely, the underlying virtue is the actual physical control which generates the attributility of the terrorist attack to the de facto regime, and renders the de facto regime responsible for the terrorist attack. This may now be used as a connecting link to the discussion concerning the occupied territories.

4.2. Occupied territories

4.2.1. Effective control

It is well known that there is no clear definition of 'occupation'. Plainly the notion of occupation implies the exercise of control. Yet it is unclear what degree of control is needed to amount to occupation.[57] Article 42 of the Hague Regulations states, 'Territory is considered occupied when it is actually *placed under the authority* of the hostile army. The occupation extends *only to the territory where such authority has been*

51. See Randelzhofer, *supra* note 12, at 802.
52. M. Herdegen, *Völkerrecht* (2005), 234.
53. J. A. Frowein, *Das de facto-Regime im Völkerrecht* (1968), 38.
54. See Frowein, *supra* note 30, at 887. However, such symmetry does not always exist. As Murphy notes, although the Court saw Art. 2(4) as relevant law with respect to Israel's conduct in the 'Occupied Palestinian Territory', (*Legal Consequences of the Construction of a Wall*, Advisory Opinion, *supra* note 4, paras. 86–87) it saw no such relevance for Art. 51 with respect to the exact same Israeli conduct. Murphy, *supra* note 17, at 64.
55. J. A. Frowein, 'De Facto Régime', in Bernhardt, *supra* note 9, I, 966, at 967.
56. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 3, at 54.
57. E. Benvenisti, 'The Status of the Palestinian Authority', in E. Cotran and C. Mattat (eds.), *The Arab–Israeli Accords: Legal Perspectives* (1996), 47, at 56: 'Therefore, the test for effective control is not the military strength of the foreign army . . . what matters is the extent of that power's effective control of civilian life within the occupied area . . .'. See in general P. Chifelet, 'Recent Legal Developments: The Judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Mladen Naletilić and Vinko Martinović*', (2003) 16 LJIL 525, at 531.

established and can be exercised'.[58] According to Israel, since the 1993 Oslo agreement and the loss of effective control in certain areas of the Occupied Territories, the Palestinian Authority is the one that bears responsibility.

Thus, for example, Benvenisti suggests that there were periods of time in which Israel had transferred control over certain areas to the Palestinians. These areas were no longer subject to Israeli occupation. When Israel started the offensive in response to the suicide bombings stemming from these areas, it was doing so in self-defence. Put differently, at that time the Palestinians in these areas were not occupied and therefore, as he observes, did not have the right to fight.[59]

The ICJ rejected the Israeli position. Indeed, it referred to the agreements signed between Israel and the Palestine Liberation Organization (PLO) since 1993, which required the transfer to Palestinian authorities of certain powers and responsibilities exercised in the Occupied Palestinian Territory by its military and civil administration.[60] While confirming that such transfers have taken place, it stresses that 'as a result of subsequent events, they remained partial and limited'. Therefore the Court concluded that the transfers 'have done nothing to alter the situation of [the occupation]'.[61] The ICJ opined that Israel has effective control over the West Bank and Gaza and therefore cannot use force on the basis of self-defence.

It might be said that by its ruling the ICJ assimilated the Occupied Territories to the internal situation within the occupying state. Given the fact that the occupier has de facto authority concerning the administration of the territories, such attacks come very close to mere domestic problems of violence. Just as a state cannot argue self-defence against its own people, so, too, a state cannot argue self-defence against residents living under the occupation of its army. In such situations a state can make use of powers concerning law enforcement,[62] but not the right of self-defence.

According to Schmitt, occupation breaks through the dualistic concept of domestic and international law, exposing it as 'only a formal-judicially interesting question of second order'.[63] Schmitt asserts that belligerent occupation exposes the fragility of the dualistic approach to domestic and international law. He states that 'It is incompatible with the dogmatic exclusiveness of the so-called dualistic theory of internal and external relationship. For it is neither pure domestic law nor pure international law'.[64] Such a dualistic approach can be found also in the Court's Advisory Opinion, in which on the one hand it considered the construction of the wall as 'tantamount to de facto annexation' of another's territory, the equivalent of

58. Hague Convention IV Respecting the Laws and Customs of War on Land, signed on 18 Oct. 1907, Annex, Art. 42 (emphasis added).
59. E. Benvenisti, 'Israel and the Palestinians: What Laws Were Broken?', in Crimes of War, 8 May 2002, can be found at http://www.crimesofwar.org/print/expert/me-Benvenisti-print.html.
60. See *Legal Consequences of the Construction of a Wall*, Advisory Opinion, *supra* note 4, para. 77.
61. *Ibid.*, at para. 78.
62. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Havana, 1990), 8th UN Meeting on the Prevention of Crime and the Treatment of Criminals.
63. C. Schmitt, *Der Nomos der Erde* (1997 [1950]), 182.
64. Ibid.

illegal intervention in another's territory, and on the other hand, for the purposes of self-defence, it deemed Palestine to be a component of Israel.[65]

Indeed, occupation raises questions about where sovereignty lies and about the relevance of analogies with previous instances of occupation.[66] These are the queries which the Court needed to deal with. Its point of departure, according to which whoever exercises effective control cannot invoke the right of self-defence, seems to me to be the correct one. Effective control grows to be the prevailing characteristic for attributing responsibility to states. Accordingly, the European Court of Human Rights (ECHR) has clarified that the responsibility of a contracting party could arise when, as a consequence of military action, it exercises effective territorial control of an area outside its national territory.[67] Indeed, in the Advisory Opinion the ICJ followed a similar reasoning to that of the ECHR with regard to the responsibility of Israel for human rights violations in the Occupied Territories, based on extra-territorial jurisdiction. It might be argued that the effects of the rulings of these two courts are contradictory. The ECHR's ruling on effective control, so the argument will run, expands the scope of application of international law on extraterritorial jurisdictions, while the ICJ's analysis of effective control denies the application of international law concerning the right of self-defence. However, there is indeed a fundamental difference between the exercise of self-defence – which the Court regards as an 'external' action vis-à-vis territories controlled by a state – and the extraterritorial respect for human rights – which should be regarded as 'internal' to the territories controlled by the state. Therefore, both rulings appear to be in harmony.

Hence the ICJ Advisory Opinion sustains the widespread consensus that states can be held responsible for the commission of terrorist acts if the terrorist group in question is acting under its direction and control. This view is also supported by Article 8 of the Draft Articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission,[68] which codifies the approach adopted by the ICJ in the *Nicaragua* case[69] and provides that the conduct of a person or a group of persons which are acting on the instruction or under the direction or

65. For this argument see A. De Puy, 'Bringing Down the Barrier: A Comparative Analysis of the ICJ Advisory Opinion and the High Court of Justice of Israel's Ruling on Israel's Construction of a Barrier in the Occupied Territories', (2005) 13 *Tulane Journal of International and Comparative Law* 275, at 301. The author correctly states that 'Judge Higgins noted in her separate opinion that the ICJ was unpersuasive in declaring that an occupying power lost the right to defend its citizens from armed attacks merely because the armed attacks arose from the occupied territory itself. This was especially ironic as the ICJ elsewhere in its Advisory Opinion had emphasized that the occupied territory was not annexed but was "other than Israel". Judge Higgins noted that this was a "formalism of an unevenhanded sort", and responsibility should have been assigned for the groups sent to kill innocent Israeli civilians' (see *Legal Consequences of the Construction of a Wall*, Advisory Opinion, *supra* note 4 (Judge Higgins, Separate Opinion), para. 34).

66. P. Stirk, 'Carl Schmitt, the Law of Occupation, and the Iraq War', (2004) 11 *Constellations* 527, at 535.

67. *Loizidou v. Turkey*, Judgment of 23 March 1995 (preliminary objections), [1995] ECHR (Ser. A), at 310, para. 62; *Loizidou v. Turkey*, Judgment of 18 December 1996 (merits and just-satisfaction), [1996] V Reports, at 2227, para. 52; *Cyprus v. Turkey*, Judgment of 10 May 2001 (merits), [2001] IV *Reports of Judgments and Decisions*, para. 77; F. Hoffmeister, 'Comment on Cyprus v. Turkey', (2002) 96 AJIL 445.

68. Official Records of the General Assembly, 56th Session (2001), Supplement No. 10 (A/56/10), Chp. IV.E.1. Art. 8 reads: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.

69. *Nicaragua* case, *supra* note 3.

control of a state shall be considered an act of that state. The ICJ's opinion does not take a stand towards the slightly widened scope of state responsibility for violence committed by private groups expressed by the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case,[70] which embraced the concept of 'overall control', which required that the state had a general role in organizing, co-ordinating or planning the military activities of the armed group without asking whether specific instruction had been given concerning the commission of the relevant acts. Moreover, the Advisory Opinion does not provide an answer to the question of whether there is room for the attribution of terrorist acts to occupied states below the level of actual or overall control over the terrorists.

One might speculate, for example, about the legal implications of a possible takeover of part of occupied territories by terrorists. It might be argued, on the one hand, that according to Article 42 of the Hague Regulations the law of occupation ceases to apply to those areas in which the occupying power no longer exercises actual authority. Such isolated areas, which are under the control of the terrorists, are effectively cut off from the rest of the occupied territory. Yet, on the other hand, despite the absence of full effective control one might be inclined to prefer the argument according to which, as long as the occupation continues, the occupying state has no right of self-defence against such isolated areas by drawing further the analogy from domestic matters. As Scobbie notes, albeit in another context, 'it would be odd to conclude that Israel may rely on self-defence to justify its response to acts that denote a breakdown of the order for which it ultimately bears responsibility under international law'.[71]

Another open question, which departs from the unique situation of the Israeli occupation, is whether an occupier can rely on the right of self-defence against terror attacks stemming from an occupied state, for example terror action stemming from Iraq against US territory or US nationals in Iraq. In one aspect, applying Article 51 to the territories occupied by Israel would be easier than if foreign states were involved. Given the fact that the attack is targeted towards the terrorist organization, independently from a foreign state, there is no violation of the sovereignty of the state harbouring such organization in the absence of a Palestinian state. Yet the question which remains open after the ICJ's ruling is whether the criteria according to which there is an armed attack stemming from an occupied foreign state will trump questions of effective control or the other way around. In my opinion, also in the case of an occupied state, the factor of control over the occupied territories takes precedence over the fact that theoretically the prerequisites for invoking Article 51 seem to be fully fulfilled, in the sense that this appears to be an armed attack by one state against another state. One cannot apply to an occupied territory the maxim *sic utere tuo ut alienum non laedas* – 'every state's obligation not to allow knowingly its territory to be used for acts contrary to the right of other states'.[72] Without being

70. *Prosecutor v. Tadić*, Case No. IT-94–1 (15 July 1999), 38 ILM, 1540, at paras. 115–145.
71. I. Scobbie, 'Words My Mother Never Taught Me – "In Defense of the International Court"', (2005) 99 AJIL 76, at 83.
72. *The Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4, at 22.

able to exercise the functions of a sovereign state and independently enforce public order, no obligations and responsibilities can be attributed to the occupied state and hence it falls beyond the scope of Article 51. Put differently, though stemming from the occupied state, the terror activity cannot be imputable to it.

Another interesting question will arise if a third state comes into the play. What if a terror activity stemming from an occupied territory is directed, for whatever reasons, against a third state, which is not the occupying state? Against whom can this third state exercise its right of self-defence? Can the attack be attributed to the occupied sovereign, although its sovereignty is at least temporarily taken over by the occupying force? Is the occupying state responsible under international law for the fact that it was not able to prevent those attacks? Clearly, the occupied sovereign cannot be held liable since the responsibility has been shifted to the occupying state. Yet the occupying state bears only the obligation to 'take all measures *in* [*its*] *power* to restore and ensure, *as far as possible*, public order and safety'.[73] It seems that in such a case the third state will be able to exercise its right of self-defence by attacking directly the terrorist's bases within the occupied territory from which the attack was launched or directed.[74]

Finally, the Supreme Court of Israel raised the question, 'what shall be the status of international terrorism which penetrates into territory under belligerent occupation, while being launched from the territory by international terrorism's local agents?'[75] Although leaving the examination of the issue of self-defence for a future opportunity, it seems that the Israeli Court favoured the view according to which the occupying state is entitled to invoke its right of self-defence against such international terrorism.[76] It might be maintained that such a view could be supported by relying on the Security Council resolutions, which are viewed by some as generally authorizing states to defend themselves against international terrorism. Yet, in my opinion, on the basis of the effective-control test, one should be inclined to say here also that the occupying power bears the responsibility of preventing such penetration of international terrorism into the occupied territories, while exercising the powers, incorporated in the principles of *jus in bello*, of taking all necessary action to preserve security in the territories.

Indeed, although not recognizing Israel's right of self-defence, the ICJ did examine the legality of the construction of the separation barrier vis-à-vis rules of *jus in bello*, and I will turn to this point now.

4.2.2. The labyrinth of jus ad bellum *and* jus in bello *– Keeping worlds apart?*

The Palestinian Authority has argued that Israel's right to use force within the occupied territory is governed exclusively by the *jus in bello* as *lex specialis*, such

73. Hague Convention IV Respecting the Laws and Customs of War on Land, signed on 18 Oct. 1907, Annex, Art. 43 (emphasis added).
74. By analogy from Dinstein's concept of 'extra-Territorial law enforcement', see Dinstein, *supra* note 43, at 213.
75. *Mara'abe case*, *supra* note 5, para. 23.
76. The Supreme Court of Israel states that 'we find [the] approach of the International Court of Justice hard to come to terms with. . . . It is doubtful whether it fits the needs of democracy in its struggle against terrorism'. Ibid.

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that any rights existing under Article 51 of the Charter are displaced and cannot be invoked.[77] The argument can be stated as follows: the application of the law of belligerent occupation begins after the invasion with the establishment of actual control over the territory. It ends when the occupation is in fact terminated by the withdrawal of the occupying power or by a determination of the final fate of the territory after the re-establishment of peaceful relations between the parties. For the whole period the law of belligerent occupation is *lex specialis* to the situation.[78]

Murphy notes that many scholars see a linkage between the *jus ad bellum* and the *jus in bello* (in relation, for example, to their respective use of customary rules on necessity and proportionality) without seeing one body of law as wholly displacing the other.[79] He also states that there are those who argue that as a hierarchical matter, rights and obligations arising under the UN Charter would seem to trump those arising from the Hague Regulations or Geneva Conventions, or for that matter in human rights conventions.[80]

I would argue, however, that the argument of *lex specialis* is correct. *Lex specialis* may operate *ratione materiae*, when more detailed and specific rules are provided with respect to a more general regulation of the same subject. Here the question does not concern the use of force in general but the use of force during an occupation. The law of belligerent occupation is indeed intended to separate the question of what is permitted and forbidden in the battlefield from the question of the circumstances that justify the use of force in the first place. Article 51 is part of the branch of laws regarding the initiation of warfare, stating what is a lawful and what is an unlawful use of force, and is not part of the laws of warfare, which decide what is permitted and what is prohibited in an armed conflict. A war can be legal yet conducted by illegal means, and a war can be illegal but conducted by legal means.[81] Article 51 deals with the question of the justification of the use of force and not with the question of the legality of the way in which force is used. Once a war is going on, the laws of war automatically exclude the application of Article 51. In line with this argument the Supreme Court of Israel also has decided the case concerning the legality of the separation barrier according to *jus in bello* principles.[82] Scobbie correctly argues

77. Written Statement Submitted by Palestine, para. 534 (30 Jan. 2004), *Legal Consequences of the Construction of a Wall*, Advisory Opinion *supra* note 4.
78. A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*', (2005) 74 *Nordic Journal of International Law* 27.
79. See Murphy, *supra* note 17, at 71; C. Greenwood, 'The relationship between *Ius ad Bellum* and *Ius in Bello*', (1983) 9 *Review of International Studies* 221.
80. See Murphy, *supra* note 17, at 71. Art. 103 of the UN Charter reads, 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.
81. '. . . an occupying state has the right and indeed the duty to maintain public order through proportionate means within an occupied territory, and this capacity does not turn upon the *casus belli* of the underlying conflict', Wedgwood, *supra* note 34, at 59; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1997), 306.
82. HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel and the Commander of the IDF Forces in the West Bank*, www.court.gov.il. E. Holmila, 'Another Brick in the Wall? The Decision of the Israeli Supreme Court in the case of *Beit Sourik Village Council v. The Government of Israel and the Commander of the IDF Forces in the West Bank* (HCJ 2056/04, 30 June 2004)', (2005) 74 *Nordic Journal of International Law* 103, at 111.

that once we are in the realm of *jus in bello*, the time when self-defence could be invoked has passed: the resort to force has already occurred and the situation is now governed by the different regime of international humanitarian law. Hence laws of belligerent occupation should be considered as *lex specialis* in relation to the general laws concerning the use of force.

Indeed, it seems that the ICJ has favoured the opinion according to which *jus ad bellum* may not determine the legality of belligerent acts when they resurface after hostilities have ceased. Rather it preferred the view that the doctrine of belligerent rights is the applicable one,[83] since it ruled: 'The Court considers that the military exigencies ... may be invoked in occupied territories *even after the general close of the military operations that led to their occupation*'.[84] It might be suggested that the ICJ preferred the view that in order to invoke *jus ad bellum* anew, the state of war which led to the occupation in the first place needs to come to an end, and as long as the effective control over the occupied territories continues the norms of belligerent occupation rights reign.

Another confirmation for the support of the ICJ for the *lex specialis* argument can be deduced from its discussion concerning the application of human rights treaties in the situation of occupation. The Court ruled that while international humanitarian law is the *lex specialis*, human rights protection does not cease in case of armed conflict. This is certainly true given the prevailing view according to which human rights law should be broadly construed and universally applicable.[85] It is just the other way around as far as the *jus ad bellum* rules are concerned; to these, as stated above, one should aspire to give narrow application. Therefore, in the situation of occupation, to the extent that *jus in bello* rules are *lex specialis* in a strict sense, namely in the sense that the more specific rule is an exception to the general rule, they preclude the application of the rules of *jus ad bellum*. These two regimes will then be mutually exclusive.

However, as stated above, there are those who believe that these two regimes are complementary. Hence the *jus in bello* is *lex specialis* only in the wider sense, namely in the sense that the general norm is supplemented by the special norm. In such a case I would argue that *jus in bello* rules should serve as a yardstick for measuring the lawfulness of the use of the right of self-defence, placing further limitations on the scope of interpretation to be given to the principles of necessity and proportionality of such use of force, against protected persons.

Admittedly, this whole discussion might be regarded as a superfluous exercise in legal acrobatics. The above analysis may only bear importance if there are certain measures which are permitted on the basis of the one regime and foreclosed on the basis of the other. To the extent that one subscribes to the view that the resort to use of force in self-defence is subject to stringent conditions of necessity, proportionality,

83. For support of the view that *jus ad bellum* may be used after the cessation of hostilities see J. G. Gardam, 'A Role for Proportionality in the War on Terror', (2005) 74 *Nordic Journal of International Law* 3, at 17.
84. See *Legal Consequences of the Construction of a Wall, supra* note 4, at para. 135 (emphasis added).
85. O. Ben-Naftali and Y. Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories', (2003) 37 *Israel Law Review* 17.

and compliance with the fundamental principles of humanitarian law,[86] on the one hand, and accepts the view – which was also expressed by Judge Kooijmans, Judge Higgins, and the Supreme Court of Israel[87] – according to which international humanitarian law can be used by a state for protecting the legitimate rights of its citizens situated outside the occupied territories,[88] on the other hand, then one wonders whether these two regimes are not essentially overlapping. This is the view expressed by the Supreme Court of Israel, stating that 'we have found that regulation 43 of The Hague Regulations authorizes the military commander to take all necessary action to preserve security. The acts which self defense permits are surely included within such action'.[89] If that is the case then it is unclear why it was so important to differentiate between them in the context of terrorist attacks stemming from occupied territories and which are aimed against the occupier's citizens.

Yet it is widely accepted that the existence of a discrepancy between the two regimes is to be found in the expansive view of *jus ad bellum*. According to this view the use of force regime constrains state behaviour much less than the humanitarian law regime.[90] There is an increased level of tolerance to the extent of military force used by the victim state when it comes to responding to terrorist attacks by invoking the right to self-defence. This is especially true in examining the different views concerning the application of the necessity and proportionality principle to each of these regimes.[91] The primary focus of proportionality in international humanitarian law concerns collateral damage to civilians and civilian objects. In contrast, proportionality in *jus ad bellum* takes into account a wide range of matters such as interference with the territorial integrity of the target state, the non-punitive

86. A. Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law', in http://www.ejil.org/forum_WTC.

87. See *Legal Consequences of the Construction of a Wall*, Advisory Opinion, *supra* note 4 (Judge Kooijmans, Separate Opinion), para. 34: 'it is of decisive importance that, even if the construction of the wall and its associated regime could be justified as measures necessary to protect *the legitimate rights of Israeli citizens* these measures would not pass the proportionality test' (emphasis added). Judge Higgins, Separate Opinion, para. 34: '*I fail to understand the Court's view that an occupying Power loses the right to defend its own civilian citizens at home if the attacks emanate from the occupied territory* – a territory which it has found not to have been annexed and is certainly "other than" Israel' (emphasis added). The same view was held by the Supreme Court of Israel which has defined military necessity to include not only the military interests of the occupation forces, but also the security of the State of Israel itself, HCJ 606/78 *Ayoub v. Minister of Defense*, 33(2) P.D., 113; HCJ 4219/02 *Yusef Muhammed Gusen v. Commander of IDF Forces*, 56(4) P.D., 608. Moreover, the Israeli Supreme Court has also reached the conclusion that the military commander is authorized to construct a separation fence in the *area* for the purpose of defending the lives and safety of Israeli settlers in the *area*. 'It is not relevant whatsoever to this conclusion to examine whether this settlement activity conforms to international law or defies it, as determined in the Advisory Opinion of the International Court of Justice at the Hague. For this reason, we shall express no position regarding that question. The authority to construct a security fence for the purpose of defending the lives and safety of Israeli settlers is derived from the need to preserve "public order and safety" (regulation 43 of *The Hague Regulations*). It is called for, in light of the human dignity of every human individual. It is intended to preserve the life of every person created in God's image. The life of a person who is in the area illegally is not up for the taking'. *Mara'abe case, supra* note 5, para. 19.

88. In this article I do not refer to the more controversial issue of the protection of civilians in the occupied territories – see D. Kretzmer, 'The Advisory Opinion: The Light Treatment of International Humanitarian Law', (2005) 99 AJIL 88.

89. *Mara'abe case, supra* note 5, para. 23.

90. This can be deduced from Dinstein, *supra* note 43, at 208.

91. See Gardam, *supra* note 83. On proportionality in general see J. G. Gardam, 'Proportionality and Force in International Law', (1993) 87 AJIL 391; T. Stein, 'Proportionality Revisited – Überlegungen zum Grundsatz der Verhältnismäßigkeit im internationalen Recht', in Dicke et al., *supra* note 1, at 727.

character of the measures, what would amount to measures which halt or repulse the attack, the geographical and destructive scope of the response, the duration of the response, the selection of means and methods of warfare and targets, and so on. However, despite the above-mentioned sentiment of more lenience towards massive violence used under the auspices of the right of self-defence, a closer look at the matter reveals that there is a lack of clarity in the existing literature concerning the scope of application of *jus ad bellum*, and one can find many contradictory views and inconsistent state practice concerning the amount of force which can be legally exercised in the context of self-defence.[92] Moreover, although generalizing, it seems correct to state that throughout its jurisprudence the ICJ has been favouring a restrictive interpretation of the scope of invoking legally the right of self-defence. Hence, for example in the *Oil Platforms* case, it opted for a restrictive interpretation of the concept of armed attack.[93] In the *Nicaragua* case it warranted only 'measures which are proportional to the armed attack and necessary to respond to it'.[94] Such rulings imply that the circumstances for legally applying *jus ad bellum* are not infinitely elastic.

Specifically, the question of possible means and methods adopted by a state in the exercise of its self-defence – means which might cause superfluous injury and unnecessary civilian suffering – is of interest regarding the measures taken by the state of Israel in constructing the separation barrier. From time to time there have been suggestions that issues such as the means and methods chosen by a state are purely the province of the *jus in bello*. However, in the *Nuclear Weapons Opinion* the ICJ brought these worlds together, stating that 'a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable to armed conflict which comprise in particular the principles and rules of humanitarian law'.[95] Yet the reverse is also true. Namely, it might be that the proportionality test in *jus ad bellum* will allow less excessive activity causing less civilian suffering than what will be considered legitimate under the *jus in bello*.[96] Thus the requirements of proportionality in its *jus ad bellum* sense must also be met. This view enjoys the majority support of commentators.[97] State practice is

92. Cassese is of the opinion that the use of force must only be exercised for repulsing the aggression and should be terminated as soon as the aggression had come to an end. See Cassese, *supra* note 18, 355. Contrary, see Dinstein, *supra* note 43, at 209; P. Zengel, 'Assassination and the Law of Armed Conflict', (1991) 34 *Military Law Review* 123, at 148; S. Ratner, '*Jus ad Bellum* and *Jus in Bello* after September 11', (2002) 96 AJIL 905.

93. See *Case Concerning Oil Platforms*, *supra* note 8.

94. See *Nicaragua* case, *supra* note 3, at 84, para. 176.

95. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, at para. 78.

96. As demonstrated by Gardam, *supra* note 83, at 19. But see M. Walzer, *Just and Unjust Wars – A Moral Argument with Historical Illustrations* (1992), 151.

97. C. Greenwood, '"*Jus ad Bellum* and *Jus in Bello*" in the *Nuclear Weapons* Advisory Opinion', in L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999), 247, at 258; I. Scobbie, 'Smoke Mirror and Killer Whales: the International Court's Opinion on the Israeli Barrier Wall', (2004) 5 *German Law Journal*, no. 9, para. 56, www.germallawjournal.com: 'Simply to state the proposition that measures taken in self-defence may exculpate a State from responsibility for violations of international humanitarian law is to demonstrate both the fallacy and danger at the heart of Israeli argument. It is to claim that the law designed to restrain the exercise of force does not apply when force is being exercised. This surely cannot be correct'; O. Schachter, 'The Extra-territorial Use of Force against Terrorist Bases', (1989) 11 *Houston Journal of International Law* 309, at 315: 'Self-defense actions against terrorism are not exempted

also generally consistent with the relevance of proportionality to these questions.[98] Surely the non-reciprocal characteristics of these two regimes in the ICJ's Advisory Opinion on the wall and their complete severance, especially in context of the particular circumstances – concerning a long-term occupation – seems to be, at least, questionable.

If, however, one holds the view that under the law of belligerent occupation (and international humanitarian law in general) military necessity cannot relate to anything other than the security interests of the military forces of the occupying power and then only in the occupied territories,[99] and therefore maintains that Israel cannot use force in accordance either with *jus in bello* (since it is used for the purpose of protecting its citizens who reside in Israel, namely outside the territories) or with *jus ad bellum* (since it exercises effective control over the Occupied Territories), then it remains unclear according to which normative rules of international law Israel may act in order to fulfil its duty to protect the lives of its citizens living in Israel.[100]

Interestingly enough, the building of a wall qualifies as a non-forcible measure. On the one hand, this fact did not deter the ICJ from seeing it as falling within self-defence under Article 51. On the other hand, the ICJ did not express a clear view on the question of whether a non-militant measure would be considered by definition as a more proportionate measure than invoking military strikes within the self-defence provision.[101] Be that as it may, clearly according to the ICJ's view the victim state may not use measures which are aimed against facilities and property which primarily or predominantly serve the needs of the civilian population of the host territory. Admittedly, the ICJ did not view the construction of the security fence per se as unlawful, but insofar as it was built on the Occupied Territories. It follows that, according to the ICJ Advisory Opinion, the construction of a fence on the border (the Green Line) or in Israeli territory would be acceptable as a way of protecting Israel's own civilian citizens at home. However, it should be noted that the Supreme Court of Israel expressed its view expansively, according to which such a wall will not suffice to fulfil this aim: '*The only reason for establishing the route beyond the Green Line is a*

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from the humanitarian rules applicable to armed conflict. Thus, the general prohibition[s] against [targeting] non combatants or excessive destruction of civilian property apply. The fact that terrorist bases are found in the midst of cities, and may therefore be "shielded" by non-combatants, can give rise to a difficult dilemma. It is nonetheless desirable to recognize legal as well as moral restraints relating to non-combatants'.

98. See Gardam, *supra* note 83, at 18.

99. A. Imseis, 'Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion', (2005) 99 AJIL 102, at 112. But see Scobbie, *supra* note 97, at para. 59: 'The law of belligerent occupation recognizes the authority of the military commander to maintain security in the area and to protect the security of his country and citizens. This authority must be properly balanced against the rights, needs, and interests of the local population'.

100. I hereby refer to one of the more ambiguous and obscure paragraphs produced by the ICJ: 'The fact remains that Israel has to face numerous indiscriminate and deadly acts of violence against its civilian population. It has the right, and indeed the duty, to respond in order to protect the life of its citizens. The measures taken are bound nevertheless to remain in conformity with applicable international law' (see *Legal Consequences of the Construction of a Wall*, Advisory Opinion, *supra* note 4, at para. 141). To the extent that the Court refers to unilateral possible actions taken by Israel this paragraph remains vague and obscure.

101. Judge Higgins has commented, 'I remain unconvinced that non-forcible measures (such as building of a wall) fall within self-defence under Art. 51 of the Charter as that provision is normally understood,' *Legal Consequences of the Construction of a Wall*, Advisory Opinion, *supra* note 4, (Judge Higgins, Separate Opinion), para. 35.

professional reason related to topography, the ability to control the immediate surroundings and other similar military reasons. Upon which rules of international law can it be said that such a route violates international law?'[102] Alternative, more adequate, measures which will comply with international law were not suggested by the ICJ.

5. Conclusion

Occupier citizens' lives may be threatened by terrorism stemming from the occupied territories which are under the occupier's effective control. With what means does international law then provide the occupier in order to fulfil legally its duty to protect its citizens' lives? According to the ICJ, the construction of a separation barrier which runs within the occupied territories is an illegal measure. It remains obscure, however, on which norms of international law Israel can rely while looking for alternative methods to fulfil its duties as a state vis-à-vis its citizens. Apparently, according to the ICJ the applicable rules are to be found in the realm of *jus in bello* and not in the realm of *jus ad bellum*.

Clearly, Israel's responses to the Palestinians' activities should be discussed within international law. I side with those who criticize a call for systematic change of international law, saying that revolutionary solutions might transform the international legal system, which is already imperfect and frail enough, into a completely unworkable system, almost installing the very anarchy that one of the declared purposes of combating terrorism is to repel.[103] However, clinging to outdated perceptions (like the attribution of the attack to a state in order for the right of self-defence to be triggered) might be counterproductive as well, since it will provoke international cynicism towards what is often perceived as an idealistic and unrealistic legal system.

While the ICJ's reluctance to broaden the notion of self-defence, the prospects of which it might not be able to foretell, is understandable, it could have been expected to join the effort to devise clear guidelines for the specific inquiries posed to it. By not doing so in its Advisory Opinion of 2004, the Court has found itself at the beginning of the twenty-first century running behind events instead of setting the tone.

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102. *Mara'abe case*, *supra* note 5, para. 70. (emphasis added). The Supreme Court of Israel added, '. . . expansive parts of the fence . . . are adjacent to the Green Line (that is less than 500 m away). An additional . . . route [is] within a distance of between 500 m and 2000 m from the Green Line. Between these parts of the route and the Green Line (the "seamline area") there are no Palestinian communities, not is there agricultural land. Nor are there Israeli communities in this area. . . . Other parts of the fence are close to the Green Line. They separate Palestinian farmers and their lands, but the cultivated lands are most minimal. Gates were built into the fence, which allow passage, when necessary, to the cultivated lands. Can it be determined that this arrangement contradicts international law *prima facie*, without examining, in a detailed fashion, the injury to the farmers on the one hand, and the military necessity on the other? Should the monetary compensation offered in each case, the option of allocation of alternative land . . . not be considered? There are, of course, other segments of the fence, whose location lands a severe blow upon the local residents. Each of these requires an exacting examination of the essence of the injury, of the various suggestions for reducing it, and of the security and military considerations. None of this was done by the ICJ, and it could not have been done with the factual basis before the ICJ'.

103. See Abi-Saab, *supra* note 2, at xv.

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