

## Article 51 - The Right to Self-Defence

The International Court of Justice (ICJ) & the Goldstone Report [1]

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### Article 51

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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The Goldstone Mission Report dated September 25, 2009 feeds off the Advisory Opinion of the International Court of Justice (ICJ) of July 9, 2004. In this article I will discuss the effort made by the International Court of Justice (ICJ) to rewrite the language of Article 51 and to deceive and deny Israel the right to self-defence.

Article 51 of the UN Charter clearly recognizes "the inherent right of individual or collective self-defence" by *anyone*. That is, the language of Article 51 does not identify or stipulate the kind of aggressor or aggressors against whom this right of self-defence can be exercised ... and certainly does not limit the right to self-defence to attacks by States!

ICJ's attempt to qualify the use of self-defence under Article 51 as aggression committed by a 'state' *only*, is clearly an attempt to evade international law.

The ICJ Bench ignored repeated acts of terrorism from 'Palestine' as emanating from non-State entities and therefore inadmissible to the issue of the security fence.

The ICJ's opinion engages in some highly questionable interpretations not only of its own mandate, but also of the UN Charter's article on the right to self-defence, or in the case of Israel, the lack of the right to self-defence. The worst of all statements concerns a *fallacious interpretation* of Article 51 of the UN Charter.

The ICJ writes in paragraph 139 of the opinion:

“Under the terms of Article 51 of the Charter of the United Nations:

‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.’

“Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by *one State against another State* [Article 51 does not mention attack by *one State against another State*]. However, Israel does not claim that the attacks against it are imputable to a foreign State. ... Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case”.

In addition to, and apart from, the provisions of Article 51, the ICJ also ignores the fact that Palestinian warfare is “Strictly regulated by the customs and provisions of the law of armed conflict, referred to here as international humanitarian law (IHL).”

“The authoritative commentary of the ICRC to the Fourth Geneva Convention justifies applying the provision to non-state actors, saying [t]here can be no drawbacks in this, since the Article in its reduced form, contrary to what might be thought, does not in any way limit the right [E.H., to self-defence] of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel [in this case the Palestinian Authority] party ...” [italics by author].

The ICJ ignores the Palestinian Authority (PA) violations of their assumed responsibility, such as the Oslo Accords, that required the Palestinians to abide by internationally recognized human rights standards. The Israeli Palestinian interim agreement of September 28 1995 stated:

“Israel and the Council [Palestinian Interim Self-Government Authority, i.e., the elected Council,] hereinafter ‘the Council’ or ‘the Palestinian Council’ shall exercise their powers and responsibilities pursuant to this Agreement with due regard to internationally-accepted norms and principles of human rights and the rule of law.”

Israel’s right to self-defence under Article 51 cannot be more apparent according to both international humanitarian law and the ‘Oslo Accord.’

Nothing can be more ludicrous than the ICJ conclusion that because “Israel does not claim that the attacks [by Palestinian terrorists] against it are imputable to a foreign State,” it *lost* its right to act in self-defence.

It is worth noting that the UN and its organs have compromised even the Geneva Convention’s protocols, by selective politicization to bash Israel. The High Contracting Parties never met to discuss Cambodia’s killing fields or the 800,000 Rwandans murdered in the course of three months in 1994. *Israel is the only country in the Geneva Convention’s 54-year history to be the object of a country-specific denunciation.*

## **The ICJ Lacks the Authority to Amend or ‘Interpret’ Article 51.**

There is no foundation for ‘adding restrictions,’ narrowly interpreting Article 51’s meaning, or simply making changes to the UN Charter. The ICJ fails to reference Articles 108 and 109 of the UN Charter that set the precedent rules for amending the Charter:

“Amendments to the present Charter shall come into force for all Members [E.H., and not a customized version for Israel] of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.”

It is rather strange that the ICJ, of all bodies, takes liberties to change what Article 51 clearly states. This ICJ also failed to review its own past writings on the subject of *attempting to interpret* UN Charter Articles. Elsewhere in the opinion, the ICJ quotes its 1950 ruling on South West Africa (Namibia) regarding Article 80 of the same UN Charter, saying that Articles of the UN Charter were carefully penned and should be strictly read in a direct manner ‘as is’:

“The Court considered that if Article ... had been intended to create an obligation ... such intention would have been expressed in a direct manner.”

The ICJ Bench zig-zags from strict construction to loose construction, coupled with biased *interpretation*, to deny Israel the fundamental right to defend its citizens from terrorism.

Writing on the subject of the *legal effect of Resolutions and Codes of Conduct of the United Nations*, Professor, Judge Schwebel, the former president of the International Court of Justice, notes:

“What the terms and the *travaux* (notes for the official record) of the Charter do not support can scarcely be implemented.”

Ironically, in December 2004, the UN High-level Panel on Threats, Challenges and Change, published the much anticipated report entitled “A more secure world: Our shared responsibility.” Paragraph 192 of this report states:

**“We do not favour the rewriting or reinterpretation of Article 51”** [Bold in the original].

The same is true of the International Court of Justice, an organ of the United Nations, which lacks the mandate to ‘amend’ Article 51.

## **When Use of Force is Lawful**

UN Charter Article 51 is not the only UN sanction of self-defence to be disregarded by the ICJ. The Court also chooses to ignore a number of highly relevant United Nations Resolutions, passed by the General Assembly and the Security Council, addressing the legitimate and lawful use of force in self-defence by Member States.

For instance, the rationale behind General Assembly Resolution 3314 – “Definition of Aggression” – is highly relevant to the case at hand. It states:

“*Convinced* that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to the victim.”

The ICJ speaks repeatedly of the “inadmissibility of the acquisition of territory by war.” What does this phrase mean in the framework of international law? The ICJ’s use of this important principle is selective, misplaced, misleading and totally out of context.

The Bench chooses to quote Article 2, paragraph 4, of the UN Charter, which says:

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”

But the Bench chooses to ignore Article 5, paragraph 3, of UN GA Resolution 3314 which states:

“No territorial acquisition or special advantage *resulting from aggression* is or shall be recognized as lawful” [italics by author].

That is, the inadmissibility of the acquisition of territory by war cannot and should not be viewed as a blanket statement. Rather, it hinges on acquisition being the result of aggression. Arab countries acted aggressively against Israel in 1948 and 1967. Israel was not the aggressor in either the 1948 War of Independence or in the 1967 Six-Day War.

In the same manner, the ICJ quotes *selectively* from the 1970 General Assembly Resolution 2625 (“Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States”). In paragraph 87 of the ICJ opinion, the Bench notes that Resolution 2625:

“Emphasized that ‘No territorial acquisition resulting from the threat or use of force shall be recognized as legal.’”

It hides from the reader that the same Resolution subsequently clarifies that:

“The territory of a State shall not be the object of military occupation *resulting from* the use of force in contravention of the provisions of the Charter” [italics by author].

The same Resolution continues:

“Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning *cases in which the use of force is lawful*” [italics by author].

Judge Schwebel explains that the principle of “acquisition of territory by war is inadmissible” must be read together with other principles:

“Namely, that no legal right shall spring from a wrong, and the Charter principle that the Members of the United Nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.”

Simply stated, illegal Arab aggression against the territorial integrity and political independence of Israel cannot be rewarded.

Had the Charter forbidden use of force in any and all circumstances, it would not need to use the words “resulting from.” The Resolution would have simply read: “The territory of a State shall not be the object of military occupation by another State.” Period.

It is relevant at this juncture to recall again Judge Lauterpacht’s explanation on this important issue, a point also cited by Schwebel in his writing:

“Territorial change cannot properly take place as a result of the ‘unlawful’ use of force. But to omit the word ‘unlawful’ is to change the substantive content of the rule and to turn an important safeguard of legal principle into an aggressor’s charter. For if force can never be used to effect lawful territory change, then, if territory has once changed hands as a result of the unlawful use of force, the illegitimacy of the position thus established is sterilized by the prohibition upon the use of force to restore the lawful sovereign. This cannot be regarded as reasonable or correct.”

That is, there are situations involving *lawful* use of force and there are *lawful* occupations in the course of repelling aggression. Article 51 addresses the right to self-defence and the lawful use of force when one faces an aggressor.

The Security Council is the only UN body authorized to label a Member State (or non-State entity) an aggressor. In the Preamble of Resolution 3314 (“Definition of Aggression”) it says:

“Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

### **Palestinian Terrorism is an Act of Aggression.**

The United Nations defines aggressor as an entity that was first to start hostility by using armed force. In this regard the Security Council has never labeled Israel an aggressor in its entire history.

General Assembly Resolution 3314, adopted unanimously in 1974, makes it abundantly clear that no group, including non-State entities and individuals, can expect to be shielded behind the ICJ’s narrow and warped interpretation of Article 51 (the right to self-defence), which suggests that only aggression by “one State against another State” qualify for self-defence.

Article 3(a) of UN Resolution 3314 clarifies that the definition of a State when defining aggressors must be loosely construed:

“Without prejudice to questions of recognition or to whether a State is a member of the United Nations.”

This clause clearly covers aggression emanating from the Palestinian Authority, an internationally recognized autonomous, national political entity established by

international treaty – the Oslo Accords. Moreover, Article 3(g) cites specifically that this includes:

“The sending by or on behalf of a State of armed hands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”

Furthermore, in Article 4, Resolution 3314 notes that “The acts enumerated above are not exhaustive” and declares they can be further enumerated by the Security Council. Palestinian terrorist organizations, with headquarters and support in places such as Gaza, Lebanon, Iran and Syria, using areas under the civil and security responsibility of the Palestinian Authority as organizational and staging areas to commit terrorist acts, clearly fall within the confines of this Resolution.

### **Self-defence Should be Used Against “All Perpetrators” of Terrorism “Whomever” They Are.**

UN General Assembly and Security Council Resolutions, including the *International Convention for the Suppression of Terrorist Bombings*, call for specific actions to be taken by *all States* and underscore repeatedly that terrorism must be fought by *all parties*, by *all means*, at *all times*, by *whomever* and against *all perpetrators*. None of these requirements are cited by the ICJ, neither in its discussion of Article 51 and the right of Israel to self-defence, nor in any other similar context within the ICJ’s opinion.

### **The ICJ Suggests: Israelis Have to Face Deadly Acts of Violence, and Lack the Right for Self-defence.**

In paragraph 141 of the ICJ Opinion, the Court concludes that:

“The fact remains that Israel *has* to face numerous indiscriminate and deadly acts of violence against its civilian population” [italics the author].

The Court’s use of the word ‘*has*’ rather than ‘*faces*’ [deadly acts], has the ring of a ‘court order.’ The Court doesn’t condemn the attacks; instead it ‘sentences’ Israel to a form of cruel and unusual punishment.

The Court recognizes Israel’s predicaments, while being careful not to use the “T” word (terrorism) or bring itself to classify Palestinian’s acts as “*crimes against humanity*,” for to do so would imply that Israel’s plight comes under the umbrella of Resolutions and International Conventions safeguarding universal human rights.

The Court that in paragraph 141 suggests that Israel “has the right, and indeed the duty, to respond in order to protect the life of its citizens” is the same Court that in paragraph 142 leaves Israel powerless; denies it the right for self-defence and rules against building a non-lethal security barrier that saves lives, in favor of Palestinian inconvenience and Palestinian terrorism.

[1] *Reply, Myths and Facts*, January 2006. See with notes at:  
<http://www.mythsandfacts.org/ReplyOnlineEdition/chapter-5.html>

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