OPERATION CAST LEAD: USE OF FORCE DISCOURSE AND JUS AD BELLUM CONTROVERSIES

Victor Kattan*

* Victor Kattan is a Teaching Fellow at the Centre for International Studies and Diplomacy at the School of Oriental and African Studies (SOAS), University of London. This article is based in part on the author's short piece *Gaza: Not a War of Self-Defence*, published on the website of JURIST – LEGAL NEWS & RESEARCH, at the University of Pittsburgh Law School on January 16, 2009. This article can be accessed online at: http://jurist.law.pitt.edu/forumy/2009/01/gaza-not-war-of-self-defense.php. Victor Kattan is grateful to His Honour Eugene Cotran and Michel Abdel Massih QC of Tooks Chambers for providing the initial impetus to write this article. In addition, the author would like to thank Professor Kaiyan Homi Kaikobad of Brunel University, Professor Iain Scobbie of SOAS, London, and an international lawyer who prefers to remain anonymous for their comments on an earlier draft. Although the author signed THE SUNDAY TIMES letter, the opinions expressed in this article are his own and do not necessarily correspond with those of any of the other signatories, or the lawyers who commented on it.

The Palestine Yearbook of International Law, Vol. XV, 2009, pp. 95–117.

Abstract

This article revisits the use of force discourse that was invoked by states, international organisations, and individuals in response to Israel's military assault on the Gaza Strip in *Operation Cast Lead*. In particular, it examines the legal issues raised in a letter published by two dozen international lawyers in *The Sunday Times* (of London) on January 11, 2009, characterising the assault as an act of aggression. The author argues that the key issue in making this determination would seem to be the legal status of the Gaza Strip. This is because if Gaza is still considered occupied territory, then the situation is one of belligerent occupation and the question of aggression would not normally arise. However, there have been examples of state practice where non-state entities entitled to self-determination have been subjected to acts of aggression in the past. In those cases, it was the gravity of the military offensive that was the determining factor. Seen in this light, and taking the United Nation's 1974 Definition of Aggression as a guiding document, it could be argued that the Gaza Strip was subjected to an act of aggression in *Operation Cast Lead*.

Keywords: Aggression, self-defence, armed attack, belligerent occupation, self-determination, U.N. Charter, Israel, Hamas, the Palestinians, the Gaza Strip.

I. Introduction

On December 27, 2008, Israel launched a military offensive in the Gaza Strip by air, land, and sea, which attracted an enormous amount of international controversy. The intensity of the force used and the decision by the Israeli Government to ban the entry of all foreign correspondents to the Strip, thereby preventing independent verification of the facts, undoubtedly contributed to a sense of anger, bewilderment, and frustration that found expression in public protests throughout the world.[1] The conflict lasted twenty-two days and dominated the international headlines for most of that time. In the course of the conflict, more than 1,400 Palestinians and thirteen Israelis were killed.[2] Of the Israeli dead, 10 were soldiers and three civilians.[3] According to the Ministry of Health in Gaza, one-third of the Palestinian dead were children and over 5,000 people were injured.[4] During the aerial bombardment, mas-

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1 Israel refused to let the foreign media and human rights monitors enter the Strip throughout the duration of the conflict, in spite of a December 31, 2008 Israeli High Court ruling urging the Israeli Government to allow access. *See* Press Release, Human Rights Watch, Israel: Allow Media and Human Rights Monitors Access to Gaza (Jan. 5, 2009), *available at* http://www.hrw.org/en/news/2009/01/05/israel-allow-media-and-rights-monitors-access-gaza (last retrieved Oct. 2, 2009).

2 See House of Commons, Foreign Affairs Committee. Global Security: Israel and the Occupied Palestinian Territories, Fifth Report of Session 2008–09, Report, together with formal minutes, oral and written evidence (London: The Stationery Office Ltd., Jul. 26, 2009), 15–16, para. 12.

3 *Id.* at 15 (three of the Israeli soldiers were killed in "friendly fire").

4 *Id.* at 16.

sive damage was inflicted on Gaza's already dilapidated infrastructure and at the time of writing much of it is still in a state of disrepair. Whole families were killed, many have been forced to live in makeshift tents and have had to virtually beg for food from international aid agencies, particularly in the immediate aftermath of the conflict when Israel banned the importation of bread, pasta, and other essential foodstuffs.[5]

Since the end of the conflict, and in the aftermath of U.N. Security Council resolution 1860, which called "for an immediate, durable and fully respected ceasefire, leading to the full withdrawal of Israeli forces from Gaza," several commissions of inquiry have been sent there to examine whether the laws of war were infringed.[6] Most of these inquiries have focused on individual violations of international criminal, humanitarian, and human rights law, and have overlooked the preliminary question as to whether the conflict was lawful to begin with.[7] One exception in this regard was the Independent Fact-Finding Committee's report *No Safe Haven*,[8] which was drafted by several international lawyers[9] and presented to the League of Arab States on April 30, 2009, and which briefly addressed the events leading up to the conflagration on December 27, 2008. The report will be used in this article as a point for legal debate. This article does not examine the conduct of the war or violations of the *jus in bello*, as these were dealt with extensively in the Goldstone report, in the Arab League report, and by independent human rights organisations like Amnesty International and Human Rights Watch.[10] Rather, this article engages with the *a priori* question as to whether the initial use of armed force was lawful, which entails an examination of the *jus ad bellum*.

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5 Dion Nissenbaum, *Israel Blocks Pasta Shipment to Gaza, and Tensions Boil*, McClatchy Newspapers, Feb. 26, 2009. Israel has also blocked the importation of cement, steel and other building materials that are necessary for rebuilding Gaza. *See* International Committee of the Red Cross, Gaza: 1.5 million people trapped in despair (June 2009), 2.

6 SC Resolution 1860, Jan. 8, 2009, operative paragraph 1.

7 See e.g. Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact Finding Mission on the Gaza Conflict, Human Rights Council, U.N. doc. A/HRC/12/48, Sept. 15, 2009 (hereinafter referred to as "the Goldstone Report"). All information relating to the Goldstone Report can be accessed on the Human Rights Council's website at: http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm. See also *Israel/Gaza: Operation 'Cast Lead': 22 Days of Death and Destruction*, a report by Amnesty International Publications 2009, which did not address the cause of the hostilities, or the *jus ad bellum, available at:* http://www.amnesty.org/en/library/asset/MDE15/015/2009/en/8f299083–9a74–4853–860f-0563725e633a/mde150152009en.pdf (last visited Oct. 2, 2009).

8 *Report of the Fact-Finding Committee on Gaza: No Safe Place*, Presented to the League of Arab States on April 30, 2009 (hereinafter referred to as "*No Safe Haven*").

9 The Committee comprised Professor John Dugard (South Africa: Chairman), Professor Paul de Waart (Netherlands), Judge Finn Lynghjem (Norway), Advocate Gonzalo Boye (Chile/Germany), Professor Francisco Corte-Real (Portugal: forensic body damage evaluator) and Ms Raelene Sharp, solicitor (Australia: Rapporteur).

10 *22 Days of Death and Destruction*, the *Goldstone Report, supra* note 7, and *No Safe Place, supra* note 8.

II. Use of force discourse

On the very morning Israel launched its offensive in Gaza – the day it killed 225 Palestinian civilians[11] in a single airstrike, one of the highest single-day death tolls recorded in the occupied Palestinian territories since 1967[12] – Gabriela Shalev, Israel's Permanent Representative to the United Nations (U.N.), sent a letter to the U.N. Secretary-General announcing that "after a long period of utmost restraint, the Government of Israel has decided to exercise, as of this morning, its right to self-defence."[13] According to the letter, Israel had "decided to actively fight terrorism and protect its citizens from further terrorist attacks" by conducting its response to the rockets fired from the armed-wing of Hamas from the Gaza Strip into southern Israel "in accordance with the inherent right of every State to self-defence as enshrined in Article 51 of the Charter of the United Nations." The letter claimed that Israel's response was "aimed solely against the terrorists and their infrastructure in the Gaza Strip" and that it was "not directed at the civilian population." In sharp contrast, Khalid Shawabkah, Jordan's Permanent Representative to the U.N., disputed Israel's claim of self-defence and instead characterised Israel's assault on the Gaza Strip as an act of aggression:

> *Jordan condemns this unjustified aggression, which has led to a large number of civilian deaths, and firmly requests that the international community assume its political, legal and moral responsibilities by exerting pressure on Israel to halt immediately all military operations, end the policy of collective punishment directed at Palestinian civilians and end the enormous suffering created by those operations, which are a clear violation of international humanitarian law, in one of the most densely populated areas of the world.*[14]

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[11] Taghreed El-Khodary and Ethan Bronner, *Israelis Say Strikes Against Hamas will Continue*, N.Y. Times, Dec. 28, 2008. Most of the dead were unarmed Palestinian police cadets on parade at a graduation ceremony. Under international law, they would not be classified as combatants. As the Goldstone Report, *supra* note 7, p. 132, para. 431 noted, "there is insufficient information to conclude that the Gaza police as a whole had been 'incorporated' into the armed forces of the Gaza authorities. Accordingly, the policemen killed cannot be considered to have been combatants by virtue of their membership in the police."

[12] United Nations Office for the Coordination of Humanitarian Affairs, Gaza Humanitarian Situation Report, Dec. 28, 2008, 16:00 ("Reports from Al Mezan Centre for Human Rights in Gaza indicated that most fatalities were civilian police; other fatalities included at least 20 children, nine women, and 60 other unarmed civilians. Most casualties fell in the first few minutes of the operation. The Israeli operation resulted in one of the highest single-day death tolls recorded in the occupied Palestinian territory since 1967.").

[13] *See* identical letters dated Dec. 27, 2008 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. S/2008/816, Dec. 27, 2008.

[14] Identical letters dated Dec. 27, 2008 from the *Chargé d'affaires a.i.* of the Permanent Mission of Jordan to the United Nations addressed to the Secretary-General and to the President of the Security Council, U.N. Doc. S/2008/818, Dec. 27, 2008.

Shawabkah's reference to Israel's aggression, its policy of collective punishment, and international humanitarian law was intriguing. It seems the Jordanian Ambassador was of the opinion that an act of aggression had taken place against a territory subject to belligerent occupation.[15] Miguel d'Escoto Brockmann, the President of the 63rd session of the U.N. General Assembly, likewise condemned the Gaza airstrikes as "the commission of wanton *aggression* by a very powerful state against a territory that [it] *illegally occupies*".[16] On January 12, the U.N. Human Rights Council in Geneva passed a resolution in which, *inter alia*, it called on "the international community to support the current initiative aiming at putting an immediate end to the *current military aggression* in Gaza".[17] To this end, the Human Rights Council decided "to dispatch an urgent independent international fact-finding mission . . . to investigate all violations of international human rights law and International Humanitarian Law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the *occupied* Gaza Strip, *due to the current aggression*."[18] Two days later, the Malaysian Parliament passed a resolution in which it called on "the United Nations General Assembly to immediately establish an International Criminal Tribunal for Palestine to investigate and prosecute suspected Israeli war criminals involved in the brutal and *aggressive* acts on the Palestinian people."[19] From these statements, a mere sample of the dozens issued during the conflict, it becomes clear that many states, particularly those from the developing world, were of the opinion that an act of aggression had taken

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[15] Jordan voted in favour of G.A. Res. ES-10/18, Jan. 23, 2009, supporting an immediate ceasefire in the Gaza Strip according to SC Res. 1860 (2009), which recalled "the relevant rules and principles of international law, including international humanitarian and human rights law, particularly the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, which is applicable to the Occupied Palestinian Territory, including East Jerusalem." Jordan also voted in favour of the Human Rights Council resolution, infra n. 20, which decided to dispatch an urgent independent fact-finding mission to Gaza, and that expressly referred to the "Occupied Gaza Strip."

[16] U.N. Press Release, On Gaza airstrikes - Statement by the President of the 63rd Session of the United Nations General Assembly, U.N. Headquarters, New York, Dec. 27, 2008 (emphasis added).

[17] The Commission is being chaired by Judge Richard J. Goldstone and the team is comprised of the following experts: Christine Chinkin, Hina Jilani and Desmond Travers. For the resolution, see Grave Violations of Human Rights in the Occupied Palestinian Territory particularly due to the recent Israeli military attack against the occupied Gaza Strip, revised resolution adopted by the U.N. Human Rights Council, U.N. doc. A/HRC/S-9/L.1/Rev. 2, Jan. 12, 2009, operative para. 7 (emphasis added).

[18] *Id.* at operative para. 14 (emphasis added). *See* the Goldstone Report, *supra* note 7. Both the Bush and Obama administrations attacked the mandate of the Goldstone Fact-Finding Commission as one-sided even though Justice Goldstone made it clear that he only accepted the mandate on the condition that he could look at human rights violations by *both* Israel and Hamas, which is precisely what the report's authors did. This did not seem to make the slightest bit of difference, however, as both Israel and the Obama Administration vehemently attacked the report when it was published.

[19] *See* Letter dated Jan. 14, 2009 from the Permanent Representative of Malaysia to the United Nations addressed to the President of the General Assembly and the Annex to the letter dated Jan. 14, 2009 from the Permanent Representative of Malaysia to the United Nations addressed to the President of the General Assembly, U.N. doc. A/ES-10/444, Jan. 16, 2009 (emphasis added).

place against a territory that they all considered to be subject to the laws of belligerent occupation.[20]

Most European states refused to address the issue of the lawfulness of Israel's actions in the early stages of the conflict, although the Czech Presidency of the EU did issue a statement equating Israel's actions as defensive before changing its stance. On January 4, the following official statement was released by the EU Presidency:

> *I would like to apologise for the misunderstanding which occurred on 3 January 2009 about the reaction of the Czech Presidency to the actions of the Israeli ground forces in the Gaza Strip according to which the operations were seen as an act of self-defence. The only official standpoint of the Czech Presidency is the following:*
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> *It is not surprising that the Israeli forces have launched land operations in the Gaza Strip. There were indications that Israel had been considering this step. But even the undisputable right of the state to defend itself does not allow actions which largely affect civilians. We call for the facilitation of humanitarian aid to the inhabitants of the Gaza Strip, and in accordance with the position agreed by the EU Foreign Ministers in Paris on the 30th December 2008 we call for the establishment of a ceasefire.*[21]

Across the Atlantic, the US House of Representatives had no such qualms about qualifying Israel's actions and passed a non-binding resolution "recognizing Israel's right to defend itself against attacks from Gaza" by a majority of 390–5. Likewise, on January 6, when an Israeli tank shell killed 40 Palestinians at a U.N. school,[22] Australia's Prime Minister Kevin Rudd said: "Australia recognizes Israel's right to self-defence."[23] And in his last press conference at the White House, President George W. Bush said that "Israel has a right to defend herself."[24]

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[20] *See* Resolution A/HRC/S-9/L.1/Rev.2, Jan. 12, 2009, adopted by the U.N. Human Rights Council, which, before condemning Israel's actions in the Gaza Strip as an act of aggression, strongly condemned in operative paragraph 1 "the ongoing Israeli military operation carried out in the Occupied Palestinian Territory, in particular in the Occupied Gaza Strip." This resolution was approved by 33 states, 1 against, with 13 abstentions. *In favour*: Angola, Argentina, Azerbaijan, Bahrain, Bangladesh, Bolivia, Brazil, Burkina Faso, Chile, China, Cuba, Djibouti, Egypt, Gabon, Ghana, India, Indonesia, Jordan, Madagascar, Malaysia, Mauritius, Mexico, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, South Africa, Uruguay, and Zambia. *Against*: Canada. *Abstentions*: Bosnia and Herzegovina, Cameroon, France, Germany, Italy, Japan, Netherlands, Republic of Korea, Slovakia, Slovenia, Switzerland, United Kingdom.

[21] *See* Official EU Presidency Statement concerning the situation in the Middle East, reproduced on the website of the Permanent Mission of the Czech Republic to the U.N. in New York at: http://www.mzv.cz/un.newyork/en/news_events/czech_eu_presidency_on_the_situation_in.html

[22] Taghreed El-Khodary and Isabel Kershner, *Israeli mortars kill 40 Palestinian refugees*, N.Y. Times, Jan. 6, 2009.

[23] *Rudd defends Israel's rights*, The Australian, Jan. 6. 2009.

[24] RAW DATA: Transcript of Bush's Last White House Press Conference, Jan. 12, 2009, FOXNews at: http://www.foxnews.com/politics/2009/01/12/raw-data-transcript-bushs-white-house-press-conference/ (last viewed Jul. 27, 2009).

It may therefore come as a surprise to some that, despite these statements, many international lawyers argued that Israel could not rely on the right of self-defence to justify its actions in Gaza. In a letter published in *The Sunday Times* while the hostilities were still ongoing, Israel's plea of self-defence was rejected by over two dozen international lawyers.[25] In the letter, it was argued that Israel's actions in the Gaza Strip amounted to aggression, not self-defence:

> *ISRAEL has sought to justify its military attacks on Gaza by stating that it amounts to an act of "self-defence" as recognised by Article 51, United Nations Charter. We categorically reject this contention.*
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> *The rocket attacks on Israel by Hamas deplorable as they are, do not, in terms of scale and effect amount to an armed attack entitling Israel to rely on self-defence. Under international law self-defence is an act of last resort and is subject to the customary rules of proportionality and necessity.*
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> *The killing of almost 800 Palestinians, mostly civilians, and more than 3,000 injuries, accompanied by the destruction of schools, mosques, houses, U.N. compounds and government buildings, which Israel has a responsibility to protect under the Fourth Geneva Convention, is not commensurate to the deaths caused by Hamas rocket fire.*
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> *For 18 months Israel had imposed an unlawful blockade on the coastal strip that brought Gazan society to the brink of collapse. In the three years after Israel's redeployment from Gaza, 11 Israelis were killed by rocket fire. And yet in 2005–8, according to the U.N., the Israeli army killed about 1,250 Palestinians in Gaza, including 222 children. Throughout this time the Gaza Strip remained occupied territory under international law because Israel maintained effective control over it.*

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[25] The full list of signatories included: Ian Brownlie QC, Blackstone Chambers; Mark Muller QC, Bar Human Rights Committee of England and Wales; Michael Mansfield QC, Joel Bennathan QC, Steve Kamlish QC and Michael Topolski QC, Tooks Chambers; Sir Geoffrey Bindman, University College London (UCL), University of London; Professor Richard Falk, Princeton University; Professor M. Cherif Bassiouni, De Paul University, Chicago; Professor Christine Chinkin, London School of Economics and Political Science (LSE); Professor John B. Quigley, Ohio State University; Professor Iain Scobbie and Victor Kattan, School of Oriental and African Studies (SOAS), University of London; Professor Vera Gowland-Debbas, Graduate Institute of International and Development Studies, Geneva; Professor Said Mahmoudi, Stockholm University; Professor Max du Plessis, University of KwaZulu-Natal, Durban; Professor Bill Bowring, Birkbeck College, University of London; Professor Joshua Castellino, Middlesex University; Professor Thomas Skouteris and Professor Michael Kagan, American University of Cairo; Professor Javaid Rehman, Brunel University, University of West London; Daniel Machover, Solicitor, Hickman & Rose, and Chairman, Lawyers for Palestinian Human Rights; Dr Phoebe Okawa, Queen Mary University, University of London; John Strawson, University of East London; Dr Nisrine Abiad, British Institute of International and Comparative Law; Dr Michael Kearney, University of York; Dr Shane Darcy, National University of Ireland, Galway; Dr Michelle Burgis, University of St Andrews; Dr Niaz Shah, University of Hull; Liz Davies, Chair, Haldane Society of Socialist Lawyers; and Professor Michael Lynk, The University of Western Ontario.

> *Israel's actions amount to aggression, not self-defence, not least because its assault on Gaza was unnecessary. Israel could have agreed to renew the truce with Hamas. Instead it killed 225 Palestinians on the first day of its attack. As things stand, its invasion and bombardment of Gaza amounts to collective punishment of Gaza's 1.5m inhabitants contrary to international humanitarian and human rights law. In addition, the blockade of humanitarian relief, the destruction of civilian infrastructure, and preventing access to basic necessities such as food and fuel, are prima facie war crimes.*
>
> *We condemn the firing of rockets by Hamas into Israel and suicide bombings which are also contrary to international humanitarian law and are war crimes. Israel has a right to take reasonable and proportionate means to protect its civilian population from such attacks. However, the manner and scale of its operations in Gaza amount to an act of aggression and is contrary to international law, notwithstanding the rocket attacks by Hamas.*[26]

This article examines whether the assertion by these international lawyers is correct as a matter of public international law, particularly the claim that "the manner and scale of [Israel's] operations in Gaza amount to an act of aggression … notwithstanding the rocket attacks by Hamas." It is noteworthy, for instance, that the Arab League's Independent Fact-Finding Committee did not take a stance on the question of aggression. Instead, "the Committee … after careful consideration, decided not to make any finding on the question whether Israel's attack constituted aggression."[27] The reason for not taking a stance on this issue was the Commission's uncertainty over the definition of aggression, and the statehood of Palestine. This "compelled the Committee to take no position on the question of whether Israel's assault on Gaza could *in law* be described as aggression."[28] Thus, the Commission drew a distinction between the use of the term aggression as a rhetorical device, and what it amounts to as a matter of international law. But this begs the question: if Israel's actions did not amount to self-defence which the Commission argued, and which is examined in more depth below, and if it could not be justified as a matter of law on any other ground, then what did Israel's actions amount to?

III. Self-defence: what is an armed attack?

Before turning to the question of aggression, it is necessary to examine the claim advanced by the Government of Israel that its military assault on the Gaza Strip was in accordance with Article 51 U.N. Charter. This provides that U.N. members have

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[26] *Israel's bombardment of Gaza is not self-defence – it's a war crime*, The Sunday Times, Jan. 11, 2009, 20.
[27] *No Safe Haven*, *supra* note 8, p. 103, para. 407.
[28] *Id.* (emphasis in original).

the inherent right of individual or collective self-defence if an armed attack occurs against any one of them:

> *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*.[29]

The question then is, what is an armed attack giving rise to a right of self-defence?

A literal reading of Article 51 might lead one to conclude that any attack that is armed amounts to an "armed attack" that would give a state the right to invoke its inherent right of self-defence and go to war. But under international law the issue is not so straightforward. If, for example, it were the case that a single shot fired across a border amounted to an armed attack for the purposes of Article 51 of the U.N. Charter, then states could invoke their "inherent" right to self-defence and enter into hostilities on the flimsiest of pretexts. Potentially, this could cause endless instability in international affairs. It could also lead to accidental wars. One has only to think of the tensions between India and Pakistan, China and Taiwan, North and South Korea, Greece and Turkey, Russia and Georgia to realise the danger. Moreover, if the threshold for an armed attack is low, then states could effectively manufacture a war.[30] All they would need to do is provoke a border incident, allege that they had been attacked first, and then send in the troops.

In the *Nicaragua* case, the International Court of Justice (I.C.J.) drew a distinction between the "scale and effects" of a particular military operation that could be classified as an armed attack as opposed to "a mere frontier incident".[31] An armed attack carried out by "armed bands, groups, irregulars or mercenaries," the Court said, would have to be "of such gravity as to amount to an actual armed attack conducted by regular forces."[32] The Court's jurisprudence in *Nicaragua* was upheld in the case concerning *Oil Platforms*, where it said that in ascertaining whether an armed attack had taken place it was necessary to distinguish "the most grave forms of the use of force from other less grave forms."[33] Even cumulative attacks, the Court said, might not necessarily amount to an armed attack for the purposes of Article 51 of the U.N. Charter.[34] The I.C.J. maintained its *jurisprudence constante* in the *Uganda* case, where it saw "no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-

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[29] Art. 51, U.N. Charter (emphasis added).

[30] For instance, President George W. Bush considered provoking a war with Saddam Hussein's regime by flying a U.S. spyplane over Iraq bearing U.N. colours, enticing the Iraqis to take a shot at it. *See* Andy McSmith, *Bush 'plotted to lure Saddam into war with fake U.N. plane,'* The Independent, Feb. 3, 2006.

[31] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, at 103, para. 195.

[32] *Id.* at 103, para. 195.

[33] Oil Platforms (Islamic Republic of Iran v. U.S.), 2003 I.C.J. 161, at 187, para. 51.

[34] Oil Platforms, *id.* at 192, para. 64.

defence *against large-scale attacks* by irregular forces."[35] This presupposes that the Court would have only examined those attacks that were of a significant magnitude if it had decided to examine the contentions of the parties to that case.

The I.C.J. is not the only international court to have adopted this approach to the *jus ad bellum* in its jurisprudence. The Eritrea-Ethiopia Claims Commission in their Partial Award of December 19, 2005 regarding Ethiopia's dispute with Eritrea before the Permanent Court of Arbitration also adopted the "scale and effects" test in its assessment.[36] According to that Commission, "[l]ocalized border encounters between small infantry units, *even those involving the loss of life*, do not constitute an armed attack for purposes of the Charter."[37] Accordingly, the Commission concluded that the clashes between Eritrean and Ethiopian patrols along their disputed border were "relatively minor incidents… not of a magnitude to constitute an armed attack by either State against the other within the meaning of Article 51 of the U.N. Charter."[38]

As regards the Israel-Palestine conflict, we are not dealing with a single shot fired across a border or a clash between infantry patrols on an unmarked border. We are faced with a decades-old territorial dispute. Assuming that the right of self-defence for the purpose of Article 51 of the U.N. Charter can apply to attacks initiated by non-state actors like Hamas, are the rockets fired by its military wing into southern Israel of such a "scale and effect" that they amount to an armed attack, as opposed to a border incident? And are they of "such gravity" that they amount to an armed attack conducted by a regular army? If so, how is one to quantify rocket attacks for the purposes of an armed attack? By the numbers fired? Or by the number of deaths they cause? Does a rocket fired into an open field or into an empty building amount to an armed attack? What if it causes damage or injures or kills someone?

While it would not be possible or even desirable to quantify precisely what amounts to an armed attack, as it will depend on the individual facts of each case, the deaths of a dozen civilians, over a one-year period, deplorable as that is, would probably not qualify as an armed attack for the purposes of Article 51 of the U.N. Charter. At the very minimum, it would seem that in a war fought with conventional weapons an armed attack that could trigger Article 51 U.N. Charter would have to be sufficiently serious and deadly, and carried out with the sophistication of a regular army backed by a state with the intention of causing a significant number of deaths. The circumstances surrounding the attack would also be relevant. For instance, a lone soldier who shoots a dozen tourists at a border in his individual capacity would not qualify as an armed attack triggering the right of self-defence by the state whose

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[35] Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda), 2005 I.C.J. 53, para. 147 (19 December).

[36] Eritrea Ethiopia Claims Commission, Partial Award, *Jus Ad Bellum*, Ethiopia's Claims 1–8, between The Federal Democratic Republic of Ethiopia and The State of Eritrea, The Hague, Dec. 19, 2005.

[37] *Id.* at 4, para. 11.

[38] *Id.* at 4, para. 12.

nationals were shot dead. Nor would a state's very survival have to be at stake in order to invoke Article 51 U.N. Charter.[39] However, if a terrorist attack was carried out by irregular forces from the territory of a third state, care would have to be taken that the state in whose territory that attack had originated from were first given an opportunity to undertake countermeasures against the rebels. Failing action against the rebels by the state from where the attack originated, the state attacked would in all due likelihood react to an armed attack by non-state actors on its territory, whether or not this would be strictly legal. In the case of an attack by the armed forces of another state, there would of course be no need for this requirement. As soon as an armed attack has been launched from the armed forces of another state, the state subject to that attack would be entitled to react to it in accordance with Article 51 U.N. Charter.

For the purposes of the law of self-defence, however, it is not always a question of who attacks first – although Article 2 of the U.N. General Assembly's 1974 Definition of Aggression,[40] which arguably reflects customary international law in part,[41] stipulates that: "The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression." As Professor Yoram Dinstein of Tel Aviv University argues in his book War, Aggression and Self-Defence, it "is not who fired the first shot but who embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon. The casting of the die, rather than the actual opening of fire, is what starts the armed attack."[42] But without doubt, it was Israel's December 27th attack on Gaza, the biggest air assault on the Strip since 1967, that, to use Dinstein's phrase, constituted the crossing of the "legal Rubicon". In this case, the Israeli air raid that led to the deaths of 225 Palestinians in a single strike would certainly have amounted to an armed attack, rather than the firing of a dozen locally-made Qassam rockets and mortar rounds by Hamas that exploded on "Israeli soil" but led to not a single death.[43]

Of course, one could argue that Israel cannot invoke self-defence because its response was not necessary or proportionate to the deaths caused by the rockets fired from Hamas and not because the rocket attacks did not reach the gravity or scale of an armed attack that would be commensurate to an attack if it was conducted by regular forces. In its *Nuclear Weapons* advisory opinion, the I.C.J. stipulated 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 in armed

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[39] As the I.C.J. seemed to conclude in Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 263, para. 96.

[40] U.N. GA Res. 3314 (XXIX), Dec. 14, 1974.

[41] See the opinion expressed by Judge Schwebel in his Dissenting Opinion in Nicaragua, *supra* note 29, 345, para. 168.

[42] Yoram Dinstein, War, Aggression and Self-Defence (Cambridge University Press 2005) 191.

[43] *See* Barak Ravid, *Disinformation, secrecy and lies: How the Gaza offensive came about*, Ha'aretz, Jun. 2, 2009, available online at: http://www.haaretz.com/hasen/spages/1050426.html.

conflict which comprise in particular the principles and rules of humanitarian law."[44] In other words, any use of force in self-defence to repel an armed attack must be necessary, proportionate, and in conformity with international humanitarian law. This is where the *jus ad bellum* becomes murky and begins to merge with the *jus in bello*. For at what precise point does the initiation of an armed conflict transpire into an actual armed conflict? And when making an assessment of whether an attack amounts to an act of aggression as opposed to an act of self-defence, does one not only have to look at all the circumstances surrounding the initial attack, but also its consequences?

Whatever the answer, it is clear that in any assessment of proportionality one must take into account all the facts of a particular claim of self-defence. An attack cannot be examined in isolation to the incidents that were alleged to have provoked it. This was the approach to proportionality adopted by the I.C.J. in the *Oil Platforms* case. In assessing the proportionality of an Iranian attack, the Court said it could not "assess in isolation the proportionality of that action to the attack to which it was said to be a response; it cannot close its eyes to the scale of the whole operation."[45] In other words, when assessing Israel's claim to self-defence and related questions of proportionality, one must be mindful of the deaths caused by Israel's own actions in the Gaza Strip prior to the escalation of hostilities. Even during the so-called "ceasefire," Israel assassinated Palestinians in Gaza, such as in its attack on November 4, which killed six people.[46] Israel also blockaded Gaza for 18 months prior to its December 27 assault on the Strip.[47] In any assessment of proportionality one cannot ignore the sheer scale of Palestinian dead in the three years prior to Israel's December 27 assault, which included 222 children.[48] As the authors of the letter noted, in the three years after Israel's redeployment from Gaza, 11 Israelis were killed by rocket fire.[49] And yet between September 12, 2005 – the day Israel completed its "disengagement" from Gaza – and December 27, 2008, the day Israel launched its air strikes, the Israeli army had killed approximately 1,250 Palestinians in Gaza, according to data collected by the United Nations Organization for the Coordination of Humanitarian Affairs.[50] Nor can one ignore the number of civilians killed during the current hostilities. Is

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44 Nuclear Weapons, Advisory Opinion, *supra* note 39, at 245, para. 42.

45 Oil Platforms, *supra* note 33, 198, para. 77.

46 As the Arab League's Independent Fact-Finding Commission noted: "Israel was itself responsible for violating an agreed six month truce with Hamas that commenced on Jun. 19, 2008 and was largely effective in maintaining peace…On Nov. 4, 2008 Israel violated the truce when it launched an attack on Gaza on the pretext of closing a tunnel to be used to abduct Israeli soldiers that killed six Palestinians. This violation resulted in a resurgence of rocket fire but it seems that Israel refused attempts to renew the truce. This all casts doubt on the integrity of Israel's claim that it acted in self-defence." See *No Safe Haven*, *supra* note 8, 105, para. 411 (2) (footnotes suppressed).

47 For details on the blockade, see the Goldstone Report, *supra* note 7, at 95, paras. 311–326.

48 Office for the Coordination of Humanitarian Affairs, Occupied Palestinian Territory, Casualties Database, http://www.ochaopt.org/poc/.

49 Griff Witte, *Israel Poised for Long Fight*, The Washington Post, Dec. 29, 2008. ("Since the 2005 Israeli withdrawal, 11 Israelis have been killed by rocket fire from the strip.")

50 *See* OCHA casualty database, *supra* note 46.

the firing by Hamas of hundreds of rockets into southern Israel in the weeks prior to *Operation Cast Lead*, which led to little or no casualties, commensurate to the deaths of 1,400 Palestinians? Moreover, would Israel, in order to legitimately invoke its right of self-defence under international law, not be required to target those who launched the rockets, rather than the people of Gaza as a whole? As the authors of the Goldstone Report noted: "While the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self defence, the Mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole."[51]

IV. Occupied territory and belligerent occupation

Although Israel relocated its troops from Gaza in August-September 2005 under Prime Minister Ariel Sharon's unilateral "Disengagement Plan," many international lawyers have argued that the Gaza Strip remains occupied territory under international law.[52] Indeed, it may be said that this view represents the academic consensus[53] and the views of the international community,[54] despite a recent decision by Israel's Supreme Court that held that Gaza was no longer occupied.[55] The principal reasons that most international lawyers, including the authors of the Goldstone report, advance in support of their arguments that Gaza remains subject to the laws of belligerent occupation, is that Israel controls all of the Strip's entry and exit points, its airspace, its territorial waters, its local monetary market, and population registry.[56] In the words of the Arab League's Independent Fact-Finding Committee:

> *403. The test for determining whether a territory is occupied under international law is effective control, and not the permanent physical presence of the Occupying Power's military forces in the territory in question. Judged by this test it is clear that Israel remains the Occupying Power as technological developments have made possible for Israel to assert control over the people of Gaza without a permanent military presence. Israel's effective control is demonstrated by the following factors:*

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51 *See* the Goldstone Report, *supra* note 7, at 523, para. 1680.

52 *See e.g.* Iain Scobbie, *An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination*, *in* The Palestine Question in International Law (Victor Kattan (ed.), London: British Institute of International and Comparative Law, 2008), 637.

53 *See* the list of articles cited by Iain Scobbie in *A Note on Collective Punishment* for the House of Commons, Foreign Affairs Committee. Global Security: Israel and the Occupied Palestinian Territories, *supra* note 2, Ev 55, note 2.

54 *See* the Goldstone Report, *supra* note 7, at 85, para. 277.

55 HCJ 9132/07 Jaber al Bassouini Ahmed et al v Prime Minister and Minister of Defense [2008], opinion of President Beinisch, para. 12, available at www.adalah.org/eng/gaza%20report.html (last viewed July 27, 2009).

56 *See* the Goldstone Report, *supra* note 7, at 85–86, para. 278.

(1) Effective control of Gaza's six land crossings;
(2) Complete control of Gaza's airspace and territorial waters;
(3) Control through military incursions, rockets attacks and sonic booms: sections of Gaza have been declared "no-go" zones in which residents will be shot if they enter;
(4) Control on the Palestinian Population Registry which determines who may reside in Gaza and who may leave and enter the territory.

404. In the opinion of the Committee it is therefore clear that in law Gaza is a territory occupied by Israel.[57]

The capacity of the Israeli army to invade the Gaza Strip at its time of choosing; to block humanitarian access; to close the border crossings at will; to blockade and limit the fishing zone; to control the supply of food, fuel, and electricity; to determine Gaza's currency and control its taxes and custom duties; and to bar all foreign correspondents and human rights monitors from entering the Strip, which it enforced prior to the latest conflict; all point to the conclusion that the Gaza Strip remains under effective Israeli control, despite Israel's 2005 "disengagement."[58] As the preamble to U.N. Security Council Resolution 1860 stresses: "the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state."[59]

According to The Chatham House Principles of International Law on the Use of Force in Self-Defence,[60] an armed attack is an attack directed from outside the territory controlled by the state. Recalling the International Court of Justice's advisory opinion in *Wall*,[61] the authors of these Principles noted that "unless an attack is directed from outside territory under the control of the defending State, the question of self-defence in the sense of Article 51 does not normally arise."[62] Thus, in principle, a state cannot invoke self-defence in relation to an attack that originates within territory it occupies.

It is important to note that not all defensive measures are measures taken in self-defence under Article 51 of the U.N. Charter. This is because self-defence is an exculpatory plea regarding resort to force in the first place, and not for an offensive taken during an armed conflict. In the *Targeted Killings* case,[63] Judge Barak accepted that the Israel-Palestine conflict is an international armed conflict where the laws of

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57 *No Safe Haven, supra* note 8, pp. 102–3 (footnotes suppressed).
58 *See* the Goldstone Report, *supra* note 7, at 85, para. 276. ("Israel has without doubt at all times relevant to the mandate of the Mission exercised effective control over the Gaza Strip.")
59 S.C. Res.1860 (Jan. 8, 2009).
60 *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 Int'l & Comp. Law Quart. 963 (2006).
61 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, at 194, para. 139.
62 *The Chatham House Principles*, *supra* note 60, p. 966.
63 HCJ 769/02, The Public Committee against Torture in Israel v. The Government of Israel [2005], available online at elyon1.court.gov.il/Files_ENG/02/690/007/.../02007690.a34.pdf (last viewed Jul. 27, 2009).

belligerent occupation are applicable.[64] Under the law of belligerent occupation, the appropriate legal framework is the *jus in bello* and not the *jus ad bellum*. Self-defence, under Article 51 of the U.N. Charter, is only relevant to the latter.

Under the law of belligerent occupation, Israel could use the justification of belligerent reprisals to justify pin-point attacks against Hamas. But the sheer scale of *Operation Cast Lead* goes well beyond the proportionality requirement inherent in the law of belligerent reprisals.[65] Most importantly, the law of armed conflict prohibits belligerent reprisals against civilians, civilian populations and certain civilian objects.[66] This is confirmed in Articles 51, paragraph 6 and Article 54, paragraph 4 of the Additional Protocol I to the Geneva Conventions of 1949.[67] It also goes beyond the proportionality requirement in the classical law of self-defence. This is because in the *Caroline* formulation, the test of proportionality was stated to require "nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[68]

Under the law of belligerent occupation, Israel has the duty to ensure law and order in the occupied territory. Article 43 of the Hague Regulations respecting the Laws and Customs of War on Land of 1907 provides that the Occupying Power "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[69] Article 64 of the Fourth Geneva Convention of 1949 further provides that the Occupying Power may subject the population of the occupied territory to provisions that are essential to enable it to fulfil its functions, to maintain orderly government, and to ensure its security.[70] Because Israel has failed to fulfil

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64 *Id.* at para. 18.

65 As the I.C.J. noted in its Nuclear Weapons Advisory Opinion, to be lawful, belligerent reprisals, like self-defence, must comply with the principle of proportionality. *See* Nuclear Weapons, Advisory Opinion, *supra* note 39, 246, para. 46. In his oral and written expert testimony before the House of Commons Select Committee, Professor Scobbie expressed his opinion that "collective punishments or penalties cannot be justified under the doctrine of belligerent reprisals." *See* House of Commons Select Committee: Global Security: Israel and the Occupied Palestinian Territories, *supra* note 2, 36, para. 70; Ev 17, Q82; and his written memorandum at Ev 55 and Ev 57 ("Article 33.3 of the Fourth Geneva Convention expressly states 'Reprisals against protected persons and their property are prohibited'".)

66 *Id.* Iain Scobbie, *A Note on Collective Punishment*.

67 Although Israel has not ratified Additional Protocol I, many of its provisions reflect customary international law. The preamble to G.A. Res ES-10/14 (2003), which requested the Wall Advisory Opinion, reaffirmed "the applicability of the Fourth Geneva Convention as well as Additional Protocol 1 to the Geneva Conventions to Occupied Palestinian Territory, including East Jerusalem." On the customary status of some of Additional Protocol I's provisions see Fausto Pocar, *Protocol I Additional to the 1949 Geneva Conventions and Customary International Law*, 31 Isr. Ybk Hum Rts 145 (2001).

68 *See* the letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, British Minister in Washington, April 24, 1841, 29 Brit. & Foreign St. Papers 1129, at 1138 (1840–41).

69 Art. 43, Hague Convention (IV) Respecting the Laws and Customs of War on Land, and Annex: Regulations Respecting the Laws and Customs of War on Land, T.S. No. 539, 1 Bevans 631, signed at The Hague, Oct. 18, 1907, entry into force Jan. 26, 1910.

70 Art. 64 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War of 1949, 75 U.N.T.S. 287 (1950).

these obligations, it allowed the situation to develop where Hamas could prepare and launch Qassam rockets against southern Israel in retaliation for the blockade. The deaths, injuries and damage caused by *Operation Cast Lead* amount to retribution inflicted on Gaza as a response to activities that Israel had the responsibility to prevent.[71]

V. Aggression and self-determination

If Israel's actions do not amount to self-defence, then what do they amount to? This is a matter of some controversy and is related to the legal status of the Gaza Strip. For if, as has been argued in this article, the Gaza Strip remains a territory subject to belligerent occupation, then the applicable law is to be found in the *jus in bello*, as opposed to the *jus ad bellum*. The question of aggression would therefore not normally arise. However, the Government of Israel has advanced the argument that (1) the Gaza Strip is not occupied territory; and (2) Israel's assault on the Strip was a lawful measure of self-defence, as recognised by Article 51 U.N. Charter.[72] In other words, in adopting this argument, Israel has opened itself up to the accusation that if its December 27th assault on the Gaza Strip could not be justified as an act of self-defence, then correspondingly it could be characterised as an act of aggression.

As previously mentioned, the Arab League's Independent Fact-Finding Committee, after "careful consideration," avoided addressing the issue of whether or not Israel's attack on Gaza, which it described as "heinous and inhuman,"[73] could be described as aggression, due to uncertainty over its definition and the statehood of Palestine. And yet, the Committee accepted that: "The most satisfactory definition of aggression is to be found in General Assembly Resolution 3314, which describes aggression as "the use of armed force by a state against the sovereignty, territorial integrity or political

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[71] As the authors of the Goldstone Report noted, the Israeli Government – through a series of acts that deprive Palestinians in the Gaza Strip from their means of subsistence, employment, housing, and water – may even justify a competent court from finding that the crime of persecution, a form of crime against humanity, had been committed. *See* the Goldstone Report, *supra* note 7, at 370, paras. 1326–1329.

[72] *See* the Disengagement Plan and related documents at the website of Israel's Foreign Ministry: http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Disengagement+Plan++General+Outline.htm (last retrieved Jul. 12, 2009). *See also* the Identical letters dated Dec. 22, 2008 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2008/807, Dec. 24, 2008 in which Gabriel Shalev, the Permanent Representative of Israel to the United Nations, curiously invoked self-defence under Article 51 U.N. Charter three days before the outbreak of hostilities, while at the same time writing that "Israel will continue to provide the people of Gaza with their basic humanitarian needs." This seems to assume that the Israel Foreign Ministry (or at least whoever is advising Dr. Shalev) does consider the Strip as occupied territory and subject to the Fourth Geneva Convention, despite the ruling by Israel's Supreme Court. But how can Israel claim self-defence against a territory that it occupies?

[73] *No Safe Haven*, *supra* note 8, p. 103, para. 405.

independence of *another state*…."[74] Two things are worth noting here. First, the Committee seemed to be confusing the uncertainty over the definition of the *crime* of aggression, which attracts individual criminal responsibility, with the definition of aggression contained in resolution 3314, which attracts *state* responsibility. Second, the Committee did not quote the definition of aggression in Article 1 of Assembly Resolution 3314 in full, which provides:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, *or in any other manner inconsistent with the Charter of the United Nations*, as set out in this Definition.

Explanatory note: In this Definition the term "State":

(a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;
(b) Includes the concept of a "group of States" where appropriate.[75]

It is significant that a period does not appear after the words "another State" in Article 1 of this Definition. Instead, its drafters explicitly recognised that while aggression could only be committed by a state, the entity that was subject to an act of aggression need not necessarily be a state. This would explain the reference to the U.N. Charter. And the only use of force that is not inconsistent with the Charter is armed force that has been authorised by an affirmative vote of nine members of the U.N. Security Council, including the concurring votes of the five permanent members,[76] or exceptionally, where it is a question of self-defence, which in the words of Article 51, must be in response to an armed attack. As has already been argued above, Israel's claim of self-defence in *Operation Cast Lead* did not stand up to scrutiny under article 51 of the Charter and it was not authorised by the U.N. Security Council. Accordingly, one is left with the only other possibility: the question of aggression.

In the various reports of the Special Committee on the Question of Defining Aggression, which prepared the Definition of Aggression, the subject of the "political entities" to which the definition would apply and the question of self-determination proved to be points of contention.[77] Indeed, the two issues went hand in hand, since it was recognised by the Special Committee that there were political entities that were not, strictly speaking, states – or recognised as such – and yet many of the

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74 *No Safe Haven*, ibid., p. 103, para. 406 (emphasis in original, footnote omitted).
75 Art. 1, Definition of Aggression, annexed to U.N. G.A. Res. 3314, (XXIX), Dec. 14, 1974 (emphasis added).
76 *See* Art. 27 (3), U.N. Charter.
77 *See* the Report of the Special Committee on the Question of Defining Aggression, Feb. 24–Apr. 3 1969; General Assembly, Official Records: Twenty-Fourth Session, Supplement No. 20 (A/7620); Report of the Special Committee on the Question of Defining Aggression, Jan. 31–Mar. 3, 1972, General Assembly, Official Records: Twenty-Seventh Session, Supplement No. 19 (A/8719); General Assembly, Official Records: Twenty-Fourth Session, Supplement No. 20 (A/7620); Report of the Special Committee on the Question of Defining Aggression, Mar. 11–Apr. 12, 1974, General Assembly, Official Records: Twenty-Ninth Session, Supplement No. 19 (A/9619).

delegates tasked with drafting the Definition thought it would be odd if their legal status precluded them from being subject to an act of aggression.[78] Indeed, Article II of the 1972 draft proposal for the Definition of Aggression[79] submitted by Australia, Canada, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland, and the US provided that "Any act which would constitute aggression by or against a State likewise constitutes aggression when committed by a State or other political entity delimited by international boundaries or internationally agreed lines of demarcation against any State or other political entity so delimited and not subject to its authority."[80] As explained below, there have been several instances of state practice both prior to and after the Definition of Aggression was adopted by the U.N. General Assembly in 1974, where it had been claimed by states that acts of aggression had been committed by or against political entities that were not recognised as states or whose sovereign status was controversial under international law. The reason why the word "state" was retained in Article 1 of the Definition was to ensure conformity with the language used in the U.N. Charter.[81] However, while states are the primary subjects that are a party to that treaty, the Charter recognises that there are political entities other than states that are subject to its provisions – such as former mandates and trusteeships that are explicitly mentioned in Chapter XII, as well as those colonies that have been listed by the Special Committee on Decolonization as non-self-governing territories.

For political reasons, it is extremely rare for the U.N. Security Council to characterize a specific conflict as amounting to an act of aggression, even though it is charged with this task by Article 39 of the U.N. Charter, which provides:

> *The Security Council 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.*

For instance, in a score of resolutions passed in 1990 in response to Iraq's invasion of Kuwait, the U.N. Security Council did not determine that an act of aggression had taken place, even though to all intents and purposes that is precisely what occurred.[82] Moreover, the practice of the Security Council on the question of aggression has been haphazard. For instance, in 1985, in response to an air raid on a suburb of Tunis,

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78 See the Report of the Special Committee on the Question of Defining Aggression, Feb. 24–Apr. 3, 1969, id. at 14–15, paras. 23–24; 25–26, para. 60.

79 *See* U.N. docs. A/AC.134/L.17 and Add.1 and 2 in the Report of the Special Committee on the Question of Defining Aggression, Jan. 31–Mar. 3, 1972, *supra* note 77, 11.

80 Ibid., 11.

81 *See* the Report of the Special Committee on the Question of Defining Aggression, Feb. 24–Apr. 3, 1969, *supra* note 77, 15, para. 24.

82 For instance, U.N. S.C. Res. 660, 661, 662, 664, 665, 666 and 665 (the latter only "condemns aggressive acts perpetrated by Iraq against diplomatic premises and personnel in Kuwait"), as well as resolutions 670, 677, 678, which were all passed by the body in the aftermath of the Iraqi invasion in 1990, use the language of "invasion and occupation," rather than "aggression."

the Security Council, in Resolution 573, condemned "vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct."[83] In addition, it demanded that "Israel refrain from perpetrating such acts of aggression or from the threat to do so."[84] Undoubtedly, the Israeli air raid on Tunis was a serious violation of international law, but it was no more or less an act of aggression than Iraq's invasion of Kuwait, or Israel's invasion and occupation of East Jerusalem, the West Bank, and the Gaza Strip, the Golan Heights and the Sinai in June 1967, or indeed its numerous invasions of Lebanon, or its latest attack on the Gaza Strip. For these reasons, one must look beyond individual resolutions to the statements made by various Permanent Representatives in the Security Council where the question of aggression has been raised. This approach is adopted in the remainder of this article.

It is clear from a brief survey of statements made by various state representatives before the Security Council that geographic and political entities entitled to self-determination, or whose legal status is controversial due to a lack of recognition from other states, can be subject to acts of aggression. The first case to mention in this regard is the complaint of aggression upon South Korea, which was subject to an attack from North Korea on June 25, 1950. At the time, the Government of the Republic of (South) Korea had just been brought into being by the United Nations, and had been recognised by 30 states.[85] The north, from where the attack was launched, was effectively a puppet regime of the Soviet Union. In the Security Council debate that took place in the immediate aftermath of the attack from North Korea, the controversies over the precise legal status of the governments to the north and south of the 38th parallel did not prevent those partaking in the debate from issuing statements to the effect that what took place was an act of aggression.[86] The statement by Mr. Gross, the Permanent Representative of the United States to the United Nations, provides a good example of the language used. He described the armed attack from North Korean forces as "wholly illegal," which, in the view of his government, constituted "a breach of the peace and an act of aggression."[87] He went on to describe it as "an invasion upon a State which the United Nations itself, by

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[83] S.C. Res. 573, Oct. 4, 1985, operative para. 1.

[84] *Id.* at operative para. 2.

[85] In 1949, both governments applied for United Nations membership. The application of the Korean People's Democratic Republic (i.e. North Korea) was not considered, and that of the Republic of Korea (i.e. South Korea) was vetoed by the Soviet Union. North and South Korea were not admitted as members of the United Nations until 1991. For a description of the controversies over the legal status of North and South Korea and whether and when they became states, see James Crawford, The Creation of States in International Law (Oxford University Press 2006), 466–472.

[86] *See*, for instance, the statements by the representatives of the US, the Republic of Korea, China, and Ecuador in the debate in the U.N. Security Council, in Official Records, Fifth Year, 473rd Meeting, U.N. Doc. S/PV.473, Jun. 25, 1950, 4–12 (all describing the attack as an act of aggression).

[87] *Id.* at 4.

action of its General Assembly, has brought into being. It is armed aggression against the Government elected under United Nations supervision."[88]

Other examples of allegations made by states of acts of aggression against geographic and political entities that did not amount to states include the 1961 Indian invasion of Goa, Damão, and Diu, which were Portuguese colonies. In that instance, the Union of India was accused by the Portuguese representative of committing "a fully premeditated and unprovoked aggression against Portugal."[89] In 1969, after South Africa refused to withdraw from Namibia in defiance of a U.N. Security Council resolution calling on it to do so,[90] the Council passed a further resolution in which it decided that "the continued occupation of the Territory of Namibia by the South African authorities constitutes an aggressive encroachment on the authority of the United Nations."[91] Indeed, the legal status of the territory of Namibia was not so different to that of Palestine, both being former League of Nations mandates whose mandatories had a "sacred trust" to look after their population's wellbeing until they attained independence.[92] In later debates on the Namibian question, allegations of aggression at the Security Council were frequent, especially when the violence between South Africa and the front-line states had intensified.[93] When Indonesian troops invaded East Timor in December 1975, which was a non-self-governing territory, the Portuguese representative protested several times to the Security Council that an act of aggression had taken place against the territory of East Timor:

> *56. I believe that it is unnecessary to dwell further on these events to show that the armed action of Indonesia against the Territory of Timor represents a violation*

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88 *Id.* It may seriously be questioned whether South Korea could be considered a state at this stage, as Crawford notes, *supra* note 85. Moreover, the parallels between the Korean question and the Palestine question are intriguing, for the U.N. General Assembly had also attempted to create an Arab Palestinian state by virtue of its Partition Plan in G.A. Res. 181 (II), Nov. 29, 1947.

89 *See* the statement by Mr. Garin (Portugal) in U.N. Security Council, Official Records, Sixteenth Year, 987th meeting, U.N. Doc. S/PV.987, Dec. 18, 1961, 2.

90 S.C. Res. 264, Mar. 20, 1969, operative para. 3.

91 S.C. Res. 269, Aug. 12, 1969, operative para. 3. In this instance, it appears that the U.N. can also be subject to an act of aggression. The I.C.J. did not say much about this but cited S.C. Res. 269 with approval, noting that the Council, when it adopted this resolution "was acting in the exercise of what it deemed to be its primary responsibility, the maintenance of international peace and security." *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), 1971 I.C.J. 39–40, para. 109.

92 *See* Art. 22, Covenant of the League of Nations, 1 L.N.O.J. 9 (1920).

93 South Africa's illegal occupation of Namibia was referred to as an act of aggression, as were individual attacks by South African Government forces against SWAPO and the front-line states. *See* e.g. the statements by Mr. Maboumou (Cameroon), U.N. Security Council Official Records, 2505th meeting, U.N. Doc. S/PV. 2585 and Corr. 1, Jun. 11, 1985, 12, para. 108; Mr. Van-Dunem (Angola), and Mr. Marciel (Brazil), U.N. Security Council Official Records, 2586th meeting, U.N. Doc. S/PV. 2586, Jun. 12, 1985, 10–11, para. 94; 14, para. 134; Mr. Moushoutas (Cyprus), U.N. Security Council Official Records, 2587th meeting, U.N. Doc. S/PV. 2587, Jun. 12, 1985, 139, para. 139; Mr. Zain (Malaysia), U.N. Security Council Official Records, 2588th meeting, U.N. Doc. S/PV. 2588, Jun. 13, 1985, 5, para. 38; Mr. Dinka (Ethiopia), and Mr. Kilu (Kenya), U.N. Security Council Official Records, 2589th meeting, U.N. Doc. S/PV. 2589, Jun. 13, 1985, 8, para. 77, 13, para. 119; and Mr. Safronchuk (USSR), U.N. Security Council Official Records, 2595th meeting, U.N. Doc. S/PV. 2595, Jun. 19, 1985, 5, para. 49.

> *of the fundamental rules of international law and international morality, as well as the provisions of the Charter of the United Nations, and that, in the opinion of my Government, it constitutes an act of aggression falling under the provisions of Article 39 of the Charter.*[94]

In addition to the claim that the Indonesian action amounted to an act of aggression, the Portuguese representative also thought that it "seriously threatens the right of the people of Timor to self-determination and independence."[95]

When Argentina invaded the Falkland Islands in 1982, which at that time was classified under British law as a British Dependent Territory, and which, for the purposes of international law, is classified as a non-self-governing territory, Sir Anthony Parsons claimed that an act of aggression had taken place. He said that his government stood from a position of absolute legitimacy, "namely, that the aggressor must withdraw, that the *status quo ante* be restored and that the diplomatic negotiations…be resumed at the point at which they had been broken off."[96] He then said there "was no question of self-defence by Argentina,"[97] and continued:

> *108. Indeed, by its first use of force, Argentina committed an act of aggression within the meaning of the definition of aggression suggested by the General Assembly in resolution 3314 (XXIX)…*
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> *109. Having established that the Argentine use of force was illegal, because it violated both Article 2, paragraph 3, and Article 2, paragraph 4, of the Charter, it follows that the military occupation of the Falkland Islands was and is also illegal.…*[98]

The question of an illegal occupation raised by Sir Anthony in the Falkland's war was not novel. The Security Council had already determined that South Africa's occupation of Namibia was illegal in the same resolution referred to earlier.[99] Moreover, in a 1985 debate on Namibia, the Ukrainian Permanent Representative to the U.N. reminded the Security Council that the U.N. General Assembly had "repeatedly pointed out that the illegal colonial occupation of Namibia by South Africa, in violation of numerous decisions of the United Nations, constitutes an act of aggression against the people of Namibia and poses a grave threat to international peace and security as a whole."[100] In the words of the representative from Lesotho: "…the South

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[94] Statement by Mr. Galvão Teles (Portugal), U.N. Security Council, Official Records, Thirtieth Year, 1864th meeting: U.N. Doc. S/PV. 1864, Dec. 15, 1975, 2–9, at 8, para. 56.
[95] *Id.* at 9, para. 61.
[96] U.N. Security Council Official Records, Twenty-Seventh Year, 2360th Meeting: U.N. Doc. S/PV.2360, May 21, 1982, 10, para. 103.
[97] *Id.* at 10, para. 107.
[98] *Id.* at 11.
[99] *See* S.C. Res. 264, and S.C. Res. 269, *supra* note 90 and 91.
[100] Statement by Mr. Oudovenk (Ukrainian Soviet Socialist Republic), U.N. Security Council Official Records, 2590th meeting, U.N. Doc. S/PV. 2590, Jun. 14, 1985, 6, para. 60.

African presence in Namibia cannot be described as anything but an act of aggression against the Territory and people of Namibia."[101]

These statements provide some indication that the arguments advanced by the authors of *The Sunday Times* letter has merit and that an act of aggression may be committed by a state against a territory that is not independent. This is all the more so if the reason why the territory in question is not independent is due to the actions of an external agency in preventing the people of the territory from exercising self-determination. The precedents cited above afford further scope for the argument that a territory that is even under the effective control of another state, whether that territory is annexed, placed under belligerent occupation, or subject to any other form of external control, may also be subject to an act of aggression. *Operation Cast Lead* was not merely another Israeli "incursion," a "targeted killing", or an attempt to "reoccupy" the Strip. It was a large-scale invasion on the scale of Israel's assault on Lebanon in the summer of 2006, in which Israel's air force, army, and navy coordinated their attacks in unison.[102] All the paraphernalia of a full-scale war were used in Gaza, including cruise missiles launched from sea, missiles fired from helicopter gunships, followed by a land invasion that included the entry of tanks and troops into the Strip, triggering Articles 3 (a), (b), (c), and (d) of the 1974 Definition of Aggression.[103] Moreover, the Gaza Strip had also been subject to a naval and land blockade for almost two years prior to the initiation of *Operation Cast Lead*, a blockade that is still in full effect at the time of writing.[104] In this case it would seem that it is the gravity and scale of force used that is the determining factor in whether an act of aggression has occurred. In this regard, it is significant that Article 2 of the Definition precludes the Security Council from making a determination of an act of aggression where "the acts concerned or their consequences *are not of sufficient gravity*."[105] In not one of the cases cited above, whether it was conflict in Korea, Goa,

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[101] Statement by Mr. Makeka (Lesotho), U.N. Security Council Official Records, 2594th meeting, U.N. Doc. S/PV. 2594, Jun 17, 1985, 4, para. 26.

[102] On the 2006 conflict in Lebanon, see Said Mahmoudi, *The Second Lebanon War: Reflections on the 2006 Israeli Military Operations Against Hezbollah* in Law at War: the Law as it was and the Law as it should be: liber amicorum Ove Bring 175 (Ola Engdahl & Pål Wrange eds., Leiden: Martinus Nijhoff Publishers 2008); Carsten Hoppe, *Who was Calling Whose Shots? Hezbollah and Lebanon in the 2006 Armed Conflict with Israel*, 16 Italian Y'bk Int'l L. 21 (2007); Georgina Redsell, *Illegitimate, Unnecessary, and Disproportionate: Israel's Use of Force in Lebanon*, 3 C.S.L.R. 70 (2006–7); Victor Kattan, *The Use and Abuse of Self-Defence in International Law: The Israel-Hezbollah Conflict as a Case Study*, 12 Y'bk Islamic & M.E. Law 31 (2005–6); and also by the same author, *Israel, Hezbollah and the Conflict in Lebanon: An Act of Aggression or Self-Defence?* 14 (1) Hum. Rts. B. 26 (2006).

[103] Definition of Aggression, *supra* note 40.

[104] *See* Mel Frykberg, *How Israel's naval blockade denies Gazans, food, aid*, The Christian Science Monitor, June 30, 2009. Professor Richard Falk, the U.N. Special Rapporteur for Human Rights in the Occupied Palestinian Territories, said that Israel's continuing blockade amounted to a crime against humanity and an act of collective punishment prohibited by Geneva Convention IV. See *U.N.'s Richard Falk: IDF seizure of Gaza-bound ship is 'criminal,'* Ha'aretz, July 3, 2009. The authors of the Goldstone Report also thought that the blockade amounted to collective punishment of the civilian population of the Gaza Strip. See the Goldstone Report, *supra* note 7, 521, para. 1674.

[105] Definition of Aggression, *supra* note 40 (emphasis added).

Damão and Diu, Namibia, East Timor, or the Falkland Islands, was the argument advanced that an act of aggression could not have taken place due to the precise legal status of the territories in question. It is therefore arguable that the legal status of the territory subjected to an act of aggression is not a significant factor in making a determination as to whether such an act in fact occurred.

VI. Conclusions

From this brief analysis of state practice, it is clear that controversies over the precise legal status of geographic and political entities entitled to self-determination do not preclude those territories or the peoples who inhabit them from being subject to acts of aggression. This is particularly the case where the state accused of aggression treats the territory that it commits an act of aggression against as separate from its own. The Gaza Strip, East Jerusalem and the West Bank are collectively part of a delineated and internationally recognised self-determination unit and the people who inhabit it are entitled to independence.[106] They have a right to freely determine their political status and to freely pursue their economic, social, and cultural development, which includes the right to choose their own form of government. The principal reason why the Palestinians do not yet have a state of their own is because Israel refuses to relinquish control over East Jerusalem, the West Bank and Gaza, and continues to populate the former two territories with its own nationals in settlements violating Article 49 (6) of the Fourth Geneva Convention of 1949, and several U.N. Security Council resolutions.[107] While the majority of actors in the international community continue

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[106] Several provisions of the Oslo Accords provide that the West Bank and Gaza Strip form 'a single territorial unit' whose integrity is to be preserved pending the conclusion of permanent status negotiations. See e.g. Article IV of the 1993 Declaration of Principles on Interim Self-Government Arrangements and Article XI.1. 5 of the 1995 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip. In its Wall Advisory Opinion, *supra* note 61, 199, para. 195, the I.C.J. expressed its opinion that Israel was violating the obligation to respect the right of the Palestinian people to self-determination, which it considered an obligation *erga omnes*.

[107] Art. 49 (6), Geneva Convention IV, *supra* note 70. On Sep. 18, 1967, Theodor Meron, the then Legal Adviser to Israel's Foreign Ministry, came to the conclusion that: "…civilian settlement in the administered territories contravenes explicit provisions of the Fourth Geneva Convention." A scan of the original Hebrew text of this opinion is available at: http://southjerusalem.com/settlement-and-occupation-historical-documents/, and a complete English translation on the website of the Sir Joseph Hotung Programme in Law, Human Rights and Peace Building in the Middle East (SOAS, London) at: http://www.soas.ac.uk/lawpeacemideast/resources/48485.pdf (last viewed Aug. 1, 2009). Likewise, on Apr. 21, 1978, the State Department's Legal Advisor Herbert J. Hansell concluded that "…the establishment of the civilian settlements in [the occupied] territories is inconsistent with international law." See United States: Letter of the State Department Legal Adviser Concerning the Legality of Israeli Settlements in the Occupied Territories, April 21, 1978, in 17 I.L.M, 777, at 779 (1978). This position was most recently affirmed on July 9, 2004, when the I.C.J. came to the same conclusion in its Wall Advisory Opinion: "Israeli settlements in the Occupied Palestinian Territory (including in East Jerusalem) have been established in breach of international law." See Wall, Advisory Opinion, *supra* note 61, 136 at 184, para. 120. See also S.C. Res. 446, March 22, 1979; S.C. Res. 452, July, 20, 1979; 465, S.C. Res. March, 1, 1980; and S.C. Res. 471, June, 5, 1980.

to hold the position that the Gaza Strip remains occupied territory pending its actual transition towards independence, Israel has advanced the argument that Gaza, ruled by the Hamas government since it relinquished control over it in September 2005, effectively already has some form of independent political status – a position that has been endorsed by its Supreme Court.[108] As a consequence, Gaza is, in practice, being treated as a separate political entity by the Government of Israel, which the international community holds as being responsible for it as the Occupying Power. Israel should, however, be aware that if the international community was to accept this argument and treat Gaza as a quasi-independent sovereign entity, as opposed to occupied territory, and correspondingly should Israel's plea of self-defence fail, then Israel inevitably opens itself up to the accusation that it could have committed an act of aggression in *Operation Cast Lead*, with all the serious consequences this entails. And even if Gaza is considered to still be occupied, the precedents referred to earlier indicate that even a territory that is under effective external control might still be subject to an act of aggression if the force used against it is of sufficient gravity. Of course, the principal organ mandated to make this determination is the U.N. Security Council, which for political reasons is unlikely, in the foreseeable future, ever to declare that such an event occurred. However, this does not prevent individual states or other international actors from speaking out, should the Council fail to act as it has done so many times in the past.

[108] *See* Jaber al Bassouini Ahmed et al v Prime Minister and Minister of Defense, *supra* note 55.