



# UN in the Middle East Research Initiative

The Issam Fares Institute for Public Policy and International Affairs (IFI)

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March 2011

#2

Working Paper Series

## Is it Wrong or Illegal?

### Situating the Gaza Blockade Between International Law and the UN Response

Noura Erakat

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by Noura Erakat

In 2009, the Issam Fares Institute for Public Policy and International Affairs (IFI) launched the United Nations in the Middle East Research Initiative with the objective of exploring and analyzing the role of the United Nations (UN) in the Middle East and the impact it has had on regional politics and societies.

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Published by the Issam Fares Institute for Public Policy and International Affairs, American University of Beirut.

This report can be obtained from the Issam Fares Institute for Public Policy and International Affairs office at the American University of Beirut or can be downloaded from the following website: [www.aub.edu.lb/ifi](http://www.aub.edu.lb/ifi)

**Beirut, March 2011**  
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Noura Erakat is a human rights attorney and activist. She is currently an adjunct professor of international human rights law in the Middle East at Georgetown University and the U.S.-based Legal Advocacy Coordinator for Badil. Among her many achievements is the active role she has played in American politics; serving as a Middle East advisor to US Congressman Dennis Kucinich as well as Legal Counsel to his Congressional Subcommittee. In her latest research paper, Ms. Erakat critically examines the legal dimensions of the Gaza blockade from an international law perspective, with emphasis on the role of the United Nations in the matter.

## Acknowledgments

This working paper is built upon the scholarship of several luminaries including Iain Scobbie, Claude Bruderlein, and George Bisharat. Special and warm thanks to Susan Akram and George Bisharat for their generous guidance as I waded through evolving legal issues. Thanks also to Jumana Musa and Bassam Haddad for friendship and faith. Finally, I am deeply grateful to AUB's Issam Fares Institute for Public Policy and International Affairs for its support without which I could not have completed this project—namely to Rami Khouri, Ramzi El Houry, Zaki Boulos, Sarine Karajerjian, and especially Karim Makdisi.

## I. Introduction

Since the Second Palestinian Intifada, or uprising, Israel has advanced the notion that it is engaged in an international armed conflict both within the West Bank as well as Gaza.<sup>1</sup> Accordingly, it argues that it can 1) invoke self-defense, pursuant to Article 51 of the United Nations Charter, and 2) use force beyond that permissible during law enforcement, even where an occupation exists and to which the laws of occupation apply. UN Security Council Resolutions 1368 (2001) and 1373 (2001), passed in response to the September 11th attacks on the United States, declare that terrorist attacks amount to an armed attack thereby justifying the invocation of Article 51 self-defense. Israel uses this to argue that notwithstanding existing legal debate, “there can be no doubt that the assault of terrorism against Israel fits the definition of an armed attack,” effectively permitting Israel to use military force against those entities.<sup>2</sup> Israeli officials continue that the laws of war can therefore apply to “both occupied territory and to territory which is not occupied, as long as armed conflict is taking place on it.”<sup>3</sup> This, however, contravenes the existing legal order on the matter.

The legal right to self-defense, is regulated by *jus ad bellum*, whereas the ongoing use of force, is regulated by *jus in bello*.<sup>4</sup> The two regimes are not always compatible as self-defense is a legal justification for the initiation of force (*jus ad bellum*), not for the ongoing use of force, as is the case in belligerent occupation (*jus in bello*). Therefore, where force has already been initiated and an occupation is in place, the right to initiate force is not an available remedy. Moreover, pursuant to the laws of occupation, the permissible use of force by an Occupying Power in Occupied Territories is that which is available for law enforcement purposes or policing.

While the International Court of Justice (ICJ) underscores this distinction in its holding that the right to initiate force against occupied territory is not available to an occupying power,<sup>5</sup> Israel insists that the continuous attacks from the West Bank and Gaza into Israel constitute an armed attack thereby triggering Article 51 of the UN Charter. Adamant that international law is not mature enough to handle its unique security problems, Israel argues that it is forced to rely on its own interpretation of international law.<sup>6</sup>

Israel’s argument amounts to a challenge of the existing legal order: namely it challenges the scope of permissible use of force during an occupation as well as the legal definition of self-defense. As noted by George Bisharat, et. al. in their comprehensive law review piece on Operation Cast Lead, Israel’s offensive against Gaza, Israel’s attempts to change the law are conscious and deliberate. Consider the statement made by the former head of the International Law Division of the Israeli Military Advocate General:

*If you do something for long enough, the world will accept it. The whole of international law is now based on the notion that an act that is forbidden today becomes permissible if executed by enough countries... international law progresses through violations. We invented the targeted assassination thesis and we had to push it. At first there were protrusions that made it hard to insert easily into legal moulds. Eight years later it is at the center of the bounds of legitimacy.*<sup>7</sup>

According to the Laws of Occupation, an occupying power cannot use deadly force within the territory it occupies, but instead only the force available during law enforcement operations. Erasure of this distinction would change the law and dramatically expand the legitimate use of military force. In the case of occupation, it justifies the declaration of war by an occupying

power against the civilians it occupies making them doubly vulnerable to warfare. This possibility raises a serious question for the future of international humanitarian law: can a non-state entity emerging from occupied territories commit an armed attack against its occupying power within the meaning of Article 51 thereby triggering the just use of force and if so, can that override an existing legal regime, as is the case when an occupation already exists?

Although this legal issue is not settled as evidenced by the question’s very emergence, I am assuming that the consensus view is that the two regimes, *jus ad bellum* and *jus in bello*, are incompatible and that an occupying power cannot declare war on the territory that it occupies. I base my assumption on the fact that the ICJ, the world’s highest legal authority, has already ruled on this matter, and since challenge to its analysis has only been advanced by one state, that there does not exist sufficient debate to justify the law’s transformation. While a tangible shift in international law has not been realized by Israel, at the very least its arguments and its consistent contravention of existing international norms have blurred the demarcation between *jus ad bellum* and *jus in bello* thereby creating confusion where the ICJ has tried to achieve clarity.

Using Israel’s blockade on Gaza as a case study, I examine the United Nation’s Security Council’s (UNSC) handling of this confusion and conclude that it has not only failed to resolve this controversy, but has perpetuated it by affording inordinate deference to the violating party. Additionally, rather than affirm the blockade’s illegality, the Security Council has dealt with the humanitarian crisis as a political matter only. In doing so, the UNSC has not provided proper guidance to its member states, has allowed Israel to continue its affront to the international legal order without sanction, has undermined its own legitimacy as well as the legitimacy of international law, and has abrogated its duties pursuant to the UN Charter. Redressing such failure requires the UNSC to uphold the rule of law by centralizing humanitarian law in its assessment and treatment of the Gaza blockade. This includes affirming the blockade’s illegal nature and sanctioning Israel for its breach of international law.

To demonstrate the UNSC’s failure to uphold the rule of law, I will begin by providing a background of the Gaza Strip leading to the imposition of a blockade. I will then show that the blockade is an illegal pursuant to international humanitarian law. Third, I will demonstrate how the UN is in violation of its own Charter because of the Security Council’s failure to respect international law and the grotesque discrepancy between its handling of the crisis in Gaza as compared with other international case studies. Such a discrepancy renders the situation in Gaza a legal black hole where might, as opposed to law, is right. I conclude by making recommendations to the UN to redress such failure, as well as to posit questions for future research.

## II. Background: Israel, occupation, and the blockade on Gaza

The Gaza Strip constitutes the western-most border of historic Palestine under the British Mandate and was intended to be a part of a Palestinian state in the United Nation’s Partition Plan.<sup>8</sup> In the aftermath of the 1948 Arab-Israeli War, Gaza came under Egyptian control, which administered the territory in accordance with Arab League policy until 1967.<sup>9</sup> As a result of the Six Day War, Israel captured and occupied the Gaza Strip, the West Bank, East Jerusalem, the Sinai Peninsula, and the Golan Heights. Israel imposed military rule over the West Bank and Gaza but denied the applicability of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, or the Fourth Geneva Convention (“FGC”). Israel argued because the territories did not constitute as part of a sovereign state at the time of conquest, that it simply administered the territories and did not occupy them within the

1 H.C. 7015/02, Ajuri v. The Military Commander of the Judea and Samaria Area, 56(6) P.D. 352, 358. (“Since late September 2000, severe combat has been taking place in areas of Judea and Samaria. It is not police activity. It is an armed conflict.”) [Hereinafter Military Commander].

2 H.C. 769/02, The Public Committee Against Torture in Israel v. The Government of Israel, P.D. paragraph 10. [Hereinafter The Public Committee Against Torture].

3 Id. (“[The Israeli Government’s] stance is that the argument that Israel is permitted to defend herself against terrorism only via means of law enforcement is to be rejected.”)

4 See David Luban, Was the Gaza Campaign Legal?, 31 Nat’l Sec. L. R., (Jan./Feb. 2009) available at <http://ssrn.com/abstract=1364608> [Hereinafter Luban].

5 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 63, para. 141 (July 4) (Israel has a right and a duty to protect its citizens however “the measures taken are bound nonetheless to remain in conformity with applicable international law.”) [Hereinafter ICJ Wall Decision].

6 Robert Marquand, Never mind the Freedom Flotilla: Is Israel’s Gaza blockade legal? Christian Science Monitor, June 8, 2010, available <http://www.csmonitor.com/World/Middle-East/2010/0608/Never-mind-the-Freedom-Flotilla-Is-Israel-s-Gaza-blockade-legal> [Hereinafter Marquand].

7 See Yotam Feldman & Uri Blau, Consent and Advise, Haaretz, Feb. 5 2009, at <http://www.haaretz.com/hasen/spages/1059925.html> as quoted in George E. Bisharat, Timothy Crawley, Sara Elturk, Carey James, Rose Mishaan, Akila Radhakrishnan, and Anna Sanders, Israel’s Invasion of Gaza in International Law, 38 Denv. J. Int’l L. & Pol’y 41, 55 (2009). [Hereinafter Bisharat].

8 UN GA Res. 181, Resolution 181 (II) Future government of Palestine, U.N. Doc. A/RES/181(II), (1947) available at <http://domino.un.org/unispal.nsf/0/7f0af2bd897689b785256c330061d253>.

9 See Ardi Imseis, On the Fourth Geneva Convention in the Occupied Palestinian Territory, 44 Harv. Int’l L.J. 65, 78 (2003). [Hereinafter Imseis].

meaning of international law.<sup>10</sup> The UN Security Council,<sup>11</sup> the International Court of Justice,<sup>12</sup> the UN General Assembly,<sup>13</sup> as well as the Israeli Supreme Court<sup>14</sup> have roundly rejected Israel's position. Significantly, Israel's Supreme Court, or the High Court of Justice, recognizes that the entirety of the Hague Regulations<sup>15</sup> and certain provisions of the FGC as customary international law.<sup>16</sup>

In August 2005, in accordance with its Revised Disengagement Plan of 6 June 2004 (Disengagement Plan), Israel withdrew 9,000 settlers, dismantled 21 settlements, and removed its military infrastructure from Gaza, including all of its military orders that applied to the Gaza Strip.<sup>17</sup> Israel maintained control over Gaza's electricity and sewage systems, its population registry, its electromagnetic sphere, its tax revenue distribution, and its telecommunications network.<sup>18</sup> Moreover, Israel continues to control Gaza's air space and territorial waters, a buffer zone along Gaza's land and sea borders,<sup>19</sup> and has continued to conduct military operations in the Strip.<sup>20</sup> Israel also continues to authorize substantial control over the Rafah Crossing, Gaza's only crossing point with Egypt.<sup>21</sup>

In January 2006, after years of a policy that disassociated itself from the Oslo Process and the legitimacy of the Palestinian Authority, Hamas decided to participate in national elections. It comprised the main portion of the "Change and Reform List" which won the majority of seats in the Palestinian Legislative Council thereby earning it the right to form the cabinet in the Palestinian Authority (PA). In response, members of the international community imposed sanctions on the PA demanding that it recognize key principles established by Quartet, namely: 1) a renunciation of violence; 2) the recognition of the State of Israel; and 3) a recognition of previous agreements.<sup>22</sup> These economic sanctions included the withholding of tax revenues, a restriction on movement and goods within, out of, and into the Territories, as well as a prohibition of access to foreign aid.<sup>23</sup>

The debilitating impact of the sanctions along with Fatah's refusal to cede control of all Palestinian Authority institutions to Hamas spilled over into tensions and armed conflict between the rival political parties.<sup>24</sup> In June 2007, Hamas ousted Fatah from the Gaza Strip, in what some analysts have described as a preemptive coup, and established itself as the sole governing authority in the Strip.<sup>25</sup> Israel thereafter imposed upon it a comprehensive siege that prohibited the ingress and egress of all people and goods, effectively cutting off the 360 square mile territory from the world.<sup>26</sup> In September 2007, Israel declared Gaza a

"hostile territory" and purported that its blockade constitutes an act of self-defense.<sup>27</sup> Despite claims of self-defense, Israel has not defined a definitive purpose for the blockade, the achievement of which would indicate its end. Official Israeli goals have ranged from limiting Hamas's access to weapons,<sup>28</sup> to seeking retribution for the pain caused to Israeli civilians,<sup>29</sup> and to compelling the Palestinian population to overthrow the Hamas government,<sup>30</sup> indicating an unpredictable end date to the closure policy.

Since its imposition, Israel has sealed the five crossings between it and Gaza: Erez, Karni, Sufa, Nahal Oz, and Kerem Shalom. It has also imposed a naval blockade and limited fuel and electricity into the Strip. Israel's policies have also amounted to an almost complete prohibition on the movement of people into and out of the Strip with few exceptions even for the ill seeking medical treatment.<sup>31</sup> The devastating impact of the blockade on Gaza's 1.5 million person population has been well-documented, and defined as a humanitarian crisis, by a broad range of international human rights and humanitarian aid organizations.<sup>32</sup>

As of January 2010, imports into Gaza are at approximately 25% of what its population needs. This amounts to about 2,500 truckloads of goods per month, as opposed to the 10,400 truckloads per month that were entering Gaza before the closure began in June 2007.<sup>33</sup> The World Food Program has said that 400 trucks are needed in Gaza per day, or 2,800 a week.<sup>34</sup> The table below is illustrative of the gap between the goods allowed into Gaza versus the needs of its Palestinian population.<sup>35</sup>

Poverty levels have reached 80% and unemployment throughout Gaza is at 42% rendering 80% of Gaza's population dependent on food assistance for survival.<sup>36</sup> Before the imposition of the siege in June 2007, nearly 3,900 economic establishments existed in Gaza employing 150,000 workers who provided for approximately 500,000 individuals. By the beginning of December 2008, 90% of these establishments were closed.<sup>37</sup>

The closure has resulted in dramatic price increases that, coupled with poverty, have led to food insecurity among Palestinian families. According to the Palestinian Central Bureau of Statistics (PCBS), due to the confluence of price increases and

10 Bisharat, supra note 7, at 48.

11 UN SC Res. 242 (1967) (The resolution reaffirmed "the inadmissibility of the acquisition of territory by war," and called upon Israel to withdraw "its armed forces from the territories occupied in the recent conflict."); See also UN SC Res. 446 (1979) (The Security Council declared that settlements in the Palestinian Territories were not legally valid and affirmed "once more that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Arab territories occupied by Israel since 1967, including Jerusalem."); See also UN SC Res. 681 (1990) (the Security Council urged "the Government of Israel to accept the de jure applicability of the Fourth Geneva Convention... to all territories occupied by Israel since 1967 and to abide scrupulously by the provisions of the Convention.")

12 ICJ Wall Decision, supra note 5, at para. 101 ("... the Court considers that the Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that that Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise prior status of those territories.")

13 UN GA Res. 56/60, U.N. GAOR, 56th Sess., U.N. Doc. A/Res/56/60 (2002) (The General Assembly affirmed that "that the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967")

14 H.C. 4764/04, Physicians for Human Rights v. The IDF Commander in Gaza, ("«The military operations of the [Israeli Defence Forces] in Rafah, to the extent they affect civilians, are governed by Hague Convention IV Respecting the Laws and Customs of War on Land 1907... and the Geneva Convention relative to the Protection of Persons in Time of War 1949.») [Hereinafter Physicians for Human Rights].

15 See H.C. 593/82 Leah Tsemel, Attorney, et. al, v. The Minister of Defence and others.

16 See H.C. 2056.04, Beit Sourik Village Council v. the Government of Israel and others.

17 The Cabinet Decision Regarding the Disengagement Plan, (Israeli Ministry of Foreign Affairs), June 6, 2004 available <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6+June+2004.htm>.

18 See Disengaged Occupiers: The Legal Status of Gaza (GISHA/Position Paper/Israel), January 2007, available at <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf>. [Hereinafter Disengaged Occupiers]

19 23 Days of War, 928 Days of Closure, (Palestinian Centre for Human Rights/Gaza), December 2009, at 21. [Hereinafter War and Closure]

20 Bisharat supra note 7, at 49.

21 Suffocating: The Gaza Strip Under Israeli Blockade, (Amnesty International/London), January 2010. [Hereinafter Suffocating the Gaza Strip]

22 See Secretary-General Kofi Annan, Press Conference at United Nations Headquarters, (9 May 2006) in Transcript of Press Conference on Middle East by Secretary-General Kofi Annan, Quartet Principles, at United Nations Headquarters, U.N. Doc. SG/SM/10453 available at <http://domino.un.org/unispal.nsf/b792301807650d6685256cef0073cb80/f54947c91ea0fc568525716a004ebdc0?OpenDocument>.

23 See Esther Pan, Hamas and the Shrinking PA Budget, (Council on Foreign Relations/Washington, D.C.), April 21, 2006, available at [http://www.cfr.org/publication/10499/hamas\\_and\\_the\\_shrinking\\_pa\\_budget.html#](http://www.cfr.org/publication/10499/hamas_and_the_shrinking_pa_budget.html#).

24 See *Infighting Between Fatah and Hamas in the Gaza Strip*: Timeline, (Miftah/Ramallah, Occupied West Bank), July 17, 2007 available at <http://www.miftah.org/Display.cfm?DocId=14207&CategoryId=4>.

25 See David Rose, The Gaza Bombshell, Vanity Fair, April 2008 available at <http://www.vanityfair.com/politics/features/2008/04/gaza200804>.

26 War and Closure, supra note 19.

27 Avi Ischaroff, Barak Ravid, and Shlomo Shamir, Cabinet declares Gaza 'hostile territory', Haaretz, Sept. 20, 2007, available at <http://www.haaretz.com/print-edition/news/cabinet-declares-gaza-hostile-territory-1.229665>.

28 Statement, Israeli President Shimon Peres at a meeting with French President Nicolas Sarkozy, (January 5, 2009) ("President Peres noted that tons of explosives and long-range rockets have been smuggled from Iran through tunnels in the last half-year, and that Iran was using Hizbullah in Lebanon and Hamas in Gaza as malicious proxies and represents a tangible threat to the State of Israel and all of the Middle East.") available at <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/The+Hamas+war+against+Israel+Statements+by+Israeli+leaders.htm>

29 See News Agencies, PM: Gazans can't expect normal lives while rockets hit Israel, Haaretz, (January 23, 2008) available at <http://www.haaretz.com/hasen/spages/947515.html> (Israeli Prime Minister Ehud Olmert said "There is no justification for demanding we allow residents of Gaza to live normal lives while shells and rockets are fired from their streets and courtyards at Sderot and other communities in the south." According to Haaretz, the Prime Minister added, "Does anyone seriously think that our children will wet their beds at night in fear and be afraid to go out of the house and they (Gazans) will live in quiet normality?"); See also Israel's Supreme Court upholds fuel cuts to Gaza, (Global Security) November 30, 2007, (Statement of Israeli Foreign Minister to the Israeli High Court: "The Palestinians need to understand that business is not usual, I mean there is no equation in which Israeli children will be under attacks by Kassam rockets on a daily basis and life in the Gaza Strip can be as usual.") available at <http://www.globalsecurity.org/military/library/news/2007/11/mil-071130-voa02.htm> as quoted in Report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, at 676 (September 15, 2009), [Hereinafter Goldstone Report].

30 Jeffrey Heller, Israel easing Gaza land blockade, Reuters, June 17, 2010, ("In fact Israeli officials had long made clear that the blockade was a strategy of "economic warfare" against Hamas, aimed at squeezing the civilian population of Gaza to turn it against the Islamist movement that seized complete control of Gaza after a power struggle with Fatah militias in 2007.") available at <http://www.reuters.com/article/idUSTRE65G10H20100617>; See also Press Conference, Statement of Israeli Foreign Ministry Tzipi Livni at a Press Conference with German Foreign Minister Steinmeier (January 11, 2009) ("In the long term, Hamas's rule in the Gaza Strip is certainly Israel's problem, but it's first of all a Palestinian problem. Hamas' rule stands in the way of their ever establishing a state, because Israel and the world will never accept or agree to have a terrorist state controlled by Hamas. Today the residents of Gaza are finding out what a heavy price they pay for Hamas taking over Gaza. The entire region now understands how problematic Hamas is...") available at <http://www.mfa.gov.il/MFA/Terrorism+Obstacle+to+Peace/Hamas+war+against+Israel/The+Hamas+war+against+Israel+Statements+by+Israeli+leaders.htm>.

31 Suffocating the Gaza Strip supra note 21.

32 See Deprived and Endangered: Humanitarian Crisis in Gaza, (Human Rights Watch/New York, NY) January 2009, available at [http://www.hrw.org/en/news/2009/01/12/deprived-and-endangered-humanitarian-crisis-gaza-strip#\\_ftn22](http://www.hrw.org/en/news/2009/01/12/deprived-and-endangered-humanitarian-crisis-gaza-strip#_ftn22); See also UNRWA Chief: Gaza on brink of humanitarian catastrophe, Reuters, Nov. 21, 2008, available at <http://www.haaretz.com/news/unrwa-chief-gaza-on-brink-of-humanitarian-catastrophe-1.257784>; See also Press Statement, Amnesty International, Israeli Gaza Blockade must be completely lifted (June 17, 2010), available at <http://www.amnesty.org/en/news-and-updates/israel-gaza-blockade-must-be-completely-lifted-2010-06-17>; See also Agencies rush aid to Gaza Strip, BBC, Jan. 19, 2009, available at <http://news.bbc.co.uk/2/hi/7812295.stm>; See also Disease risk assessment and intervention: Gaza Strip, (World Health Organization) January 2009, available at [http://www.who.int/diseasecontrol\\_emergencies/EPR\\_DCE\\_2009\\_1.pdf](http://www.who.int/diseasecontrol_emergencies/EPR_DCE_2009_1.pdf). [Hereinafter Disease risk and intervention]

33 Restrictions on the transfer of goods to Gaza: Obstruction and Obfuscation, (Gisha/Israel), January 2010.

34 Marquand supra note 6, (Israel asserts that an "average of 371 truckloads of food products were delivered per week in 2009 and 310 per week so far in 2010.")

35 Goods-Needs v. Supply June 20-July 17, 2010, (Office for the Coordination of Humanitarian Affairs (OCHA) and the Coordination Committee in Gaza) Table available at <http://www.gazagateway.org/>.

36 War and Closure, supra note 19.

37 Id. at 15.

poverty, 33.7% of households in Gaza consume lower quality food, while 16.2% consume less food all together.<sup>38</sup> Moreover, the UN's Food and Agricultural Organization say that 61% of Palestinians in Gaza are food insecure.<sup>39</sup>

Israel's closure policies have also devastated Gaza's agricultural sector, a critical source of food and income for its Palestinian inhabitants. According to the Humanitarian Coordinator for the Occupied Palestinian Territories, Phillippe Lazzarini, the blockade threatens to destroy the entirety of Gaza's fishing and farming sectors. Preventing such destruction depends on access to agricultural materials and international markets; unrestricted access to agricultural lands and fishing zones; and access to materials necessary for the treatment of soil damage caused by contamination and salination—the access to which is prohibited by Israel's blockade.<sup>40</sup>

The health of Gaza's population has been severely compromised as the blockade has limited access to medical treatment,<sup>41</sup> created a shortage of medical equipment and technical supplies in its hospitals,<sup>42</sup> and resulted in a higher risk of air- and water-borne diseases.<sup>43</sup> The World Health Organization documents that 80% of Gaza's water is unsafe for drinking and that disruption of its sewage system has led to the spillage of sewage in the streets of Beit Hanoun and Beit Lahiya.<sup>44</sup> The incident in Beit Lahiya killed five residents and displaced 2,000 others.<sup>45</sup>

### III. The legal nature of the blockade in international humanitarian law

Under customary international law, a blockade constitutes an act of war and is therefore regulated by the law of self-defense.<sup>46</sup> As an occupying power of the Gaza Strip, the legality of Israel's blockade depends on whether or not an occupying power can declare war on the territory that it occupies.

Israel argues that since its 2005 Disengagement from the Gaza Strip that it is no longer an occupying power and that it is engaged in an international armed conflict with Hamas regulated only by the laws of war and not those of occupation. Moreover, even if it were an occupying power, Israel argues that an existing occupation is irrelevant as to the application of the laws of war.<sup>47</sup> These assertions are not without controversy.

First, there is a substantial argument that Israel remains the occupying power in Gaza as a matter of law.<sup>48</sup> Second, while Israel dismisses the impact of an occupation upon the applicable legal framework regulating the use of force, the ICJ, has held that to the contrary, legal self-defense cannot be invoked where an occupation exists.<sup>49</sup>

To demonstrate the illegality of Israel's blockade on Gaza, I will first show that Israel continues to be an occupying force of the Territory. I will then briefly discuss the provisions of international humanitarian law that regulate a blockade but will not discuss in full detail how Israel's blockade violates such laws as that is beyond the scope of my inquiry. Instead, I will demonstrate

that the blockade itself, irrespective of the manner in which it is imposed, is illegal by demonstrating the incompatibility of the laws of occupation (part of *jus in bello*) and the law of self-defense (*jus ad bellum*).

#### a. Israel remains an Occupying Power in the Gaza Strip and the enduring application of the laws of occupation

Israeli officials have insisted that despite its ongoing control in the Gaza Strip its occupation came to an end upon the completion of its Disengagement.<sup>50</sup> It asserts that without a permanent physical presence in the territory, Israel does not exercise "effective control" as derived from Article 42 of the 1907 Hague Regulations. Article 42 reads:

*Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.*<sup>51</sup>

The "effective control" test does not require the military presence of the Occupier throughout the territory but rather "the extent to which the Occupying Power, through its military presence, is exerting effective control over the territory and limiting the right of self-determination of the occupied population."<sup>52</sup> The controlling element is whether a belligerent has established its authority and has the ability to exercise it.

This standard has been confirmed in several international tribunals. In the Nuremberg Tribunal in *USA v. Wilhelm List, et. al.*, the Tribunal determined that Germany remained an occupying power in Greece and Yugoslavia even though its military forces had been ousted from various sections of the country at various times because Germany could at any time reenter the country and exercise effective control.<sup>53</sup> More recently in the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Naletilic*, the Tribunal turned to the Hague Regulations and held that a key element of control includes 'a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt.'<sup>54</sup>

Based on the "effective control" test, Israel continues to occupy the Gaza Strip if it has the ability to exercise its effective control over the territory whether accomplished through the presence of continuous ground troops or not. Indeed Israel has such capacity to reenter and make its presence felt within a reasonable time, has demonstrated this capacity in a series of military operations since its disengagement, and has never ceased to exercise its effective control of Gaza.

Consider that in its Disengagement Plan, Israel reserved the right to use force against Palestinians living in Gaza in the name of preventive and reactive self-defense.<sup>55</sup> Since 2005, Israel has conducted several military operations in the Strip in the

38 Id. at 16.

39 Guide: Gaza Under Blockade, BBC (July 6, 2010), available at [http://news.bbc.co.uk/2/hi/middle\\_east/7545636.stm](http://news.bbc.co.uk/2/hi/middle_east/7545636.stm).

40 Gaza blockade suffocating agricultural sector, United Nations Radio, (May 25, 2010) available at <http://www.unmultimedia.org/radio/english/detail/96056.html>.

41 See Suffocating the Gaza Strip, supra note 21.

42 War and Closure, supra note 19.

43 Disease risk and intervention, supra note 32.

44 Id.

45 War and Closure, supra note 19, at 35.

46 Encyclopedia of Public International Law vol. 1, at 408 (Peter MacAlister-Smith ed., Max Planck Inst. for Comparative Public Law and Intl Law Under the Direction of Rudolf Bernhardt 2000) as quoted in Bisharat, supra note 7; Cf., Julius Stone, Legal Controls of International Conflict, (London: Steven & Sons Limited) (1954: 292) (blockades imposed in peacetime, or pacific blockades, imposed unilaterally and not collectively under Article 42 of the UN Charter, is illegal today).

47 The Public Committee Against Torture, supra note 2, at paragraph 10. (Israeli officials continue that the laws of war can therefore apply to "both occupied territory and to territory which is not occupied, as long as armed conflict is taking place on it.")

48 See e.g. John Dugard, Despite the 'Withdrawal,' the siege of Gaza goes on, THE INDEPENDENT, Oct. 5, 2006, available at <http://www.independent.co.uk/opinion/commentators/john-dugard-despite-the-withdrawal-the-siege-of-gaza-goes-on-418723.html>; See also Disengagement will not end Gaza Occupation, (Human Rights Watch/New York, NY), Oct. 28, 2004, available at <http://www.hrw.org/en/news/2004/10/28/israel-disengagement-will-not-end-gaza-occupation> ("The removal of settlers and most military forces will not end Israel's control over Gaza...Israel plans to reconfigure its occupation of the territory, but it will remain an occupying power with responsibility for the welfare of the civilian.")

49 See ICJ Wall Decision, supra note 5, at para. 141; See also ICJ Wall Decision, supra note 5, at para. 139 ("Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State...Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.")

50 See Disengagement Plan of Prime Minister Ariel Sharon, (Knesset/Documents/Israel), April 16, 2004, ("As a result, there will be no basis for claiming that the Gaza Strip is occupied territory.") available at [http://www.knesset.gov.il/process/docs/DisengageSharon\\_eng.htm](http://www.knesset.gov.il/process/docs/DisengageSharon_eng.htm); See also Israel's Disengagement Plan: Selected Documents, Cabinet Communication, (Israel Ministry of Foreign Affairs), Sept. 11, 2005, ("Upon the withdrawal of IDF forces from the foregoing areas, responsibility for them will be transferred to the Palestinian Authority (PA) and the military administration in the Gaza Strip will end.") available at <http://www.mfa.gov.il/MFA/Government/Communiques/2005/Cabinet+Communique+11-Sep-2005.htm>; See also H.C. 9132/07 Albiassioni v. Prime Minister, ("The military administration that governed [the Gaza Strip] in the past was abrogated by a decision of the government, and Israeli soldiers are no longer present in this territory on a permanent basis, nor do they control what takes place there. In such circumstances, the State of Israel does not have a general duty to ensure the welfare of the inhabitants of the Gaza strip and to maintain public order in the Gaza Strip under all laws of occupation in international law.")

51 Convention (IV) Respecting the Laws and Customs of War on Land: Regulations concerning the Laws and Customs of War on Land. (The Hague) October 18 1907. [Hereinafter The Hague Regulations]

52 Claude Bruderlein, Legal Aspects of Israel's Disengagement Plan Under International Humanitarian Law, Program on Humanitarian Policy and Conflict Research at Harvard University, (November 2004), 8 [Hereinafter Bruderlein]; See also Bisharat, supra note 7 at 49 ("The test does not require the presence of permanent military personnel in the occupied territory.")

53 See Bisharat, supra note 7 at 49 ("This principle was confirmed by the Nuremberg Tribunal in *USA v. Wilhelm List et al.*, in which the Tribunal determined that the German occupation of Greece and Yugoslavia did not end with the withdraw of German forces and the assertion of some degree of authority by indigenous groupings because the German military could have reentered the territories and exercised effective control at will."); See also Bruderlein, supra note 52 at 8 ("In the same decision, the tribunal considered a territory occupied even though the occupying army had partially evacuated certain parts of the territory and lost control over the population, as long as it could "at any time" assume physical control of any part of the territory").

54 Prosecutor v. Naletilic, International Criminal Tribunal of Yugoslavia, Judgment of March 31, 2003, para. 217 as quoted in Occupation, armed conflict, and the legal aspects of the relationship between Israel, the West Bank, and the Gaza Strip: A resource for practitioners, Program on Humanitarian Policy and Conflict Research at Harvard University, September 2008, available at <http://opt.ihlresearch.org/index.cfm?fuseaction=Page.viewPage&pagelid=2043>.

55 Bruderlein, supra note 52 at 10.

name of such self-defense.<sup>56</sup> Consider also that Israel has maintained control of its air space, its seaports,<sup>57</sup> its telecommunications network, its electromagnetic sphere, its tax revenue distribution, and its population registry.<sup>58</sup> Finally, Israel has complete control of Palestinian movement as it controls its five border crossings with Gaza and therefore the ingress and egress of all its goods and people.<sup>59</sup> The confluence of its ongoing control, its continuous military operations, as well as its capacity to redeploy its troops within a reasonable time, demonstrates that Israel remains in effective control of the Gaza Strip. There exists general international consensus affirming the Gaza's ongoing status as an occupied territory and Israel's status as an occupying power.<sup>60</sup> Accordingly, the laws of occupation remain in force.

## b. Israel fails to fulfill its duties to provide relief to civilians living in the territories it occupies under the laws of occupation

As an occupying power, Israel retains responsibility for public order in Gaza as well as for the welfare of its civilian population. Pursuant to Articles 55,<sup>61</sup> 56,<sup>62</sup> 57,<sup>63</sup> of the Fourth Geneva Convention as well as Article 69 of the 1977 Protocol Additional to the Geneva Conventions (Additional Protocol I), this includes ensuring the population's access to food, water, medical supplies, and all other goods essential to their survival as well as maintaining its public health. Under Article 59<sup>64</sup> of the Fourth Geneva Convention, Israel is also required to permit the free access of humanitarian and relief consignments through its territory. In its commentary on Article 59, the International Committee of the Red Cross stressed that said obligation upon the Occupying Power to ensure humanitarian relief to the civilian population is 'unconditional.'<sup>65</sup>

Even in the case that Israel no longer occupied Gaza, and was indeed engaged in an international armed conflict with Hamas, under the laws of armed conflict it still maintains a legal obligation towards Gaza's civilian population. A belligerent engaged in armed conflict, international or internal, is still bound by certain provisions of humanitarian law to ensure the welfare of the civilian population.<sup>66</sup> During a maritime blockade, belligerents "shall allow free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing, and tonics intended for children under fifteen, expectant mothers, and maternity cases."<sup>67</sup> In all cases where closure policies are used in armed conflict, belligerents are bound by customary international law on the matter derived from Article 54 (1-3) of Additional Protocol I, which prohibits the starvation of civilians as a method of warfare and prohibits the destruction and/or attack of objects

56 See Israeli Troops Roll Into Gaza, CNN, 28 June 2006, (Israeli ground troops backed by artillery crossed the Gaza border from Kerem Shalom to Rafah in an effort to rescue kidnapped soldier Gilad Shalit. Before the incursion, Israeli air strikes knocked out an electric plant in Gaza City as well as demolished two bridges.) available at <http://www.cnn.com/2006/WORLD/meast/06/27/israel.soldier/index.html>; See also Annan Warning on Gaza 'disaster', BBC, 9 July 2006, (Israel's continuing offensive against Gaza that began on June 28, 2006 has a serious toll on casualties. Israel also maintains a presence in the south of the territory and east of the Gaza Strip.) available at [http://news.bbc.co.uk/2/hi/middle\\_east/5162062.stm](http://news.bbc.co.uk/2/hi/middle_east/5162062.stm).

57 See Disengaged Occupiers, supra note 18.

58 Id.

59 Id.

60 Goldstone Report, supra note 29 at para. 276 ("Israel has without doubt at all times relevant to the mandate of the Mission exercised effective control over the Gaza Strip. The Mission is of the view that the circumstances of this control establish that the Gaza Strip remains occupied by Israel. The provisions of the Fourth Geneva Convention therefore apply at all relevant times with regard to the obligations of Israel towards the population of the Gaza Strip.") See also infra note 48.

61 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, August 12, 1949, Article 55 ("To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores, and other articles if the resources of the occupied territory are inadequate.") [Hereinafter Fourth Geneva Convention]

62 Id., Article 56 ("To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.")

63 Id., Article 57 ("...The material and stores of civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.")

64 Id., Article 59 ("If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all means at its disposal.")

65 O.M. Uhler and H. Coursier, eds. Commentary, IV Geneva Convention (1958), p. 320 as quoted in Yoram Dinstein, The Right to Humanitarian Assistance, Naval War College Review (Autumn 2000) available at <http://ihlresearch.org/index.cfm?fuseaction=page.viewPage&pageID=808&nodeID=2>. [Hereinafter Dinstein]

66 See Goldstone Report, supra note 29 at para. 275 ("Unlike the Hague, the Fourth Geneva Convention is concerned with the protection of civilians during war irrespective of the status of the Occupied Territories.")

67 Fourth Geneva Convention, supra note 61, Article 23 (1). See e.g., Dinstein, supra note 65.

deemed indispensable to the survival of the civilian populations "such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive."<sup>68</sup> Therefore, irrespective of Israel's status as an occupying power, the manner in which it has imposed its closure policies arguably amount to violations of humanitarian law.

That Israel's blockade is illegal because it contravenes its obligations towards a civilian population living under its occupation pursuant to international humanitarian law has been covered at length by several commentators and human rights organizations elsewhere.<sup>69</sup> I will not explore this further as my inquiry does not seek to demonstrate Israel's contravention of humanitarian law but instead its deliberate effort to shift it by insisting that it can simultaneously be at war with the entity that it occupies.

## c. The right to initiate force (jus ad bellum) is not available where an occupation exists and the laws of occupation apply (jus in bello)

Gaza's enduring status as occupied territory impacts the permissible use of force employed by Israel. While the ongoing use of force, such as that applied during a belligerent occupation as well as an international armed conflict, is regulated by jus in bello, the initiation of force is regulated by jus ad bellum.

Jus ad bellum refers to the prohibition on the use of force in the UN Charter Article 2(4), and its sole exception found in Article 51, which permits self-defense in the case of an armed attack. Once initiated, jus in bello, or the legal framework regulating the permissible use of force is triggered. Such law includes both the laws of war as well as the laws of occupation and the distinction is one within jus in bello.

The laws of war are found primarily in the Hague Regulations, the Four Geneva Conventions, and their Additional Protocols I and II.<sup>70</sup> Such law is based on a crude balance between humanitarian concerns and military advantage. As defined by the Nuremberg trials, military exigency allows a belligerent to expend "any amount and kind of force to compel the complete submission of the enemy..." so long as the destruction of life and property is not done for revenge or a lust to kill.<sup>71</sup> The permissible use of force during war is therefore expansive. The two unconditional limits on such force are derived from the customary principles of distinction and proportionality.

Stipulated in Article 48 of the Additional Protocol I, the principle of distinction provides that, "[i]n order to endure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."<sup>72</sup> Distinction mandates that belligerents distinguish between combatants and civilians and spare civilians from harm. The principle of proportionality requires that a belligerent party use the minimum force necessary to achieve its military advantage. Despite their customary and unequivocal nature, the principles of distinction and

68 Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection and Victims of International Armed Conflicts, 1977, Article 54 (1-3) [Hereinafter Protocol I]; See also J.M. Henckaerts, Study on customary international law, International Review of the Red Cross, Vol. 87, No. 857 (March 2005) (The ICRC produced a 5,000 paged study to identify those humanitarian laws that constitute customary humanitarian law. They identify the prohibition on the starvation of civilians as well as the attack on those objects indispensable to the survival of the civilian population as customary law as documented in Rules 53, 54, 55, and 56 in both international and non-international armed conflict.)

69 See e.g., Red Cross: Gaza blockade illegal, Al-Jazeera (June 14, 2010) available at <http://english.aljazeera.net/news/middleeast/2010/06/201061452646659588.html>; See also Gaza Closure Defined: Collective Punishment, (Gisha), December 2008, available at <http://gisha.org/UserFiles/File/publications/GazaClosureDefinedEng.pdf>; See also Press Statement, Israel Gaza blockade must be completely lifted, (Amnesty International/ PRE01/202/2010) June 17, 2010, available at <http://www.amnesty.org/en/for-media/press-releases/israel-gaza-blockade-must-be-completely-lifted-2010-06-17>; See also Interview by Elias Harb with Richard Falkm Richard Falk: The Shock Resulting from the Flotilla Attack has Reinforced the Campaign to De-legitimize Israel, (June 22, 2010) available at <http://www.opednews.com/articles/Richard-Falk-The-Shock-Res-by-Elias-Farhud-100621-573.html>.

70 What is International Humanitarian Law, (International Committee of the Red Cross) available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/humanitarian-law-factsheet>.

71 See e.g., Jefferson D. Reynolds, Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, And the Struggle for a Moral High Ground (The Nuremberg trials defined necessity as: "Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money ... It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces.")

72 Protocol I, supra note 68, Article 48.

proportionality are subject to debate leaving ample room for the permissible use of force during war.<sup>73</sup>

In contrast, permissible use of force pursuant to the laws of occupation are derived from Article 43 of the Hague Regulations, which is much more limiting.<sup>74</sup> Article 43 imposes a duty upon the Occupying Power to maintain law and order in the occupied territories and places the responsibility for breaches of said order during the time of occupation. As put by the U.S. Military Tribunal during the *Hostages Trial*, “[t]he status of an occupant of the territory of the enemy having been achieved, International Law places the responsibility upon the commanding general of preserving order, punishing crime, and protecting lives and property within the occupied territory. His power in accomplishing these ends is as great as his responsibility.”<sup>75</sup>

Accordingly, the permissible use of force during an occupation is that which is permissible for law enforcement or policing.<sup>76</sup> Amnesty International explains that such law enforcement standards are derived from human rights law and would require an occupying power to use the minimum amount of force necessary when addressing a security threat.<sup>77</sup> According to Marco Sassoli,

*Police operations are subject to many more restrictions than hostilities. To mention but one example, force may be used against civilians only as a last resort after non-violent means have proved unsuccessful in maintaining law and order. As for the use of firearms it is an extreme measure in police operations, while it is normal against combatants in hostilities.*<sup>78</sup>

The existing legal order prohibits an occupying power from initiating force against its occupied territory because where there exists a belligerent occupation, presumably, an armed attack has already occurred in response to which a belligerent initiated force. Therefore Article 51 self-defense is not available to Israel because “the time when self-defense could be invoked has passed: the resort to force has already occurred, and the situation is now governed by the different regime of international humanitarian law.”<sup>79</sup>

To assert otherwise is arguably unfair as it affords the occupying power both the right to use police force in a territory and, if and when it feels that those powers are inadequate, it expands its use of force by invoking a broader right to self-defense.<sup>80</sup> Moreover, an occupying power should not be able to justify its use of military force as self-defense in response to a breakdown in order within a territory for which it is responsible for maintaining order.<sup>81</sup> In doing so an occupying power would be conflating, and rendering useless, two otherwise distinct legal regimes of *jus in bello* and *jus ad bellum*.

#### **i. Israel’s deliberate mis-use of self-defense and its attempt to shift the existing legal order**

Accordingly, as an occupying power, Israel can protect itself and its citizens against attacks conducted by Hamas “[b]ut as a matter of law, it must do this as an exercise of its right to police the occupied territories, and not as an exercise of the right of self-defense.”<sup>82</sup> Iain Scobbie comments that Israel can indeed take defensive measures in response to threats but that they need not be justified as measures taken in self-defense under Article 51 of the Charter because

*To equate the two is simply to confuse the legal with the linguistic denotation of the term “defense.” Just as “negligence,” in law, does not mean “carelessness” but, rather, refers to an elaborate doctrinal structure, so “self-defense” refers to a complex doctrine that has a much more restricted scope than ordinary notions of “defense.” Unfortunately, this elision between legitimate security concerns and self-defense is embedded in Israel’s justification.<sup>83</sup>*

Israel’s deliberate use of legal self-defense as a justification both challenges the legal order as well as avoids the constraints of international humanitarian law upon an Occupying Power. This attempt fits squarely within an ongoing debate on the parameters of self-defense that began at least since the United States’ attack on Iraq in the early 1990s. The debate explores whether the legal definition of self-defense should be subject to broad framework of customary international law<sup>84</sup> or alternatively, within the narrow scope of self-defense, as defined by the UN Charter,<sup>85</sup> whether it can be invoked against a non-state entity, especially in an age where non-state actors have conducted international attacks,<sup>86</sup> and finally, whether a State should be bound by international law at all in determining whether or not it needs to defend itself.<sup>87</sup>

In regard to this case study in particular, Israel has cited UN Security Council Resolution 1368 (2001)<sup>88</sup> and UN Security Council Resolution 1373 (2001)<sup>89</sup> in its attempt to justify its use of force in the Occupied Territories as self-defense.<sup>90</sup> The Security Council passed Resolutions 1368 and 1373 in direct response to the Al-Qaeda attacks on the United States on September 11, 2001. The Resolutions affirm that terrorist acts amount to threats to international peace and security and therefore trigger the “inherent right of individual or collective self-defense as recognized by the Charter of the United Nations.”<sup>91</sup> Israel has deliberately worked to first cast all acts of Palestinian violence as terrorist acts;<sup>92</sup> secondly to frame those acts as amounting to armed attacks; and thirdly to argue that such armed attack triggers Article 51 self-defense pursuant to Resolutions 1368 and 1373 irrespective of the West Bank and Gaza’s status as Occupied Territories.<sup>93</sup>

The Israeli Government stated its position clearly in the 2005 Israeli High Court Justice case *The Public Committee Against Torture in Israel v. The Government of Israel*, where the State argued that notwithstanding existing legal debate, “there can be no

73 See e.g., Amichai Cohen, *The Principle of Proportionality in the Context of Operation Cast Lead: Institutional Perspectives*, 35 Rutgers L. Rec. 23, (2009); Compare to Noura Erakat, *Operation Cast Lead and the Elusive Quest for Self-Defense in International Law*, 36 Rutgers L. Rec. 164 (2009).

74 Hague Regulations, supra note 51, Art. 43 (The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore, and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country.)

75 Iain Scobbie, *Words: My Mother Never Told Me—In Defense of the International Court*, *Agora: ICJ Advisory Opinion on Construction of Wall in the Occupied Palestinian Territory*, (eds. Lori Fisler Damrosch and Bernard H. Oxman) 99 A.J.I.L. 76, 83 (2005). [Hereinafter Scobbie]

76 Brudlerline, supra note 52, at 13.

77 *The Conflict in Gaza: A Briefing on Applicable Law, Investigations, and Accountability* (Amnesty International) (2009), available at <http://www.amnestyusa.org/pdf/gazabriefing.pdf> (arguing international human rights law provides an additional layer of protections) as quoted in Bisharat, supra note 7 at 52.

78 Marco Sassoli, *Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century*, Program on Humanitarian Policy and Conflict Research at Harvard University, (2004, 5).

79 Scobbie, supra note 75.

80 Written Statement submitted by Palestine in the proceedings on the Advisory Opinion (Jan. 30, 2004) (“The Fourth Geneva Convention permits forcible measures against civilian populations, subject to strict limits. That exhausts the legal rights of an Occupying Power. A State may not use all of its powers under the Fourth Geneva Convention and the Laws of War and then decide that those powers are inadequate and invoke the more general right of self-defense, which belongs to the *jus ad bellum*, in order to avoid the constraints of international humanitarian law.”) as quoted in Scobbie, supra note 75, at 84.

81 Scobbie, supra note 75, at 83 (“It would be odd to conclude that Israel may rely on self-defense to justify its response to acts that denote a breakdown of the order for which it ultimately bears responsibility under international law.”)

82 Victor Kattan, *Gaza: Not a War of Self-Defense*, *Jurist* (Jan. 15, 2009), available at <http://jurist.law.pitt.edu/forumy/2009/01/gaza-not-war-of-self-defense.php> as quoted in Bisharat, supra note 7 at 65.

83 Scobbie, supra note 75 at 84.

84 See Nicholas Rostow, *Conference Honoring The Scholarship and Work of Alan M. Dershowitz: Article: Wall of Reason: Alan Dershowitz v. The International Court of Justice* 71 Alb. L. Rev. 953 (2008) (Rostow argues that the ICJ’s decision on self-defense is incorrect and that the Court should have considered the customary law of self-defense.);

85 See Eugene V. Rostow, *The Gulf Crisis in International and International and Foreign Relations Law, Continued: Until What? Enforcement Action or Collective Self-Defense?* 85 A.J.I.L. 506, (1991) (Rostow explores how the category of an “inherent right to self-defense” may eviscerate Article 51.)

86 See Major Joshua E. Kastenburg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principle of Anticipatory Self-Defense & Preemption*, 55 A.F.L. Rev. 87 (2004) (Discusses the unresolved definition of self-defense in favor of one that includes anticipatory self-defense. In all cases, he argues that the bottom line should be the principles of distinction and proportionality.)

87 See Oscar Schachter, *Self-Defense and the Rule of Law*, 83 A.J.I.L. 259 (1989) (Schachter argues that the protective measures of states are regulated by national defense policies and the ‘politics of security’ rather than by the international law governing use of force and self defense.)

88 S.C. Res. 1368 (2001). [Hereinafter Resolution 1368].

89 S.C. Res. 1373 (2001). [Hereinafter Resolution 1373].

90 Statement of Israel’s Permanent Representative to the United Nations General Assembly, U.N. Doc. A/ES-10/DP.21, at 6, (Oct. 20 2003) as quoted in ICJ Wall Decision, supra note 5 at para. 138.

91 Resolution 1373, supra note 89.

92 Letters from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General (27 August 2001) U.N. Doc. A/56/324/S/2001/82; (13 August 2001) U.N. Doc. A/56/294-S/2001/787; (9 August 2001) U.N. Doc. A/56/272-S/2001/768; (27 July 2001) U.N. Doc. A/56/225-S/2001/743; (26 July 2001) U.N. Doc. A/56/223-S/2001/737; (17 July 2001) U.N. Doc. A/56/201-S/2001/706; (13 July 2001) U.N. Doc. A/56/184-S/2001/696; (3 July 2001) U.N. Doc. A/56/138-S/2001/66; (21 June 2001) U.N. Doc. A/56/119-S/2001/619; (19 June 2001) U.N. Doc. A/56/98-S/2001/611; (18 June 2001) U.N. Doc. A/56/97-S/2001/604; (13 June 2001) U.N. Doc. A/56/92-S/2001/585; (11 June 2001) U.N. Doc. A/56/91-S/2001/580; (4 June 2001) U.N. Doc. A/56/85-S/2001/555; (30 May 2001) U.N. Doc. A/56/81-S/2001/540; (25 May 2001) U.N. Doc. A/56/80-S/2001/524; (18 May 2001) U.N. Doc. A/56/78-S/2001/506; (11 May 2001) U.N. Doc. A/56/72-S/2001/473; (9 May 2001) U.N. Doc. A/56/69-S/2001/459; (1 May 2001) U.N. Doc. A/55/924-S/2001/435; (23 April 2001) U.N. Doc. A/55/910-S/2001/396; (16 April 2001) U.N. Doc. A/55/901-S/2001/364; (28 March 2001) U.N. Doc. A/55/863-S/2001/291; (27 March 2001) U.N. Doc. A/55/860-S/2001/280; (26 March 2001) U.N. Doc. A/55/858-S/2001/278; (19 March 2001) U.N. Doc. A/55/842-S/2001/244; (5 March 2001) U.N. Doc. A/55/821-S/2001/193; (2 March 2001) U.N. Doc. A/55/819-S/2001/187; (14 February 2001) U.N. Doc. A/55/787-S/2001/137; (13 February 2001) U.N. Doc. A/55/781-S/2001/132; (2 February 2001) U.N. Doc. A/55/762-S/2001/103; (25 January 2001) U.N. Doc. A/55/748-S/2001/81; (23 January 2001) U.N. Doc. A/55/742-S/2001/71; (28 December 2000) U.N. Doc. A/55/719-S/2000/1252; (22 November 2000) U.N. Doc. A/55/641-S/2000/1114; (20 November 2000) U.N. Doc. A/55/634-S/2000/1108; and (2 November 2000) U.N. Doc. A/55/540-S/2000/1065.

93 Summary legal position of the Government of Israel, Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/13, (A/ES-10/248, (24 November 2003), 6. (According to its statement made before the General Assembly on 20 October 2003, the Government of Israel believes the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defense and Security Council resolutions 1368 (2001) and 1373 (2001)) available at <http://unispal.un.org/UNISPAL.NSF/0/A5A017029C05606B85256DEC00626057>.

doubt that the assault of terrorism against Israel fits the definition of an armed attack," effectively permitting Israel to use military force against those entities.<sup>94</sup> Israeli officials continue that the laws of war can therefore apply to "both occupied territory and to territory which is not occupied, as long as armed conflict is taking place on it" and that the permissible use of force is not limited to law enforcement operations.<sup>95</sup> The Israeli High Court of Justice has affirmed this argument in at least three of its decisions thereby legally sanctioning the Government's position that it is engaged in an international armed conflict and that its permissible use of force is not bound by the laws of occupation.<sup>96</sup>

In its Advisory Opinion on the *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice dealt with this challenge in its assessment of the permissible use of force in the Occupied West Bank. There, the Court noted that Israel's Permanent Representative to the United Nations had claimed that Israel's construction of a wall "is a measure wholly consistent with the right of States to self-defense enshrined in Article 51 of the Charter... [the Security Council has] clearly recognized the right of States to use force in self-defense against terrorist attacks."<sup>97</sup> The ICJ reasoned that Article 51 contemplates an armed attack of one State and against another State and "Israel does not claim that the attacks against it are imputable to a foreign state."<sup>98</sup> Moreover, the Court held that because the threat to Israel "originates within, and not outside" the Occupied West Bank, "the situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defense. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case."<sup>99</sup>

The Court makes two critical distinctions here: 1) that a non-state entity cannot trigger Article 51 self-defense<sup>100</sup> and 2) that because the armed attack originated within occupied territory, presumably where the laws of occupation apply, that distinguishes it from the case of the al-Qaeda attack against the U.S. As such Resolutions 1368 and 1373, which authorize the invocation of Article 51 self-defense against al-Qaeda, are distinct from, and non-applicable to, the Occupied Palestinian Territories.

While the ICJ made clear that Article 51 self-defense is not available to occupying powers in the territories it occupies, Israel continues to insist that it is exercising its legal right to self-defense in its execution of military operations in the West Bank and the Gaza Strip. Its insistence is critical because as a legal matter the scope of self-defense is not settled, reflected by varied legal scholarship on the topic.<sup>101</sup> Since 2005, Israeli officials have nuanced its position towards the Gaza Strip and, rather than conflate the two legal regimes, they have insisted that its occupation has come to an end and that the only applicable legal regime is that of self-defense.<sup>102</sup> Even so, Israel's legal position amounts to a challenge of the legal order because, as demonstrated above,

94 The Public Committee Against Torture supra note 2 at paragraph 10.

95 Id.

96 See e.g., Physicians for Human Rights, supra note 14; The Public Committee Against Torture, supra note 2; H.C.11120/05 Hamdan v. the Southern Military Commander.

97 Statement of Israel's Permanent Representative to the United Nations General Assembly, (A/ES-10/1PV.21, p.6) (20 October 2003) as quoted in ICJ Wall Decision, supra note 2 at para. 138.

98 Id. at para. 139.

99 ICJ Wall Decision, supra note 2, at para. 139. But see Declaration of Judge Buergenthal, 43 ILM at 1078, para. 6 (Judge Buergenthal disagreed that Israel could not invoke legal self-defense.); But see also Separate Opinion of Judge Higgins, 43 ILM at 1058, para. 33 (similarly, Judge Higgins dissented on this matter.)

100 See e.g., Ruth Wedgwood, The ICJ Advisory Opinion on the Israeli Security Fence And the Limits of Self-Defense, *Agora: ICJ Advisory Opinion on Construction of Wall in the Occupied Palestinian Territory*, (eds. Lori Fisler Damrosch and Bernard H. Oxman) 99 A.J.I.L. 52, 59 (2005) ("The Charter's language does not link the right of self-defense to the particular legal personality of the attacker. In a different age, one might not have imagined that nonstate actors could mimic the force available to nation-states, but the events of September 11 have retired that assumption."); See also Geoffrey Watson, Self-Defense and the Israeli Wall Advisory Opinion: The "Wall" Decisions in Legal and Political Context, *Agora: ICJ Advisory Opinion on Construction of Wall in the Occupied Palestinian Territory*, (eds. Lori Fisler Damrosch and Bernard H. Oxman) 99 A.J.I.L. 6 (2005) (Watson argues that the ICJ's decision is "expansive and sweeping" and fails to conduct a proper analysis of law and fact.); See also Sean D. Murphy, Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the ICJ, *Agora: ICJ Advisory Opinion on Construction of Wall in the Occupied Palestinian Territory*, (eds. Lori Fisler Damrosch and Bernard H. Oxman) 99 A.J.I.L. 62, 64 (2005) ("First, nothing in the language of Article 51 of the Charter requires the exercise of self-defense to turn on whether an armed attack was committed directly by, or can be imputed to, another state. Article 51 speaks of the right of self-defense by a 'Member of the United Nations' against an armed attack, without any qualification as to who or what is conducting the armed attack. The 'ordinary meaning' of the terms of Article 51 provides no basis for reading into the text a restriction on who the attacker must be.")

101 Id.

102 See Hillel Fendel, Foreign Minister Legal Expert Explains Gaza Blockade, Israeli Ministry of Foreign Affairs, (May 27, 2010) ("In 2005, Israel completed its disengagement plan and completely withdrew from the Gaza Strip, so that no Israeli military or civilian presence remained in the Gaza Strip. The disengagement plan ended Israel's effective control of the Gaza Strip after almost 40 years of effective control... What currently exists is a state of armed conflict."); See also The Gaza flotilla and the maritime blockade of Gaza-Legal background, Israel Ministry of Foreign Affairs, (May 31, 2010) ("A maritime blockade is in effect off the coast of Gaza. Such blockade has been imposed, as Israel is currently in a state of armed conflict with the Hamas regime that controls Gaza, which has repeatedly bombed civilian targets in Israel with weapons that have been smuggled into Gaza via the seas."); See also Dore Gold, Israel's Naval Blockade of Gaza is Legal, Necessary, *Bloomberg-Business Week*, June 11, 2010, ("Naval blockades are a legitimate instrument that states employ for self-defense.")

Gaza remains occupied as a matter of law.

Israel's insistence that Gaza is not occupied, despite the near international consensus to the contrary, as well as its insistence that it can use force beyond that permissible for law enforcement irrespective of a territory's occupied status, works to blur the frameworks of jus ad bellum and jus in bello so that the law is not clear on the one hand, and on the other it slowly pushes the boundaries of existing law in an attempt to reshape it. Such an attempt would be detrimental to the existing international humanitarian legal order which is intended to protect civilians in times of war by minimizing their suffering. Specifically, in the case of Gaza,

*It forces the people of the Gaza Strip to face one of the most powerful militaries in the world without the benefit either of its own military, or of any realistic means to acquire the means to defend itself. Thus, [Bisharat, et. al.] believe that Israel's attempt to transform international humanitarian law in this respect should be firmly resisted, and that its military's operations in the Gaza Strip should continue to be evaluated by law enforcement standards.<sup>103</sup>*

Failure to uphold the law would allow states to behave according to their own whim in furtherance of their national interest even in cases where that is detrimental to civilians and to the international legal order. According to the UN Charter, preservation of such order spurred the community of nations to establish an international multilateral organization in the aftermath of World War II: the United Nations. Therefore, the onus for resisting this shift lies on the UN whose primary goal is to maintain peace and security and uphold the rule of law.

## IV. The United Nations and the Rule of Law

According to the Preamble to its Charter, the goal of the UN is "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained" as well as to "save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."<sup>104</sup> Former UN Secretary-General Kofi Annan articulated the UN's commitment to, and the definition of, the rule of law in a report where he wrote:

*Promoting the rule of law at the national and international levels is at the heart of the United Nations' mission... For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>105</sup>*

By failing to declare Israel's blockade on Gaza as ipso facto illegal and instead treating it as a political matter, the UN, specifically the Security Council, has not provided proper guidance to its member states, has allowed Israel to continue its affront to the international legal order without sanction, has undermined its own legitimacy as well as the legitimacy of international law, and has abrogated its duties as stipulated by its Charter.

### a. The UN Charter: Duties, Privileges, and the Security Council as the primary enforcement body

The UN Charter makes clear that peace and security flow from the rule of law. The logic underscores the inevitability of international disputes and affirms that in order to thwart a violent escalation, principles of justice and international law must prevail. To this end, the UN Charter states that the UN will "ensure, by the acceptance of principles and the institutions of methods,

103 Bisharat, supra note 7, at 55.

104 U.N. Charter, Preamble. [Hereinafter Preamble]

105 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, U.N. Doc. S/2004/616 (Aug 23, 2004) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>.

that armed force shall not be used, save in the common interest....<sup>106</sup> Chapter I of the Charter states that the UN shall maintain international peace and security by suppressing acts of aggression or other breaches of the peace and/or to settle international disputes which might lead to a breach of the peace based on principles of justice and international law.<sup>107</sup>

Its Charter includes several provisions that enable the UN to live up to its principles. Those measures are delegated specifically to each of the institution's six organs: the General Assembly, the Economic & Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat. Of utmost significance to this discussion are the General Assembly, the Security Council, and the International Court of Justice, which unlike the other fundamental organs reflect the political will of States and grapple with questions of international law.<sup>108</sup> While the General Assembly<sup>109</sup> and the International Court of Justice<sup>110</sup> can and do opine about the meaning and applicability of international law, arguably the UN's single organ with enforcement authority is the Security Council. This is underscored by Article 24 of the Charter, which reads:

*In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.<sup>111</sup>*

Therefore, scrutiny of the UN's ability to uphold the rule of law amounts to scrutiny of the Security Council's behavior.

The UN Charter affords the Security Council several powers in order to uphold the rule of law and thwart the onset of armed conflict. Chapter II of the Charter describes the ways in which the Security Council can suspend or expel states from the UN in response to their affront to the will of the global community. Specifically, Article 5 empowers the UN Security Council to suspend a state from exercising its rights and privileges of membership when necessary,<sup>112</sup> and Article 6 allows the expulsion of a member state from the UN for persistently violating the principles contained in the Charter.<sup>113</sup>

Chapter VII of the Charter, comprised of Articles 39 to 51, enumerates the Security Council's authority to suppress acts of aggression, threats to the peace, and breach of the peace committed by member states. Articles 39 through 42 empower the Security Council to determine the existence of such threat, breach, and/or act of aggression and to take the measures necessary to restore international peace and security. According to legal scholar and UN practitioner, Michael Akehurst, "[a] threat to the peace in the sense of Article 39 seems to be whatever the Security Council says is a threat to the peace."<sup>114</sup> This interpretation of Article 39, coupled with the several powers delegated by the UN Charter to the Security Council, demonstrates the broad and unfettered legal authority of the most powerful UN organ.

Arguably the only constraint on the Security Council's ability to exercise its authority in international matters is political in nature. The Security Council is comprised of 15 members, ten of those are rotating non-permanent members elected for two-year terms by the General Assembly and five are permanent members. The United States, France, China, Russia, and the United Kingdom have constituted the Council's five permanent members since its inception.<sup>115</sup> Each Council member has one vote and decisions require the affirmative vote of at least nine members. On substantive matters, the five permanent members must also concur and failure to do so amounts to a veto of the resolution.<sup>116</sup> Therefore, a single permanent Security Council member can

106 Preamble, supra note 104.

107 Id.

108 See UN at a Glance at <http://www.un.org/en/index.shtml> (The Secretariat carries out day-to-day work of the UN. The Trusteeship Council oversees the administration of Trust Territories. The Economic and Social Council is responsible for broad initiatives related to the development of economic and social issues.)

109 U.N. Charter, Art. 10, ("The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.")

110 U.N. Charter, Art. 94(2), ("In the case that a state fails to comply with a decision rendered by the ICJ, compliance with such decision shall be pursued with the Security Council. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.")

111 U.N. Charter, Art. 24.

112 U.N. Charter, Art. 5, ("A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.")

113 U.N. Charter, Art. 6, (A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.)

114 M.B. Akehurst, *Modern Introduction to International Law*, 7th ed., ed. P. Malanczuk (London: Allen and Unwin, 1997) as quoted in Dinstein, supra note 65.

115 See UN Security Council Members 2010 available at <http://www.un.org/sc/members.asp>.

116 Id. ("This is the rule of 'great Power unanimity', often referred to as the 'veto' power.")

block international consensus.

## b. The UN Security Council's failure to uphold the rule of law in response to Israel's blockade on Gaza

By maintaining peace and security based on tenets of international law as well as enforcing the rule of law, the UNSC operates as a legal authority. In the case of the Gaza blockade, the Security Council has failed on both counts. Rather than make definitive what the law is, it has treated the blockade on Gaza as a political matter with little to no mention of the law. Moreover, the Security Council's behavior in other situations in the Middle East, as well as situations where humanitarian relief has been impeded, demonstrates a political bias towards the crisis and conflict in Gaza.

It should be noted that while the Security Council has failed to fulfill its Charter's mandate, several other UN bodies have adequately assessed the situation in Gaza. Of particular note are Navi Pillay, the U.N. High Commissioner for Human Rights and Richard Falk, the UN Special Rapporteur to the Occupied Palestinian Territories who are among many Committees and voices within the United Nations affirming the applicability of the laws of occupation to Gaza and the illegality of the blockade.<sup>117</sup> While these voices are critical in resisting Israel's attempt to shift the law, I focus my analysis on the Security Council because of its primary responsibility to maintain peace and security as well as the enforcement authority afforded it in order to do so.

### i. The Security Council has applied the law unequally to cases of humanitarian crises and thereby diminished faith in international law among member states

A fundamental tenet of the rule of law is fairness in its application; otherwise, the law would apply to states based on political deference as opposed to universally upheld principles. Failure to apply the law equally works to diminish the faith in its value among the states whose collective endorsement makes the law binding. However, given that the UNSC is a political body, differential application is inevitable. Here I do not take issue with the discrepant application of action and scope of attention, rather with the extent of the discrepancy, thereby illustrating the UNSC's inadequate handling of the crisis in Gaza. This unwarranted discrepancy is evidenced by the Security Council's use of Chapter VII authority to treat past humanitarian crises, compared to the insufficient attention it has paid to Gaza between 2005 and 2010 notwithstanding Israel's unilateral disengagement, a devastating offensive, a humanitarian crisis, and the serious questions of law being raised by those events.

#### 1. The Security Council's use of sanctions in other cases highlights differential treatment of the situation in Gaza

The Security Council has used its Chapter VII authority to authorize the use of force and/or impose sanctions in numerous cases since its establishment.<sup>118</sup> Here I focus only on those cases where there existed a humanitarian crisis, and not just a political one, similar to the crisis that exists in Gaza.

During the break up of the former Socialist Republic of Yugoslavia, Serbian forces applied force amounting to war crimes in its former territory, and newly autonomous state, Bosnia and Herzegovina. In response to the devastating events in the war torn Republic, the Security Council passed nine resolutions between September 25, 1991 and May 30, 1992.<sup>119</sup> In Resolution 757,

117 See UN expert urges Israel to end Gaza blockade as anniversary of campaign looms, UN News Service, December 23, 2009, ("The unlawful blockade imposed by Israel continues..."); See also Gaza blockade illegal, must be lifted: UN's Pillay, Reuters, June 5, 2010, ("I have consistently reported to member states that the blockade is illegal and must be lifted"); See also Ali Treki, President of the 64th Session of the United Nations General Assembly, Address on the International Day of Solidarity with the Palestinian People, (Nov. 30, 2009) ("The United Nations has repeatedly called on Israel to lift this inhuman and illegal blockade, but Israel continues to impose collective punishment on Gaza's civilian population, in defiance of international law including international humanitarian and human rights law and particularly in breach of its obligations under the Fourth Geneva Convention."); See also Miguel D'Escoto, President of the 63rd Session of the United Nations General Assembly, Address to the 32nd Plenary Meeting of the 10th Emergency Special Session on the Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory, (Jan. 15, 2009) ("Israel remains the occupying power in the Occupied Palestinian Territory, including the Gaza Strip, and it has specific obligations under the Geneva Conventions to protect the occupied population. Instead of providing protection as mandated by international law, the occupying power is denying this population, 80 percent of whom are already refugees and more than half of whom are children, the option to seek refuge and find shelter from the war.")

118 See U.N. SC Res. 1521 (2003) (Chapter VII invoked and sanctions imposed to respond to mercenaries and non-state actors in Liberia despite an ongoing peace process); See also U.N. SC Res. 1572 (2004) (the Security Council invoked Chapter VII authority to impose sanctions on the Ivory Coast where hostilities continued despite a ceasefire); U.N. SC Res. 661 (1990) (Security Council invoked Chapter VII authority to impose sanctions on Iraq for its invasion of Kuwait).

119 U.N. SC Res. 713 (1991); U.N. SC Res. 721 (1991); U.N. SC Res. 724 (1991); U.N. SC Res. 727 (1992); U.N. SC Res. 740 (1992); U.N. SC Res. 743 (1992); U.N.

the Security Council affirmed the UN's primarily role of maintaining international peace and security, declared that the situation in Bosnia and Herzegovina and other parts of the former Yugoslavia to constitute a threat to international peace and security, and invoked its Chapter VII authority to address the situation.

Pursuant to that authority, the Security Council established an embargo on the former Yugoslavia prohibiting a broad range of activities from the inclusion of Yugoslavia in international sporting events to a ban on any flights into, out of, or over Yugoslavia. Resolution 757 also

*Demands that all parties and others concerned create immediately the necessary conditions for unimpeded delivery of humanitarian supplies to Sarajevo and other locations in Bosnia and Herzegovina, including the establishment of a security zone encompassing Sarajevo and its airport...<sup>120</sup>*

Only a few months later in October 1992, the Security Council passed Resolution 781 and effectively imposed a ban on military flights in Bosnia and Herzegovina's airspace in order to ensure the delivery of humanitarian aid and the cessation of hostilities in the territory.<sup>121</sup>

The Security Council acted with similar urgency and force in the face of a humanitarian crisis in Somalia during its civil war. It passed six resolutions relating to the crisis in Somalia in 1992 and invoked its Chapter VII authority twice in order to ensure the delivery of humanitarian relief throughout Somalia.<sup>122</sup> Still, all six resolutions mention the humanitarian crisis and the urgent need for its redress. In addition to invoking Chapter VII authority, Resolutions 733 and 794 are also noteworthy because of their reference to, and affirmation of, international law.

Resolution 733 implemented a ban on military equipment into Somalia and urged all parties to take "all necessary measures to ensure the safety of personnel sent to provide humanitarian assistance, to assist them in their tasks and to ensure full respect for the rules and principles of international law regarding the protection of civilians."<sup>123</sup> In Resolution 794, the Security Council made a much bolder statement when it expressed:

*Expressing grave alarm at continuing reports of widespread violations of international humanitarian law occurring in Somalia, including reports of violence and threats of violence against personnel participating lawfully in impartial humanitarian relief activities: deliberate attacks on non-combatants, relief consignments and vehicles, and medical and relief facilities; and impeding the delivery of food and medical supplies essential for the survival of the civilian population... Strongly condemns all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population, and affirms that those who commit or order the commission of such acts will be held individually responsible in respect of such acts...<sup>124</sup>*

The language of Resolution 794 makes several strides in the furtherance of international humanitarian law: it affirms its inviolability; it lists with specificity those acts that rise to an abrogation of the law; and it holds that perpetrators of those violations will be held individually liable for war crimes.

The Security Council's response to the humanitarian crises in Somalia and Bosnia and Herzegovina is by no means an exhaustive examination of its treatment of humanitarian crises or of international humanitarian law violations. Instead, the aforementioned resolutions simply demonstrate the Council's broad authority to both settle what the law is and take action when made necessary by conflict. That the Council has such authority but has failed to exercise it in the case of the Gaza blockade illustrates its failure to uphold the rule of law.

## **2. The Security Council's lack of adequate scrutiny of the situation in Gaza is evidenced by the discrepancy of resolutions passed as compared with other case studies and the Middle East in general**

In the face of a humanitarian crisis and conflict in Somalia, the Security Council passed six resolutions in 1992 alone. In the face

SC Res. 749 (1992); U.N. SC Res. 752 (1992), and 757 (1992).

120 U.N. SC Res. 757 (1992).

121 U.N. SC Res. 781 (1992).

122 U.N. SC Res. U.N. SC Res. 733 (1992); U.N. SC Res. 746 (1992); U.N. SC Res. 751 (1992); U.N. SC Res. 767 (1992); U.N. SC Res. 775 (1992); and U.N. SC Res. 794 (1992).

123 U.N. SC Res. 733 (1992)

124 U.N. SC Res. 794 (1992)

of similar crisis and conflict in Bosnia and Herzegovina, the Security Council passed nine resolutions in the span of eight months. This stands in stark contrast to the Council's response to the humanitarian crisis and conflict in Gaza.

Between Israel's unilateral Disengagement in 2005 and the present, the Security Council has passed 32 resolutions related to the Middle East. Of those, 19 addressed the conflict in Lebanon;<sup>125</sup> 11 affirmed the United Nations' zero tolerance policy on sexual harassment within its institutions;<sup>126</sup> and 2 discussed Gaza.<sup>127</sup> These figures are particularly troubling, in light of the grave nature of events endured by Gaza's population during that time, especially the imposition of the blockade in 2007, its continuance through 2010, a 22-day aerial and ground offensive that left 1,400 Palestinians dead in the Winter of 2008 through 2009, and an attack on civilian-activists attempting to transport aid to Gaza in contravention of the blockade wherein 9 activists were killed in 2010.

The Council's inadequate scrutiny of, and attention to, the humanitarian crisis indicates a disproportionate inequality before the law and, as commentators have shown, that inequality may be a function of political intervention. In particular, as one of its five permanent members, the US has consistently blocked resolutions critical of Israel. Between 1972 and 1997, the US used its veto 32 times to shield Israel from rebuke. This amounted to nearly half of the 69 vetoes the US cast since the founding of the UN.<sup>128</sup> The UN Charter affords the General Assembly with little recourse to treat the Council's politicization. Article 11 (3) allows the General Assembly to call the Security Council's attention to "situations, which are likely to endanger international peace and security,"<sup>129</sup> but does not empower the General Assembly to demonstrate the will of the international community to override a Security Council veto. Consequently, this authority will do little to nothing to overcome the Council's inadequate scrutiny of, and action in response to, the crisis in Gaza.

### **ii. The Security Council's treatment of the blockade has been political at the expense of international law**

According to Former Secretary-General Kofi Annan's definition of the rule of law, the law should reign supreme. However, in its handling of Israel's blockade on Gaza, the Security Council has consistently allowed politics to trump the law. This has been manifested in its two Security Council resolutions related to Gaza since the imposition of the blockade; in its response to Israel's bloody attack of the aid flotilla; and in its reaction to Israel's announcement that it will "ease" its blockade. In none of those situations has the Security Council, or the current Secretary-General, described the blockade as an illegal act or treated it according to the law.

### **1. Security Council Resolutions 1850 and 1860, the only two resolutions dealing with Gaza between 2005 and 2010, have failed to incorporate international humanitarian law**

It is significant that the Security Council has yet to address the Gaza blockade as a discrete issue considering the blockade's serious implications for international law. In fact, it has only mentioned the blockade a single time in one of two Security Council resolutions passed since its imposition in June 2007.

In Resolution 1860 (2009), the Security Council called for an "immediate, durable, [and] fully respected ceasefire" in the midst of Operation Cast Lead, Israel's 22-day offensive against the people of Gaza. While the resolution is positive in that it affirmed Gaza's status as occupied territory,<sup>130</sup> it does not explicitly mention the obligation of all states to uphold their duties enshrined in Common Article 1 of the Geneva Convention to "respect and ensure respect for the present Convention in all circumstances," nor does it make any reference to international humanitarian or human rights law. Instead the resolution calls on the Israeli government and Palestinian parties to reinvigorate its efforts to "achieve a comprehensive peace based on the vision of a region where two democratic States, Israel and Palestine, live side by side in peace with secure and recognized borders, as envisaged in Security Council resolution 1850 (2008) and other relevant resolutions."

125 U.N. SC Res. 1644 (2005); U.N. SC Res. 1636 (2005); U.N. SC Res. 1614 (2005); U.N. SC Res. 1595 (2005); U.N. SC Res. 1583 (2005); U.N. SC Res. 1701 (2006); U.N. SC Res. 1679 (2006); U.N. SC Res. 1686 (2006); U.N. SC Res. 1680 (2006); U.N. SC Res. 1664 (2006); U.N. SC Res. 1655 (2006); U.N. SC Res. 1773 (2007); U.N. SC Res. 1757 (2007); U.N. SC Res. 1748 (2007); U.N. SC Res. 1852 (2008); U.N. SC Res. 1832 (2008); U.N. SC Res. 1815 (2008); U.N. SC Res. 1884 (2009).

126 U.N. SC Res. 1648 (2005); U.N. SC Res. 1605 (2005); U.N. SC Res. 1729 (2006); U.N. SC Res. 1685 (2006); U.N. SC Res. 1788 (2007); U.N. SC Res. 1759 (2007); U.N. SC Res. 1848 (2008); U.N. SC Res. 1821 (2008); U.N. SC Res. 1899 (2009); U.N. SC Res. 1875 (2009); U.N. SC Res. 1934 (2010).

127 U.N. SC Res. 1850 (2008) and U.N. SC Res. 1860 (2009).

128 Donald Neff, Lessons to be Learned from 66 UN Resolutions Israel Ignores, Washington Report for Middle East Affairs, March 1993, available at <http://www.wrmea.com/backissues/0393/9303040.htm>.

129 U.N. Charter Art. 11 (3).

130 U.N. SC Res. 1860 (2009) (The Resolution cites resolutions 242 and 338 which call on Israel to withdraw from territories occupied in 1967 and also stresses "that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state.")

The Security Council should play a positive role in encouraging a peaceful resolution to the conflict but it also has the ultimate responsibility for affirming and prioritizing applicable international law in the conflict as was reflected by its intervention in the cases of the former Yugoslavia and Somalia. Especially in a time of war, the Security Council should have emphasized Israel's obligations as an Occupying Power to maintain order in the territory it occupies, as well as to ensure the welfare of those civilians living in the territory. The Council's failure to do so was recalled by two rotating members of the Security Council.<sup>131</sup> In effect, the Security Council missed a significant opportunity to affirm the applicability of the Geneva Conventions and implicitly, at least, the existence of the laws of occupation wherein the legitimate use of force is subject to law enforcement standards.

As to the blockade, the Resolution calls for the "unimpeded provision and distribution throughout Gaza of humanitarian assistance, including of food, fuel, and medical treatment" and "welcomes the initiatives aimed at creating and opening humanitarian corridors and other mechanisms for the sustained delivery of humanitarian aid." The language does not describe the blockade as illegal and consequently its call for the unimpeded flow of humanitarian goods does not address the flow of persons; of reconstruction materials for the provision of adequate shelter; or of commercial goods in order to revive a pummeled Gazan economy. Essentially, such flow of goods would ensure the treatment of a humanitarian crisis, but in no way begins to ensure the sustainability or welfare of Gaza's population pursuant to international humanitarian law. The inadequate language in the Resolution also leaves open for debate whether or not Israel can impose the blockade in Article 51 self-defense. Compare this to the Security Council's forceful response to the situation in war-torn Somalia where it consistently affirmed the applicability of humanitarian law and considered the impediment to the delivery of humanitarian relief tantamount to war crimes.

Moreover, rather than call on Israel to create and open such humanitarian corridors, it passively "welcomes initiatives" to do so as if the lack of humanitarian corridors were a byproduct of a natural disaster and not a willful violation of humanitarian law. Compare this to the Security Council's unequivocal language in the case of the former Yugoslavia where it "demands" the "immediate" creation of "necessary conditions for unimpeded delivery of humanitarian supplies."

Resolution 1850 is worse than its successor because it fails to mention the blockade all together. The 2008 Resolution supports the peace process and affirms former Security Council resolutions 242 and 338 upon which that process should be based in light of the renewed peace talks in Annapolis, Maryland. Resolution 1850 does more to counter the position of Hamas, who upon assuming the leadership of the Palestinian Authority, rejected the previous peace agreements. To that effect, the Security Council "declares its support for the negotiations...and its commitment to the irreversibility of the bilateral negotiations"<sup>132</sup> and makes no mention of its commitment to principles of international humanitarian law.

Resolutions 1850 and 1860 stand in marked contrast alongside the Security Council's resolutions on Bosnia and Herzegovina and Somalia, wherein it emphasized the centrality of humanitarian law and invoked its Chapter VII authority to ensure the delivery of humanitarian relief.

## 2. The Security Council missed another opportunity to deal with the illegal nature of the blockade in the aftermath of the Flotilla incident

On May 31, 2010, a flotilla of six ships filled with humanitarian aid sailed to Gaza's shore in what amounted to a direct confrontation of Israel's blockade. Israeli forces raided the Turkish ship and used lethal force against civilian activists killing nine people and wounding dozens of others.<sup>133</sup> The Security Council convened an emergency meeting to discuss the matter where Turkey, a rotating member of the Council, pushed for condemnation of Israel. The meeting resulted in a presidential statement adopted by the Security Council, distinct from a resolution, which is considered to be binding under international law.

The statement, written at a moment when the Security Council could have dealt squarely with the illegal nature of the blockade, made no mention of it, or of Israel's contravention of humanitarian law. Instead the Council called for the full implementation of Resolutions 1850 and 1860 and expressed "its grave concern at the humanitarian situation in Gaza and stress[ed] the need for the regular flow of goods and people to Gaza as well as unimpeded provision and distribution of humanitarian assistance throughout Gaza."<sup>134</sup> The Council went on to reiterate that only a political solution would solve the conflict and "bring

131 Press Statement, SC/9567, Security Council Calls for Immediate, Durable, Fully Respected Ceasefire in Gaza Leading to Full Withdrawal of Israeli Forces, (8 January 2009) available at <http://www.un.org/News/Press/docs/2009/sc9567.doc.htm> (Mexico's representative to the UN states that "Mexico would have preferred that the text incorporate an explicit reference to respect for the provisions of international humanitarian law." Also, Austria's representative stated: "One point had not been explicitly mentioned in the resolution, namely the obligation of all parties to fully respect humanitarian and human rights law.")

132 U.N. SC Res. 1850 (2008).

133 E.B. Solomont, Accusing Israel of Murder, Ankara pushes for censure at UN Security Council, Jerusalem Post, June 1, 2010.

134 Security Council, Security Council Condemns Acts Resulting in Civilian Deaths During Israeli Operation, U.N. Doc. SC/9940, (May 31, 2010).

peace to the region."<sup>135</sup> This tone is also reflected by the language of the UN's Assistant Secretary General for Political Affairs, Oscar Fernandez-Taranco, who spoke before the Council and said "bloodshed would have been avoided if repeated calls on Israel to end the counterproductive and unacceptable blockade of Gaza had been heeded."<sup>136</sup> Moreover, Taranco emphasized the deleterious impact of Israel's raid on ongoing proximity talks, which must continue.<sup>137</sup>

Fernandez-Taranco's language is inadequate and misleading because, rather than assert the blockade's illegal nature, the Assistant Secretary-General for Political Affairs characterizes the blockade in political, (i.e., counterproductive), and moral, (i.e., unacceptable) terms. Also, by describing the blockade as "counterproductive" vis-à-vis Israel's goal of protecting its citizens, Fernandez-Taranco is implicitly agreeing, and at the very least not dismissing the notion, that Israel has the right to Article 51 self-defense.

While the Statement includes positive development since it adds that people and goods should be allowed to flow freely whereas Resolution 1860 encourages the flow of humanitarian aid, the Statement is remiss for making no mention of the blockade's illegality and for failing to characterize the flow of goods, people, and aid, as a legal obligation upon the occupying power. By only citing the political process and Resolutions 1850 and 1860, the Security Council treats the matter as one involving two embroiled states as opposed to a situation wherein humanitarian law places distinct duties upon each Party. Rather than affirm the existing legal framework, which affords more protection to civilians and accountability of occupying powers, the Security Council treated the blockade as a matter subject to political negotiations.

## 3. The Secretary-General's politicized response to Israel's "easing" of the blockade undermined the rule of law and is no more instructive than the political prerogatives of the United States and Israel

The Security Council's failure to deal with the blockade as a legal matter also detrimentally impacted its demands upon Israel. The illegality of the blockade makes requisite its cessation by Israel. On the other hand, its counterproductive nature can be treated with many actions well short of cessation including its easement. In fact, the UN and its member states have applied political pressure upon Israel to lift the blockade rather than impose sanctions on it for flagrant contravention of international law similar to the measure it took against the former Yugoslavia.

Even Israel's strongest ally, the U.S. described the closure as "untenable"<sup>138</sup> and wanted to see more supplies reach the impoverished Palestinian population. Senior American officials, however, came to this conclusion as a matter of political interests rather than as a matter of law, stating that "Gaza has become the symbol in the Arab world of the Israeli treatment of Palestinians, and we have to change that. We need to remove the impulse for the flotillas. The Israelis also realize this is not sustainable."<sup>139</sup> As such, the Security Council's position is no more legally authoritative or instructive than the political interests of Israel and the U.S.

Moreover, rather than declare Israel's easement policy as an incremental and insufficient step, Secretary-General Ban-Ki Moon responded that Israel's decision to review its closure policy was "encouraging."<sup>140</sup> Moon added that the UN was ready to "scale up its efforts to help Gaza recover and rebuild if enabled to do so."<sup>141</sup> By applauding Israel for falling short of its legal obligations, and then conditioning UN support to rebuild Gaza upon Israeli approval, the Secretary-General not only fails to affirm the applicable law and legal framework, but this also relieves Israel of its accountability to such law.

Consequently notwithstanding Israel's proclamations that it would ease the blockade to allow the flow of all goods not categorized as dual-use into Gaza, the devastating conditions in Gaza continue unabated.<sup>142</sup> Worse, because the international community applauded Israel's decision to "ease" the blockade, it subsequently continues with the UN's tacit approval.

According to the Office for the Coordination of Humanitarian Affairs, in the first week of Israel's announcements, imports increased by 14 percent, but constitute only 23 percent of the weekly average that entered in the first five months of 2007 before the

135 Id.

136 Secretary-General Shocked by Israel's deadly raid on Gaza aid flotilla, UN News Centre, (May 31, 2010).

137 Id. ("The incident took place "at a time when all efforts should be focused on the need to build trust and advance Israeli-Palestinian negotiations, and nurture regional cooperation in support of peace," he said. "It is vital that the proximity talks continue.")

138 Gaza blockade untenable, U.S. believes, MSNBC.COM, June 3, 2010, at [http://www.msnbc.msn.com/id/37482341/ns/world\\_news-mideastn\\_africa/](http://www.msnbc.msn.com/id/37482341/ns/world_news-mideastn_africa/). [Hereinafter Blockade Untenable].

139 Id.

140 Secretary-General, Secretary-General, 'Encouraged' By Israel's Decision to Review Gaza Policy, Says United Nations Stands Ready to Scale Up Recovery Efforts 'If Enabled to Do So, U.N. Doc. SG/SM/12964, (June 17, 2010).

141 Id.

142 Amira Hass, Easing of siege may have negligible effect on Gaza, Haaretz (June 22, 2010) available at <http://www.haaretz.com/print-edition/news/amira-hass-easing-of-siege-may-have-negligible-effect-on-gaza-1.297552>.

imposition of the blockade.<sup>143</sup> Gisha, an Israeli organization dedicated to the Freedom of Movement found that Israel's easement did not mean an end to its "economic warfare" upon the Strip, thereby perpetuating the population's aid-dependent status.<sup>144</sup>

Despite the negligible impact of Israel's reformed policy, Israeli officials believe that its easement is rehabilitating the State's hobbled relationship to the UN. Alon Liel, former director general of the Israeli foreign ministry, explained, 'Israel eased the boycott meaningfully. Maybe we've scored some points at the UN because Israel revealed some sensitivity to the pressure.'<sup>145</sup> In what appears to be a reaction to Israel's diplomatic efforts, the Secretary-General's office announced that only land routes, and not the sea, should be used to deliver aid to Gaza.<sup>146</sup> In the best-case scenario as concerns the rule of law, the illegal nature of the blockade continues to evade scrutiny, and in the worst case, the UN has implicitly suggested that the blockade is legal by insisting that aid convoys should respect Israel's naval blockade. In both cases, the UN exhibits no resistance to Israel's challenge of the existing legal order.

### c. Implications of the UNSC's failure to uphold the rule of law

The UNSC's failure to uphold the rule of law, and worse its flagrant disavowal of it, is in and of itself a significant finding as it constitutes an abrogation of its Charter. In the case of the Gaza blockade, such failure has also had serious implications for the state of international peace and security: the UN has left confusion where there should exist clarity regarding the applicable legal order and appropriate use of force in Gaza; it has provided poor guidance to member states who are not fulfilling their obligations pursuant to Common Article 1 of the Geneva Conventions; and it has an untold impact on the authority afforded to international law and the UN among other states.

#### i. The Security Council's inadequate response to the blockade has resulted in a lack of clarity on the applicable legal regime during a military occupation

Israel has deliberately worked to shift existing international humanitarian law as it applies to Gaza by insisting that it is engaged in an armed conflict with Hamas and is therefore able to invoke self-defense pursuant to Article 51, notwithstanding the fact that it is an Occupying Power in the Gaza Strip, and therefore responsible for the lack of law or order therein. In doing so, Israel is purporting that it can both be an occupying power as well as a belligerent engaged in an international armed conflict. This would mean that Israel has the advantage of applying law enforcement force upon Gaza's population, denying them of subsistence, sovereignty, and adequate means to defend itself, as well as legitimate force available during armed hostilities. Moreover, because Israel insists that it ended its occupation upon disengagement from Gaza in 2005, it has rebuffed its duties as an occupying power. Essentially, Israel would render Gaza a legal black hole where the only applicable law was its own. By failing to characterize the blockade as illegal as well as failing to compel Israel to comport with the existing legal order defined by the international community, the UN has left Israel's deliberate attempts unchallenged.

In addition to the devastating impact on international peace and security, specifically on Gaza's population, the UN's failure to resist Israel's attempts weakens its authority, weakens international law, and leaves confusion where there should exist clarity about the relationship between *jus ad bellum* and *jus in bello*. Such lack of clarity serves to undermine the entire regime of occupation law, which is intended to afford greater protection to civilian populations. Alternatively the lack of clarity expands the available use of force to states and empowers them to determine what the law is in the furtherance of its national interests. This blatantly undermines the purpose of humanitarian law, which is not meant to embolden states but to protect civilians by placing limits on state behavior during armed conflict. This has untold consequences upon populations living under occupation or who come to live under occupation as the situation in Gaza has only begun to demonstrate.

While the UN is tending to the political sensitivities of the Middle East peace process it has foregone its responsibilities as a guarantor of international law wherefrom flows peace and security. The signal to states is that while the law is noble, it can and should be marginalized when it obstructs political expediency. States, bound by international law, will surely not object to relief from such responsibilities; however, citizens, aliens, refugees, stateless persons, and civilians in general will bear the violent brunt of this shift.

143 See UN: Easing of Gaza blockade not enough, Palestine Note, June 25, 2010, available at <http://palestinernote.com/cs/blogs/news/archive/2010/06/25/un-ease-of-gaza-blockade-not-enough.aspx>.

144 Unraveling the Closure of Gaza, (Gisha/Israel), Jul. 7, 2010) available at <http://www.gisha.org/UserFiles/File/publications/UnravelingTheClosureEng.pdf>

145 Joshua Mitnick, Israel signals new cooperation with UN over Gaza flotilla, The Christian Science Monitor, Jul. 26, 2010.

146 Id. ("On Friday, UN Secretary General Ban Ki Moon's spokesman, Martin Nesirky, said that the aid to Gaza should be delivered by established land routes rather than the sea...")

#### ii. The UNSC has provided poor guidance to member states whose national positions reflect the political and moral response to the humanitarian crisis that fails to mention its illegal nature

Common Article 1 of the Geneva Conventions imposes on High Contracting Parties the duty to "respect and to ensure respect for the present Convention in all Circumstances."<sup>147</sup> In relation to the Gaza blockade, this would amount to imposing sanctions (i.e., trade, military, diplomatic) upon Israel for its contravention of the Fourth Geneva Conventions. The UN's politicized and unfair treatment of the blockade has provided poor guidance to its member states and influenced their understanding of the blockade's legal nature leading them to fall short of their legal obligations pursuant to Common Article 1.

In a random sampling of nine states and the European Union, only three states, India,<sup>148</sup> Brazil,<sup>149</sup> and France<sup>150</sup> described the violation as a contravention of international law. Notably, Norway,<sup>151</sup> Sweden,<sup>152</sup> Britain,<sup>153</sup> and the EU<sup>154</sup> reiterated the Secretary-General's description of the blockade as "counterproductive" for failing to provide Israel with greater security. Russia<sup>155</sup> and Malaysia<sup>156</sup> called for an immediate end to the blockade, but neither described the policy as illegal. Finally, the U.S., in line with most of the world, described it as "untenable" and called for a different policy that would ensure Israel's security while alleviating impoverishment among Gaza's Palestinian population.<sup>157</sup> The random sampling indicates that most states have followed the lead of the Security Council and mirrored its politicized approach on a national level. Such an approach seeks to balance Israel's security interests with the humanitarian conditions of Palestinians in Gaza without reference to international law on the matter, thereby failing to resist Israel's challenge of the international legal order and failure to fulfill its duties under Common Article 1.

#### iii. The precise extent to which the UNSC's inadequate response to the Gaza blockade will have an unknown impact on the rule of law and the legitimacy of the United Nations

Arguably the UN's failure to resist Israel's attempt to shift international law has had the most devastating impact on its own, as well as on international law's, authority. One cannot document with any precision the international community's deference to the UN or the rule of law, but it certainly smacks of hypocrisy for the UN to insist upon the adherence to certain standards among member states that it itself has been unable to meet. The UN has created a legitimate argument among all states that the law is not applied equally nor is it immune from political influence. Instead the UN has made it more difficult for itself to exercise its own moral and legal authority among states that stand in violation of international law. A recent and telling example is the attempted prosecution of Sudan's sitting President Omar al-Bashir.

The International Criminal Court issued an arrest warrant to al-Bashir for crimes against humanity, war crimes, and genocide in March 2009.<sup>158</sup> The Court has failed to execute its warrant and the Organization of African States, the League of Arab States, the Non-Aligned Movement, and the governments of Russia and China have rejected the decision.<sup>159</sup> Failure to generate political support among African and Arab nations for the prosecution of an alleged war criminal by the world's highest ranking criminal court is indicative of the battered legitimacy of the rule of law and the UN.

147 The Geneva Conventions (1949).

148 R. Vasudevan, India, UN Security Council condemn Israeli attack on Gaza aid flotilla, Asian Tribune, June 1, 2010.

149 Id.

150 Statement of French Foreign Ministry, Blockade of Gaza (Jan. 21, 2008).

151 Statement of Royal Norwegian Ministry of Foreign Affairs, Positive that Israel has decided to ease Gaza blockade, June 21, 2010.

152 Sweden's FM blasts Israel's 'foolish' policy in Gaza, The Swedish Wire, June 7, 2010.

153 Statement of Foreign Secretary of Britain, Foreign Secretary statement on Gaza flotilla, (May 31, 2010).

154 EU ministers: 'End Gaza blockade,' The Jerusalem Post, Jul. 10, 2010.

155 Russia calls for end to Gaza blockade, easing of humanitarian crisis, Rianovosti, Jul. 16, 2010.

156 Malaysia Will Request UN General Assembly To Seek ICJ Opinion on Freedom Flotilla, Bernama.com Jul. 11, 2010.

157 Blockade Untenable, supra note 138.

158 In the Case of The Prosecutor v. Omar Hassan Ahmad Al Bashir, 2009 I.C.C. (ICC-02/05-01/09) (Mar. 4).

159 Henry Owuor, After Bashir warrant, Sudan united in protest, Daily Nation, Mar. 5, 2009.

## V. Recommendations and questions for future research

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The UN's treatment of the Gaza blockade is a single and very recent case study which does not capture the breadth, scope, or trajectory of the UN's application of the rule of law in the Middle East. Still, if one could extrapolate lessons learned from a single case study taken from a broader context, there are two fundamental lessons learned. The first is that the UNSC may be inadvertently allowing a single state, through its consistent abrogation of it, to shift international humanitarian law and challenge the existing legal order without censure. The second is that the UNSC threatens to undermine its own legitimacy and the legitimacy of international law by failing to uphold the rule of law and resist that challenge in the name of maintaining peace and security. To address both lessons and restore its legitimacy, the UN should respond both substantively to Israel's behavior and structurally to its own procedural mechanisms. To achieve these goals, I recommend that the UN:

1. President of the Security Council issue a Presidential Statement and/or the Security Council pass a resolution declaring that the blockade is illegal and a threat to international peace and security;
2. Security Council invoke Chapter VII authority to use military force to reconstruct Gaza; and/or ensure the delivery of humanitarian relief throughout Gaza; and/or to impose sanctions on Israel;
3. Security Council affirm the International Court of Justice's Advisory Opinion on the Separation Wall thereby affirming that the only legitimate use of force in Gaza is subject to law enforcement standards;
4. Security Council incorporate international humanitarian law into all of its statements, declarations, letters, speeches, etc.;
5. Secretary General request that the Government of Switzerland, in its capacity as the depository of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, to convene a conference of High-Contracting Parties to the Fourth Geneva Convention to affirm its applicability to Gaza as well as discuss measures of enforcement; and
6. Empower the General Assembly to override a Security Council veto by a 2/3-majority vote to enable the UN to be a mechanism for the exercise of international collective will

## VI. Questions for future research

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Further research should be done in order for these findings to be representative of a whole and not just a slice of the UN's application of the rule of law to the Middle East. To that end, I suggest a few leading questions below to guide future research:

1. What is the extent of the U.S.'s influence upon the UN Security Council and how has the Security Council's behavior reflected and/or furthered U.S. foreign policy, if at all?
2. What are the other ways in which Israel has challenged the existing legal order in addition to the Gaza blockade? For example, what would a similar analysis look like when discussing the issue of targeted killings? The construction of the Separation Wall? Or the use of military force in the West Bank?
3. What are the ways that Israel has insisted that it can exercise self-defense against the territory it occupies notwithstanding the distinction between the laws of occupation and the laws of war in specific regard to Gaza? I began to disaggregate this question in this policy paper and it would be useful for future research on the same topic to include a discussion of the Security Council's treatment of Operation Cast Lead and its current treatment of the Goldstone Report.
4. How have U.S. and Israeli efforts converged on questions of self-defense since Al-Qaeda's attack on the U.S. since September 11, 2001?
5. Is there a demonstrable shift away from the emphasis on international law in relation to the Palestinian-Israeli conflict and towards a political solution envisioned by the Peace Process within the Security Council?
6. Finally, what does a comparative analysis of the Security Council's treatment of previous decisions rendered by the International Court of Justice tell us about the manner in which it dealt with the Court's 2004 Advisory Opinion on the Separation Wall? Does the Wall case study constitute a standard practice of an exception within the Council?