

THE PALESTINE YEARBOOK  
OF  
INTERNATIONAL LAW

Volume XVI  
2010

Martinus Nijhoff Publishers

in Cooperation with

Institute of Law, Birzeit University

The *Palestine Yearbook of International Law* is published in cooperation with the Birzeit University Institute of Law, under whose auspices it is edited. Established in 1993, the Institute of Law is research based and aims to contribute to the modernization of Palestinian legal structures both at the academic and professional levels.

All e-mail correspondence concerning the Yearbook should be sent to the Editor-in-Chief at: PYIL.editor@birzeit.edu. Posted correspondence may be sent to: Attn: *Palestine Yearbook of International Law*, BZU Institute of Law, P.O. Box 14, Birzeit, Palestine. Telecommunication may be directed to the Institute of Law, at: Tel: (972) (2) 298-2009; Fax: (972) (2) 298-2137.

*This book is printed on acid-free paper.*

ISSN: 1386-1972

ISBN: 978 90 04 21527 6

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# THE USE OF FORCE IN A COLONIAL PRESENT, AND THE GOLDSTONE REPORT'S BLIND SPOT

John Reynolds\*

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*The pragmatic compromise over the law on the use of force has lost its hegemonic position. State violence has become increasingly accepted and political struggle is now waged on its justifications... The Owl of Minerva will, unfortunately, only be allowed to spread its wings at dusk, when guns are already silent and the 'international community' is either scandalised by aggression or called upon to give legitimacy to a novel status quo.*<sup>1</sup>

## I. Hegemonic contestations and the use of force

The 'Goldstone Report'<sup>2</sup> is significant for its cogent documentation of potential international crimes and human rights violations committed in the context of Israel's 'Operation Cast Lead' in the Gaza Strip, as well as the light it shines on the habitual failure of authorities on both sides of the Israeli-Palestinian conflict to acknowledge and adequately investigate such crimes and violations. The authors of the Report, however, neglect to address important questions relating to the recourse to the use of force under international law.

The debate as to whether Israel's most extensive assault on the Gaza Strip since 1967 is more properly explained as a legitimate resort to force in self-defense or an impermissible act of aggression – or neither – exemplifies Martti Koskenniemi's 'hegemonic contestation' thesis: "the process by which international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents."<sup>3</sup> Through law, political struggle is waged on what legal terms such as 'aggression' and 'terrorism' mean; whether they will encompass the behavior of one's adversary without overly restricting the actions of oneself or one's ally. Engagement in such a struggle can be understood as a hegemonic technique in the sense that the aspiration is to make one's particular perspective of a given issue appear as the universal understanding. The lengthy negotiations in the UN General Assembly and the International Criminal Court's Assembly of States Parties over the definitions of the act and crime of aggression respectively – as well as the as yet unsuccessful attempts at the UN to produce a comprehensive convention on terrorism – are reflective of this reality: numerous participants seeking variously exclusive and inclusive definitions. Our uniform opposition to terrorism, for example, is dependent on the degree to which we can imprint the label of 'terrorist' on our preferred adversary.<sup>4</sup>

Part I of this essay reflects on some general contestations and recent trends relating to the use of force from the standpoint of international legal norms and practice.

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<sup>1</sup> Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17(2) CAMBRIDGE REVIEW OF INTERNATIONAL AFFAIRS 197, 204 (2004).

<sup>2</sup> Report of the United Nations Fact Finding Mission on the Gaza Conflict, Human Rights Council, UN Doc. A/HRC/12/48, September 15, 2009.

<sup>3</sup> Koskenniemi, *International Law and Hegemony* 199, *supra* note 1.

<sup>4</sup> *Id.* at 200.

Part II then introduces some socio-political themes relevant to the use of force in a contemporary geo-political setting that has been described as the ‘colonial present’. In this light, the specific hegemonic contestations surrounding Israel’s decision to attack and invade the Gaza Strip at the end of 2008, and the failure of the Goldstone Report to offer any clarification over the legality of that resort to force, will be examined in part III of the essay.

\*

The objectives underpinning the norms of modern international law that govern the use of force are, of course, the protection of peoples and the preservation of peace. This goes to the very *raison d’être* of the United Nations as articulated in Article 1(1) of its founding Charter, which pronounces the maintenance of international peace and security, the suppression of breaches of the peace, and the obligation to resolve disputes by peaceful means as among the purposes of the UN, in pursuance of its determination “to save succeeding generations from the scourge of war”.<sup>5</sup> Article 2(4) accordingly prohibits the threat or use of force by states in their international relations. The only two exceptions to this rule arise when force is resorted to under a Chapter VII Security Council mandate in the face of a breach of the peace; or in self-defense against an armed attack on one’s own territorial integrity or political independence within the meaning of Article 51. Recent developments in practice indicate a loosening of inhibitions to resort to the use of force both in cases of external intervention (irrespective of a Security Council mandate) and under an expanding notion of self-defense.

The collective enforcement system under Chapter VII was intended to “function in a regular and non-selective manner each time that the circumstances required it”, but in practice “[t]he Security Council’s reaction has oscillated, according to the crises in question, between rash action [...] and inertia [...] explained by a progressive disinterest in the protection of common values and interests on the part of the great powers where they have no direct interest; hence a shocking selectivity on the level of collective action.”<sup>6</sup> Such selectivity is apparent from even a brief review of precedent. When Iraq invaded Iran with tacit encouragement from Washington in 1980,<sup>7</sup> triggering what would turn out to be an horrific eight-year war, the Security Council took six days to adopt a resolution calling for a ceasefire, and refrained from condemning the Iraqi act of aggression or calling upon Iraq to withdraw its forces from Iran.<sup>8</sup> No action was taken by the UN or its members towards the restoration of peace. When Iraq invaded Kuwait ten years later, however, the Security Council passed a resolution in a matter of hours, acting under Chapter VII of the Charter,

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<sup>5</sup> UN Charter, Preamble.

<sup>6</sup> Georges Abi-Saab, *Whither the International Community?* 9 EUROPEAN JOURNAL OF INTERNATIONAL LAW 248, 264 (1998).

<sup>7</sup> See, e.g., Dilip Hiro, *THE LONGEST WAR: THE IRAN-IRAQ MILITARY CONFLICT* 71 (London: Routledge 1991).

<sup>8</sup> See UN Security Council Resolution 479 (September 28, 1980).

“condemn[ing] the Iraqi invasion of Kuwait”, and “demand[ing] that Iraq withdraw immediately and unconditionally all its forces”.<sup>9</sup> Within days another resolution was adopted imposing economic sanctions on Iraq,<sup>10</sup> and many more would follow,<sup>11</sup> culminating in a UN-authorized, US-led coalition force attacking Iraq in January 1991. Sandwiched between these two diverging reactions to Iraqi misadventures was, for example, a Security Council resolution in response to an Israeli air raid on Tunisia in 1985, which went further in its language and characterization of the incident as “an act of armed aggression”<sup>12</sup> but was not accompanied by any sanction or intervention against the offending state.

While this selectivity in collective intervention according to the political inclinations of the global hegemonic powers did certainly not dissipate with the thawing of the Cold War, there has been a discernible movement towards a particular type of interventionism in recent years. The failure of the international community to intercede in Rwanda and Srebrenica is routinely sounded as the alarm bell to remind us of the necessity of intervention in the next crisis. Sovereignty is being eroded in the face of the push for universal implementation of human rights, democracy and free market capitalism. The idea of ‘functional’ or ‘humanitarian’ intervention is invoked to lift the veil of sovereign authority, where deference to sovereignty is seen as an obstacle to the realization of human rights or democratic governance:

It is now commonplace to say that sovereignty ought not to shield tyrannical governments, that it is neither a mantra nor a taboo. We respect it if it brings us to valuable objectives, above all security, rights, and a structure of ruling that defers to Western vocabularies of democracy and the role [sic] of law. If sovereignty itself were to endanger those objectives, then as Western interveners in Kosovo in 1999 argued, there is surely no reason to respect it.<sup>13</sup>

The quagmire that arises for international lawyers from this contestation relates to the potential tensions between the perceived morality of the intervention and its legality. The NATO intervention in Kosovo in overt breach of the UN Charter was justified by its architects on the basis of a “moral duty” to “stop the violence and bring to an end the humanitarian catastrophe” in Kosovo.<sup>14</sup> Citing the ambivalent position taken by most lawyers that the NATO bombings and the consequent 500 civilian deaths were both formally illegal and morally necessary, Koskenniemi highlights a turn in the sentiments of international lawyers from formalism to ethics;

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<sup>9</sup> UN Security Council Resolution 660 (August 2, 1990).

<sup>10</sup> UN Security Council Resolution 661 (August 6, 1990).

<sup>11</sup> UN Security Council Resolutions 662 (August 9, 1990); 664 (August 18, 1990); 665 (August 25, 1990); 666 (September 13, 1990); 667 (September 16, 1990); 669 (September 24, 1990); 670 (September 25, 1990); 674 (October 29, 1990); 677 (November 28, 1990); 678 (November 29, 1990).

<sup>12</sup> UN Security Council Resolution 573 (October 4, 1985).

<sup>13</sup> Martti Koskenniemi, *Occupied Zone – “A Zone of Reasonableness”?* 41 ISRAEL LAW REVIEW 13, 32–33 (2008).

<sup>14</sup> NATO Press Release (1991) 041, Press Statement by Dr. Javier Solana, NATO Secretary-General following the Commencement of Air Operations (March 14, 1999).



lawyers imagining themselves as moral agents in a contemporary civilizing mission.<sup>15</sup> The imperial overtones of such a position provide cause for concern in so far as it “enlists political energies to support causes dictated by the hegemonic powers and is unresponsive to the violence and injustice that sustain the global everyday.”<sup>16</sup>

Going beyond Kosovo, while demonstrating that Third World sovereignty suffers from a number of relative deficiencies that can be attributed to the operation of colonialism within international law historically, Antony Anghie notes that at the very least, international law facilitated the transformation of colonial territories into states with the protections of formal sovereignty doctrines. The “recent examples of humanitarian intervention, and the new imperialism, challenge and undermine those doctrines.”<sup>17</sup> The dangers of the Kosovo precedent were underscored by the relative ease with which the US garnered multilateral support for an invasion of Iraq in 2003, again outside the normative and institutional parameters of international law. The ostensible premise for the invasion was two-fold: for the humanitarian purpose of liberating the Iraqi people from the iron fist of Saddam Hussein;<sup>18</sup> and to pre-empt any attack potentially emanating from Iraq against the US or its allies.

Which brings us to the second way by which international legal restrictions on the use of force have been challenged by state practice. The thinning-out of sovereignty in the face of humanitarian intervention has been paralleled by a converse thickening of sovereign discretion to revert to force in self-defense, even where an armed attack has not occurred as formally required by Article 51 of the UN Charter. While the

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<sup>15</sup> See generally Martti Koskeniemi, *‘The Lady Doth Protest Too Much’: Kosovo, and the Turn to Ethics in International Law*, 65, 2 MODERN LAW REVIEW 159 (2002).

<sup>16</sup> Id. at 160. It also bears noting here that engagement in hegemonic contestations is not confined to political actors and their legal advisors; courts and adjudicating bodies are invariably drawn in to the process, often deferring to particular hegemonic contestations in light of a given political or social context. An example emanating from the Kosovo situation is again illustrative. The December 2001 decision of the European Court of Human Rights in *Banković et al. v. Belgium et al.* held that the Court had no jurisdiction to hear claims of alleged violations of the European Convention on Human Rights by seventeen European states in the context of a NATO bombing mission on a civilian broadcasting office in Belgrade in 1999. The Grand Chamber ruled that the obligations of contracting states under the Convention are “essentially territorial” (paras. 61, 63, 67) and in that instance do not extend beyond their own boundaries. This stands in stark contrast with both earlier [for example, *Cyprus v. Turkey*; *Drozd and Janousek v. France and Spain*; *Loizidou v. Turkey*] and subsequent jurisprudence [*Ilascu and Others v. Moldova and Russia*; *Issa v. Turkey*] conferring extra-territorial obligations on contracting parties. It is apparent that the European Court has found itself less constrained to judge the acts of Turkish authorities in occupied Northern Cyprus than it did the acts of the western European powers in the months following the events of September 11, 2001. For further analysis see, for example, Erik Roxstrom, Mark Gibney & Terje Einarsen, *The NATO Bombing Case* (Banković et al. v. Belgium et al.) and *the Limits of Western Human Rights Protection*, 23 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 55 (2005).

<sup>17</sup> Antony Anghie, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 274 (Cambridge: Cambridge University Press 2005).

<sup>18</sup> The strategy of the imperial hegemon in masquerading beneath a pretence of liberation had been similarly employed in Iraq’s colonial history, with General F. S. Maude proclaiming to the people of Mesopotamia upon the assertion of British control over Baghdad in March 1917 that: “Our armies do not come into your cities and lands as conquerors or enemies, but as liberators.” Quoted in Niall Ferguson, *Hegemony or Empire?* 82, 5 FOREIGN AFFAIRS 154 (2003).

idea of pre-emptive self-defense is certainly not novel, it has assumed a more central role in the arsenal of military strategies in the age of chemical and nuclear weapons. During the Cold War and its prospect of mutually assured destruction, the rational goal of the doctrine of pre-emption was deterrence. The transformation of the security threats facing the global powers since the 1990s, characterised as emanating from irrational 'rogue states and terrorists', was invoked to lend credence to the inclusion of a right of pre-emption as part of the so-called 'Bush Doctrine':

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>19</sup>

The assertion that "[f]or centuries," international law has recognized a doctrine of pre-emptive use of force<sup>20</sup> comparable to that advocated by the Bush administration is somewhat disingenuous. Noam Chomsky points out how the war drums beaten by the Bush and Blair administrations in invading Iraq were "alarmingly similar to the policy that imperial Japan employed at Pearl Harbor," for which the Japanese were condemned in the post-War trials.<sup>21</sup>

Such an expansion of self-defense to cover established or even potential threats as opposed to actual armed attacks is clearly dangerous, but at the same time, can be presented as reasonable and even necessary for the maintenance of international peace and security. While the US-led invasions of Afghanistan and Iraq should ultimately be viewed as misguided and based on false assumptions regarding the nature of the threats presented, a taboo has nonetheless been broken and "absent a serious reform of the UN's war system, the pragmatic reasonableness of coping with threats before they rise will turn the law on the use of force on its head."<sup>22</sup> Thus, through the practice of the global powers, we see the danger of custom evolving contrary to the much-fêted 'spirit' of international law. Anghie voices legitimate concern that "[i]nternational law is now being subjected to various pressures that might ultimately result in the emergence of an international system that permits, if not endorses and adopts, quite explicitly imperial practices."<sup>23</sup> The US-led responses to the events of September 11, 2001, and the language of war and crusade so fervently adopted, have brought us back to pre-modern conceptions of the primitive Muslim world as the enemy against whom a 'just war' theory may be applied. Anghie's sketch of the colo-

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<sup>19</sup> US National Security Council, *National Security Strategy of the United States*, Chap. V (September 20, 2002).

<sup>20</sup> Id.

<sup>21</sup> Noam Chomsky, *Preventive war: the supreme crime*, LE MONDE DIPLOMATIQUE, August 11, 2003.

<sup>22</sup> Koskenniemi, *International Law and Hegemony* 203, *supra* note 1.

<sup>23</sup> Anghie, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 274, *supra* note 17.

nial history of war, conquest and self-defence suggests that Vitorian<sup>24</sup> and Victorian<sup>25</sup> colonial attitudes towards the use of force are being reproduced at the beginning of the third millennium. While critiquing the seemingly paradoxical notion of “defensive” and “acceptable” imperialism,<sup>26</sup> Anghie worryingly presents “imperialism as self-defence” as a (re-)emerging paradigm for the use of force in contemporary international relations.<sup>27</sup>

## II. The use of force in the ‘colonial present’

In his study of the intersecting cartographies of violence in Afghanistan, Palestine and Iraq, geographer Derek Gregory uses the events of September 11, 2001 as a fulcrum around which to map the barbed boundaries of modern imperial power in a “colonial present.”<sup>28</sup> Referring to an intrinsically colonial modernity and its performative force, Gregory relates Edward Said’s “imaginative geographies” – the self-constructions that underwrite and animate one’s constructions of the ‘other,’ folding distances into differences by amplifying spatial partitions and enclosures that divide ‘us’ from ‘them’<sup>29</sup> – to the West’s attitudes towards Islam and the Orient in the wake of the attacks of September 11th. He demonstrates how Orientalist and colonial tendencies persist in Western representations of, and relations with, the Islamic world. While making it clear that his analysis is not to imply that we remain stuck in the nineteenth century, Gregory suggests that some of the particulars that inhere within colonial history linger today and have been projected into the colonial present. This suggestion is advanced through a narration of the ‘war on terrorism’ as a continuum of spatial stories set in Afghanistan, Iraq and Palestine. In analyzing America’s reaction as to why ‘they’ hate ‘us’ (with the focus, crucially, on ‘them’ rather than ‘us’), Gregory draws on Michael Shapiro’s writings linking geography with an ‘architecture of enmity,’ whereby territorially elaborated collectivities locate themselves in the

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<sup>24</sup> According to Vitoria, whatever was required by self-defence was legitimate: “In war everything is lawful which the defence of the common weal requires.” Franciscus de Vitoria, *DE INDIS ET DE IVRE BELLI RELECTIONES* 171 (Washington DC: Carnegie Institution, John Pawley Bate trans. 1917). Self-defence was also the vehicle by which Vitoria justifies conquest: while “[e]xtension of empire is not a just cause of war”, self-defence is, and it was through waging a ‘defensive’ war against the Indians and their territory that Spanish imperial occupation could be legitimised. See Vitoria, *id.*, 170, and Anghie, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 294, *supra* note 17.

<sup>25</sup> Anghie, *id.* at 292, argues that the notion of ‘defensive imperialism’ derives its power and resonance in part through its invocation of an old set of ideas, those of the ‘civilising mission,’ which were of course central to European colonial systems, not least that of the Victorian British Empire.

<sup>26</sup> See, e.g., Robert Cooper, *The New Liberal Imperialism*, *THE OBSERVER*, April 7, 2002; Michael Ignatieff, *Nation-Building Lite*, *NEW YORK TIMES MAGAZINE*, July 28, 2002; Niall Ferguson, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* (New York: Basic Books 2003).

<sup>27</sup> Anghie, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 273–309, *supra* note 17.

<sup>28</sup> Derek Gregory, *THE COLONIAL PRESENT* (Malden, MA: Blackwell 2004).

<sup>29</sup> See Edward W. Said, *ORIENTALISM* 44–73 (London: Penguin 1978).

world and “practice the meanings of Self and Other that provide the conditions of possibility for regarding others as threats or antagonists.”<sup>30</sup>

By exploiting these conditions of possibility and mobilizing the imaginative geographies constructed, America justified its wars on Afghanistan and Iraq. Through these wars, a distinctly colonial present crystallizes by virtue of an integrated machinery of geo-politics and geo-economics – as well as more mundane but equally significant cultural forms and practices – “that mark people as irredeemably ‘Other’ and that license the unleashing of exemplary violence against them.”<sup>31</sup> As one commentator observed in the context of the American decision to go to war in Afghanistan, “[m]ore than a rational calculation of interests takes us to war. People go to war because of how they see, perceive, picture, imagine and speak of others: that is, how they construct the difference of others as well as the sameness of themselves through representation.”<sup>32</sup> The demonization of the Oriental other, the fear-mongering and “mediatization of terror”<sup>33</sup> in the aftermath of September 11th, and the proliferation of false and misleading information (the folding of Al-Qaeda and Afghanistan into one another; the ‘evidence’ of Saddam Hussein’s weapons of mass destruction, et cetera) all fed into the construction of an us-versus-them conceptual framework.

Similar forces have been at play for some time in Israel/Palestine, and are at their zenith in respect of Gaza. Near-universal depiction within Israel of the majority of Palestinians as terrorists stems from the imaginative geographies that separate the Israeli populace from its Palestinian neighbors. This is the underpinning of the architecture of enmity that pervades almost all levels of society, evidenced from calls by Israeli leaders to block supplies to Gaza in order to “put the Palestinians on a diet,”<sup>34</sup> decrees by prominent rabbis approving<sup>35</sup> and inciting<sup>36</sup> attacks by the Israeli army on Palestinian civilians, units of soldiers printing unofficial t-shirts adorned with shocking images (a pregnant Palestinian woman in the crosshairs of a sniper rifle, for example) and equally shocking slogans (‘One shot, two kills’).<sup>37</sup>

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<sup>30</sup> Michael J. Shapiro, *VIOLENT CARTOGRAPHIES: MAPPING CULTURES OF WAR* xi (Minneapolis: University of Minnesota Press, 1997).

<sup>31</sup> Gregory, *THE COLONIAL PRESENT* 16, *supra* note 28.

<sup>32</sup> James der Derian, *The War of Networks*, 5(4) *THEORY & EVENT* §.21 (2001).

<sup>33</sup> Gregory, *THE COLONIAL PRESENT* 25, *supra* note 28.

<sup>34</sup> Dov Weisglass, advisor to then Israeli Prime Minister Ehud Olmert, quoted in Conal Urquhart, *Gaza on brink of implosion as aid cut-off starts to bite*, *THE OBSERVER*, April 16, 2006.

<sup>35</sup> During ‘Operation Cast Lead,’ four leading Israeli rabbis issued a Halakhic [Jewish legal] ruling stating: “When a population living near a Jewish town sends bombs at the Jewish town with the purpose of killing and destroying Jewish existence there, it is permitted, according to Jewish Law, to fire shells and bombs at the firing sites, even if they are populated by civilians.” See Hillel Fendel, *Top Rabbis: Morally OK to Fire at Civilian Rocket Source*, *ARUTZ SHEVA/ISRAEL NATIONAL NEWS*, December 30, 2008.

<sup>36</sup> See, e.g., Amos Harel, *IDF rabbinate publication during Gaza war: We will show no mercy on the cruel*, *HAARETZ*, January 26, 2009; Chaim Levinson, *Police release rabbi arrested for inciting to kill non-Jews*, *HAARETZ*, July 27, 2010.

<sup>37</sup> See Uri Blau, *Dead Palestinian babies and bombed mosques – IDF fashion 2009*, *HAARETZ*, March 20, 2009.

Such predilections point us towards Giorgio Agamben's thesis on the concept of 'bare life,' whereby Agamben presents *homo sacer*, a figure of archaic Roman law defined as one who can be killed but not sacrificed. As such, this was a status situated outside both divine and human law: *hominis sacri* could not be sacrificed as their deaths were of no additional value to the gods, but they could nonetheless be killed with impunity as their lives were equally worthless to society.<sup>38</sup> Agamben transposes the figure of *homo sacer* (or 'life that does not deserve to live')<sup>39</sup> to modernity through his marginalization by the operation of sovereign power. *Hominis sacri* are encompassed as objects of sovereign power, but precluded from being its subjects. Socially conditioned states of suspended life and suspended death emerge to "exemplify the distinction that Agamben offers between 'bare life' and the life of the political being (*bios politikon*), where this second sense of 'being' is established only in the context of political community."<sup>40</sup> In this sense, 'bare life' is constituted through the construction and performance of the space of the exception: a grey area between law and non-law that is conducive to exceptional practices characteristic of executive sovereign power.<sup>41</sup>

The most extreme manifestation of such a space of the exception, for Agamben, is that of the 'camp,' such as the *campos de concentraciones* created by the Spanish in Cuba or the concentration camps into which the English herded the Boers in South Africa, whereby "a state of emergency linked to a colonial war is extended to an entire civil population."<sup>42</sup> Such camps are not born out of ordinary law but out of a state of exception and martial law, with the inhabitants stripped of legal status in the eyes of their captors, and so completely deprived of their rights and prerogatives that no act committed against them could appear any longer as a crime. They are treated as *hominis sacri* by the sovereign power that incarcerates them, reduced to 'bare life.' For Agamben, the clearest embodiments of such a situation were the Nazi *Lager*.<sup>43</sup>

Without wishing to equate the circumstances of the Gaza Strip with those of what we understand from history as specific to a concentration camp, it is clear that the notion of bare life is relevant here, where the Israeli policy of keeping Gaza's population penned inside the besieged strip of land has led to the 'open-air prison' analogy becoming a common refrain.<sup>44</sup> Gaza is perhaps unique in the sense that it has a majority refugee population: 75 per cent of its inhabitants are UN-registered

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<sup>38</sup> Giorgio Agamben, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 8–10, 71–74, 83 (Stanford, CA: Stanford University Press, Daniel Heller-Roazen trans. 1998) (1995).

<sup>39</sup> Agamben, *HOMO SACER*, id. at 136–143.

<sup>40</sup> Judith Butler, *PRECARIOUS LIFE* 67 (London: Verso, 2004).

<sup>41</sup> This is a highly simplified annotation of Agamben's intricate juridico-philosophical arguments. For a full elucidation, see Agamben, *HOMO SACER*, *supra* note 38, and his *STATE OF EXCEPTION* (Chicago: University of Chicago Press, Kevin Attell trans. 2005) (2003).

<sup>42</sup> Agamben, *HOMO SACER*, id. at 166.

<sup>43</sup> Id. at 167.

<sup>44</sup> This refrain has been sounded not only by NGOs, journalists and activists, but by authorities such as the UN Under-Secretary-General for Humanitarian Affairs. See, e.g., *UN humanitarian chief warns of disaster if Gaza siege continues*, HAARETZ, March 12, 2010.

refugees,<sup>45</sup> approximately half of whom continue to live in refugee camps over 60 years after being ethnically cleansed from what is now Israel. The bare life status of Gaza's population is further highlighted by its economic suppression, with near comprehensive siege and blockade of the Strip since 2006 by Israel preventing movement of goods and services, and limiting supplies of fuel, electricity, water and medical equipment. This has exacerbated the sense of despair and hopelessness among an already impoverished society. The gratuitous killing of Gazan civilians by the Israeli military has continued for many years now, with no question of genuine accountability arising to date. In a deliberate symmetry with America's captives from its foray in Afghanistan, Palestinian fighters in Gaza have been categorized as unlawful combatants and deprived of their rights accordingly.<sup>46</sup> Civilians and combatants alike are arrested under Israeli legislation<sup>47</sup> and detained in Israel but not granted rights under Israeli law. Their plight is intermittently excluded from the scrutiny of the international media by Israel's administration of the border crossings.<sup>48</sup> All of this serves to render Gaza as an exemplar of the space of the exception, a zone of in-distinction established by Israel's sovereign power, which asserts "a monopoly of legitimate violence even as it suspends the law and abandons any responsibility for civil society."<sup>49</sup> Under such circumstances, Israel the occupier is essentially an unrestrained sovereign, with the purported temporariness of the occupation granting it the boundless license of the state of emergency.<sup>50</sup> Even Israel's competing claim that it no longer occupies the Gaza Strip<sup>51</sup> feeds into the concept of bare life, amounting as it does to an attempt to exclude Gazans from Israeli responsibility while simultaneously preventing the Palestinians from exercising their own sovereignty. This produces what Agamben might describe as "a zone of anomie, in which a violence

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<sup>45</sup> 1,106,195 of Gaza's estimated 1,500,000 population are refugees registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). See <<http://www.unrwa.org/etemplate.php?id=64>>.

<sup>46</sup> See Israel's Internment of Unlawful Combatants Law 5762–2002.

<sup>47</sup> Shortly after its 'disengagement' from Gaza in 2005, Israel enacted legislation in the form of the 2006 Criminal Procedure Law, which in practice has been used almost exclusively by the Israeli authorities as a means by which to continue to incarcerate Palestinians from the Gaza Strip in detention facilities in Israel, and to prosecute them in Israeli criminal courts. See Criminal Procedure (Enforcement Powers – Detention) (Detainees Suspected of Security Offences) (Temporary Provision) Law 5765–2006.

<sup>48</sup> On November 5, 2008 Israel imposed a ban on foreign journalists entering Gaza, which would last until the end of 'Operation Cast Lead' (suggesting a pre-meditated plan on the part of the Israeli authorities to limit information emanating from the Gaza Strip once the military campaign would begin). On January 2, 2009, in the midst of 'Operation Cast Lead,' the Israeli Supreme Court upheld this ban, in response to a petition by the Foreign Press Association. See *Foreign Press Association v. GOC Southern Command*, HCJ 9910/08 (Judgment of January 2, 2009).

<sup>49</sup> Derek Gregory, *Palestine and the "War on Terror,"* 24(1) COMPARATIVE STUDIES OF SOUTH ASIA, AFRICA AND THE MIDDLE EAST 183, 189 (2004).

<sup>50</sup> Adi Ophir, *A Time of Occupation*, in THE OTHER ISRAEL 51, 60 (Roane Carey & Jonathan Shainin eds., New York: The New Press 2002).

<sup>51</sup> See, for example, the government position as upheld by the Israeli Supreme Court in *Bassiouni Ahmed et al v Prime Minister*, HCJ 9132/07 (Judgment of January 30, 2008), para. 12.

without any juridical form acts.”<sup>52</sup> Here we see how Agamben’s abstract generalities may operate in reality. Indeed, Gaza exemplifies what Judith Butler highlights in her critique of Agamben as the tangible elements that his general claims on sovereign power and bare life fail to show: “how this power functions differentially, to target and manage certain populations, to derealize the humanity of subjects who might potentially belong to a community bound by commonly recognized laws; ...how sovereignty, understood as state sovereignty in this instance, works by differentiating populations on the basis of ethnicity and race, how the systematic management and derealisation of populations function to support and extend the claims of a sovereignty accountable to no law; how sovereignty extends its own power precisely through the tactical and permanent deferral of the law itself.”<sup>53</sup>

The violence exacted during ‘Operation Cast Lead’ suggests that for the Israeli military, all Gazans (political figures, police cadets, fighters and terrorists; civilians and combatants alike) are regarded as *hominis sacri*, stripped of their status as protected persons and of the safeguards of international law. Such is evident from the litany of incidents documented in the Goldstone Report, the testimonies of the Israeli soldiers themselves,<sup>54</sup> and more broadly from the executive decision to launch such a wholesale and wanton attack on a crowded, impoverished and already besieged territory. The Palestinians are reduced to targets haunted by the specter of *homo sacer*; subject not only to lethal fire and home raids by Israeli troops, but to white phosphorous raining down from the skies, and to surveillance and attack from above by unmanned drones.

Thus, Gaza, like Afghanistan and Iraq, can be understood as a brutal war of ‘civilisation’ against ‘barbarism’ within the space of the exception. One is reminded of Edward Said’s portrayal of the war on Iraq as “imperial arrogance unschooled in worldliness...undeterred by history or human complexity, unrepentant in its violence and the cruelty of its technology.”<sup>55</sup>

Israel’s similarly unrepentant violence in Gaza for the duration of ‘Operation Cast Lead’ was approved of domestically on the back of perceptions of the Palestinians akin to those of the ‘native’ in classic colonial systems, and to a legal philosophy reminiscent of that which prevailed during colonial encounter to enable the European powers to rule over non-Europeans without the administrative burdens of formal sovereignty.<sup>56</sup>

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<sup>52</sup> Agamben, STATE OF EXCEPTION 59, *supra* note 41.

<sup>53</sup> Butler, PRECARIOUS LIFE 68, *supra* note 40.

<sup>54</sup> See, e.g., Breaking the Silence, *Soldiers’ Testimonies from Operation Cast Lead, Gaza 2009*, containing the testimonies of thirty Israeli soldiers who felt “deep distress at the moral deterioration of the IDF.”

<sup>55</sup> Edward Said, *The Academy of Lagado*, LONDON REVIEW OF BOOKS, April 17, 2003.

<sup>56</sup> See generally Antony Anghie, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW, *supra* note 17.

### III. The use of force in Gaza and the Goldstone Report's blind spot

It was thus against a backdrop of expanding sovereign freedom internationally to resort to force, and prevailing conditions of possibility domestically to execute unfettered violence against the *hominis sacri* of Gaza, that Israel launched 'Operation Cast Lead.' On the morning of the initiation of the operation, Israeli Ambassador to the UN Gabriela Shalev formally notified the Secretary-General and the Security Council that "after a long period of utmost restraint, the government of Israel has decided to exercise, as of this morning, its right to self-defence... as enshrined in Article 51 of the Charter of the United Nations."<sup>57</sup> The twenty-two-day air, land and sea offensive that followed left more than 1,400 Palestinians and thirteen Israelis dead, and caused massive infrastructural damage. It triggered numerous reports and inquiries by international bodies and NGOs, the common primary focus of which was the conduct of hostilities, and the documentation of discrete and systemic violations of international humanitarian and human rights law committed in the course of those hostilities.<sup>58</sup> Prior questions as to the underlying causes of the conflict and its *prima facie* legality under the *jus ad bellum* – whether Israel's actions were a legitimate exercise of the right to self-defense against an armed attack, or an unlawful act of aggression, or neither – were for the most part overlooked.<sup>59</sup> When it was published in September 2009, the much-anticipated Goldstone Report to the UN Human Rights Council proved no different in its neglect of these questions. This was at once unsatisfactory yet unsurprising. Unsurprising given the difficult and contentious nature of the questions, their implications for all states confronted by the threat of transnational terrorism, and their potential to 'distract' from the Goldstone Mission's primary mandate to investigate violations of international human rights law and international humanitarian law in the context of the conflict. Unsatisfactory given the significance of such a fundamental question not just for Gaza but for international law generally, the lack of clarity over the parameters of the use of force as state practice continues to stretch

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<sup>57</sup> See identical letters dated December 27, 2008 from the Permanent Representative of Israel to the UN addressed to the Secretary-General and to the President of the Security Council respectively: Letter to UN Secretary General, S/2008/816 – 27/Dec/08.

<sup>58</sup> See, for example, *Report of the Fact-Finding Committee on Gaza: No Safe Place*, presented to the League of Arab States on April 30, 2009 ('Arab League Report'); *Report of the United Nations Headquarters Board of Enquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 January 2009*; Amnesty International, *The Conflict in Gaza: A briefing on applicable law, investigations, and accountability* (January 2009); Amnesty International, *Israel/Gaza: Operation 'Cast Lead': 22 Days of Death and Destruction* (July 2009); Human Rights Watch, *Rain of Fire: White Phosphorus in Gaza* (March 2009); Human Rights Watch, *White Flag Deaths: Killings of Palestinian Civilians during Operation Cast Lead* (August 2009).

<sup>59</sup> The Arab League-mandated Fact-Finding Committee was one exception in that its report did briefly consider events preceding the initiation of 'Operation Cast Lead,' and did to a certain extent address questions relating to self-defence and aggression. The other notable exceptions are the reports of UN Special Rapporteur Richard Falk, which will be referred to in further detail below.



international legal norms in a bid to loosen them, and the volume of competing hegemonic contestations over these questions.

One of Israel's primary criticisms of the Goldstone Report is that it disregards the right of democratic states to self-defense, and provides legitimacy to terrorism.<sup>60</sup> In fact, the report refrains from challenging Israel's invocation of self-defense as the basis for its use of force. The Israeli Ministry of Foreign Affairs notes with disapproval that the report fails to mention the right to self-defense.<sup>61</sup> This failure, conversely, can be taken as evidence of the report's assumption that Israel was entitled to act 'defensively' against Gaza under the circumstances. The criticism of the report revolves around Israel's excessive and indiscriminate uses of force, rather than its recourse to force in the first instance.

This is despite the fact that, in pursuance of its mandate to investigate violations of international law in the context of 'Operation Cast Lead,' the Goldstone Report explicitly includes the Charter of the United Nations within the normative framework for the Fact-Finding Mission:

The normative framework for the Mission has been general international law, the Charter of the United Nations, international humanitarian law, international human rights law and international criminal law.<sup>62</sup>

Article 51 of the Charter, however, receives no mention in the report, and the Israeli claim to self-defense is not weighed from the perspective of international law. The authors fail even to note that they had decided not to address questions of *jus ad bellum*, for whatever reason. In this sense, the report effectively endorses the dubious narrative that Israel attacked the Gaza Strip in legitimate pursuit of its own defense against a terrorist adversary. Judge Goldstone has confirmed that the Mission did "absolutely not" dispute Israel's right to self-defense: "What we look at is how that right was used. We don't question the right."<sup>63</sup> Thus, the Goldstone Report reserved its strongest findings for the conclusion that in the exercise of that right, Israel unlawfully targeted Gazan civilians and the population as a whole:

While the Israeli Government has sought to portray its operations as essentially a response to rocket attacks in the exercise of its right to self-defence, the Mission considers the plan to have been directed, at least in part, at a different target: the people of Gaza as a whole.<sup>64</sup>

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<sup>60</sup> See, e.g., Israeli Ministry of Foreign Affairs, *Goldstone Fact-Finding Report: A challenge to democracies fighting terror*, September 17, 2009; Israeli Ministry of Foreign Affairs, *Israel's analysis and comments on the Gaza Fact-Finding Mission Report*, September 15, 2009.

<sup>61</sup> Israeli Ministry of Foreign Affairs, *Initial Response to Report of the Fact Finding Mission on Gaza*, September 24, 2009.

<sup>62</sup> Goldstone Report, *supra* note 2, para. 155.

<sup>63</sup> Transcript of interview with Judge Richard Goldstone by Bill Moyers on *The Journal*, October 23, 2009. Available at <<http://www.pbs.org/moyers/journal/10232009/transcript1.html>>.

<sup>64</sup> Goldstone Report, *supra* note 2, para. 1883.

While this determination of Israel's "overall policy aimed at punishing the Gaza population"<sup>65</sup> provides a clear window into an Israeli mindset that views the people of Gaza as *hominis sacri*, the disproportionate nature of Israel's use of force should not be allowed to detract attention from the initial question of the legality of the use of force. This question cannot be detached from the proportionality of the force used, particularly in a context such as the Gaza Strip, in which "a massive assault on a densely populated urbanized setting where the defining reality could not but subject the entire civilian population to an inhumane form of warfare."<sup>66</sup>

Self-defence and aggression are on opposite sides of the same scales of public international law that seek to weigh the legality of the use of force. They are for all intents and purposes mutually exclusive; one being the legitimate right of a state to defend its territorial integrity and political independence in the face of an armed attack; the other an unlawful, indeed criminal, act that flies in the face of the foundational UN principles of international peace and security, and cooperation between states.

Israel was accused of aggression in its attack on Gaza by a diverse range of authorities, from governments including Chile,<sup>67</sup> Namibia<sup>68</sup> and Malaysia,<sup>69</sup> to the UN Human Rights Council<sup>70</sup> and the President of the General Assembly,<sup>71</sup> to a collective of over thirty international lawyers in a letter published in *The Sunday Times* on January 11, 2009.<sup>72</sup> Victor Kattan, one of the letter's signatories, makes an argument for a case of aggression in an article published in the previous edition of the *Palestine*

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<sup>65</sup> Id., para. 1681.

<sup>66</sup> *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk*, UN Doc. A/HRC/10/20 (17 March 2009), para. 10.

<sup>67</sup> Statement of Chilean representative to the UN General Assembly, Tenth Emergency Special Session, 34th & 35th Meetings. See UN General Assembly Department of Public Information, *General Assembly Demands Full Respect for Security Council Resolution 1860*, UN Doc. GA/10809/Rev.1 (January 16, 2009). See also the statements of Libya, Jordan, Nicaragua, Kuwait, Oman, Tunisia, Ecuador, Bolivia, Pakistan, the Maldives, Mauritania, Lebanon, Cuba and Iran referring to Israel's actions as aggression.

<sup>68</sup> Press Release, Namibian Ministry of Foreign Affairs, quoted in *Gaza Carnage Must Stop*, THE NAMIBIAN, January 9, 2009.

<sup>69</sup> Letter of January 14, 2009 from the Permanent Representative of Malaysia to the United Nations to the President of the General Assembly, UN Doc. A/ES-10/444 (January 16, 2009).

<sup>70</sup> UN Human Rights Council Res. S-9/1, UN doc. A/HRC/S-9/L.1/Rev. 2 (January 12, 2009), para. 7

<sup>71</sup> UN Press Release, On Gaza airstrikes – Statement by the President of the 63rd Session of the United Nations General Assembly (December 27, 2008).

<sup>72</sup> *Israel's bombardment of Gaza is not self-defence – it's a war crime*, THE SUNDAY TIMES, January 11, 2009, at 20. It must be noted that the signatories of the letter included Christine Chinkin, one of the members of the Goldstone fact-finding mission. This fact provided an avenue for Israeli criticism of the Goldstone Report on the basis that Prof. Chinkin's impartiality had been compromised by signing a letter suggesting Israel was responsible for war crimes and for committing an act of aggression rather than one of self-defence. There exists also the possibility that the Goldstone Report's reluctance to deal with the initial recourse to force may have been based partly on a desire to avoid any further controversy potentially arising from the fact that Chinkin had already made a pronouncement on the matter.

*Yearbook of International Law*.<sup>73</sup> Kattan does acknowledge that if the Gaza Strip is considered to be territory under Israel's belligerent occupation, then the applicable law is to be found in the *jus in bello* of international humanitarian law rather than the *jus ad bellum*, and the question of aggression would not normally arise.<sup>74</sup> Two alternative arguments are presented to counter this, however. The first takes Israel's own contestations and flips them on their head. If the dubious Israeli narrative that Gaza is no longer occupied territory<sup>75</sup> is accepted, and Israel accordingly entitled to argue that its use of force was in self-defence, then should that plea fail on its merits, Israel inevitably opens itself up to accusations of aggression against the non-occupied territory.<sup>76</sup> This seems somewhat opportunistic, given that Kattan himself refutes Israel's claims regarding self-defence and considers that the Gaza Strip remains occupied territory. The second, and perhaps more grounded argument, challenges the correctness of the assumption that aggression may not be committed in the context of an occupation or against a non-sovereign territory. Here, Kattan refers to "several instances of state practice both prior to and after the Definition of Aggression was adopted by the UN General Assembly in 1974, where it had been claimed by states that acts of aggression had been committed by or against political entities that were not recognised as states or whose sovereign status was controversial under international law."<sup>77</sup> These include references by state representatives at the Security Council to acts of aggression by India against its Portuguese colonies, South Africa against its mandate territory of Namibia and Indonesia against the territory of East Timor,<sup>78</sup> as well as to statements made by the Special Committee on Defining the Question of Aggression where it was accepted that an act of aggression could occur against a non-state 'political entity'.<sup>79</sup> Such precedents, it is claimed, provide some indication that an act of aggression may be committed by a state against a territory that is not independent; even where that territory is under the effective control of the aggressor state.<sup>80</sup> In this sense, it can be argued that the scale of the force used in the execution of 'Operation Cast Lead' render it more than merely another Israeli 'incursion' into the occupied territory.

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<sup>73</sup> Victor Kattan, *Operation Cast Lead: Use of Force Discourse and Jus ad Bellum Controversies*, XV PALESTINE YEARBOOK OF INTERNATIONAL LAW 95 (2009).

<sup>74</sup> *Id.* at 110.

<sup>75</sup> On the question of whether the Gaza Strip remains occupied territory, see, e.g., Shane Darcy & John Reynolds, *An Enduring Occupation: The Status of the Gaza Strip from the Perspective of International Humanitarian Law*, 15, 2 JOURNAL OF CONFLICT AND SECURITY LAW 211 (2010); Iain Scobbie, *An Intimate Disengagement: Israel's Withdrawal from Gaza, the Law of Occupation and of Self-Determination*, 11 YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW 3 (2004-5); cf. Yuval Shany, *Faraway, so Close: The Legal Status of Gaza after Israel's Disengagement*, 8 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 369 (2005).

<sup>76</sup> Kattan, *Operation Cast Lead* 95, 110 & 118, *supra* note 73.

<sup>77</sup> *Id.* at 112.

<sup>78</sup> *Id.* at 111-116.

<sup>79</sup> *Id.* at 112.

<sup>80</sup> *Id.* at 114-17.

On this issue the Arab League's Independent Fact-Finding Committee, "after careful consideration," refrained from taking a stance "on the question of whether Israel's assault on Gaza could *in law* be described as aggression."<sup>81</sup> This abstinence was derived partly from the Committee's uncertainty over the statehood of Palestine, citing the definition of aggression contained in General Assembly Resolution 3314<sup>82</sup> as "the use of armed force by a state against the sovereignty, territorial integrity or political independence of *another state*..."<sup>83</sup> As the question of Palestine's statehood under international law is not settled, the Committee felt it could not determine whether Israel had used force against another state, and thus could not make a finding of aggression. A legal surface over which this point may be contested, however, is provided by the remainder of the definition of aggression, not quoted by the Committee, which encompasses the use of force "...in any other manner inconsistent with the Charter of the United Nations."<sup>84</sup> As such, it is arguable that any use of armed force of sufficient gravity not carried out in valid self-defence (Article 51 of the UN Charter) or in accordance with a Security Council mandate (Articles 39, 42) would amount to aggression, even if not against another state.

This argument remains far from established though, perhaps not surprisingly given that the issue is subject to such ardent contestation. The General Assembly's 1974 definition of an act of aggression has now been complemented by the definition of the crime of aggression adopted for the Rome Statute of the International Criminal Court at the 2010 Kampala Review Conference<sup>85</sup> but in practice the application of *jus ad bellum* to the use of force in the context of a pre-existing *jus in bello* situation remains murky. As Richard Falk observes: "There exists here a complex and unresolved issue as to whether an occupying power can claim 'self-defence' in relation to an occupied society, and whether its use of force, even if excessive, and

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<sup>81</sup> Arab League Report, *supra* note 58, paras. 405, 407. Emphasis in original.

<sup>82</sup> See Definition of Aggression, annexed to UN GA Res. 3314 (XXIX), December 14, 1974.

<sup>83</sup> Quoted in Arab League Report, *supra* note 58, para. 406. Report's emphasis.

<sup>84</sup> See Article 1 of the Definition of Aggression, *supra* note 82, which reads in full:

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

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

(a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;

(b) Includes the concept of a "group of States" where appropriate.

According to Kattan: "It is significant that a period does not appear after the words "another State" in Article 1 of this Definition. Instead, its drafters explicitly recognised that while aggression could only be committed by a state, the entity that was subject to an act of aggression need not necessarily be a state." Kattan, *Operation Cast Lead* 111, *supra* note 73.

<sup>85</sup> See Assembly of States Parties, Resolution RC/Res.6 (June 11, 2010). Built upon the General Assembly's definition of an act of aggression as the use of force in a manner "inconsistent with" the UN Charter, the crime of aggression inserted as Article 8*bis* of the Rome Statute the International Criminal Court defines the crime of aggression as the planning or execution of an act of aggression as per the General Assembly definition, with the additional proviso that by its character, gravity and scale, it constitute a "manifest violation" of the UN Charter.

of a border-crossing variety, can be regarded as ‘aggression.’<sup>86</sup> In addition, Kattan’s argument supporting the potential for aggression where an occupation exists speaks to the status of the territory but not to the dilemma posed by the existence of an armed conflict itself; that is, the conundrum of how – if the common understanding of aggression as a violation of the *jus ad bellum* is accepted – the law pertaining to initial resort to force can be applied when an armed conflict, even if of low-intensity, has been in existence prior to the military actions under scrutiny.<sup>87</sup> Some lawyers would argue, quite plainly, that it cannot. Here is Jean Allain, for one:

It seems to me that both the attempt to characterise the operation as self-defence and aggression fails by missing the point that both the Gaza Strip and the West Bank remains, since 1967, under Israeli occupation. As such, issues of *jus ad bellum* are irrelevant to the case at hand. One would have to look back to 1967 to determine the responsibility of Egypt, Israel, Jordan and/or Syria in the first use of force beyond the confines of the United Nations Charter as constituting aggression, and the response being a case of individual or collective self-defence.<sup>88</sup>

While this type of *jus in bello/jus ad bellum* distinction is arguably an overly simplistic or rigid treatment of what in practice amounts to a complex interaction of military practices and legal regimes (particularly given that a military occupation itself can qualify as an act of aggression),<sup>89</sup> it is the position retained by many international lawyers. Israel, for its part, maintaining its claim of self-defence, vehemently refutes any allegations against it of aggression.

Across the spectrum, therefore, we see numerous positions contesting the question of aggression in this context. Far from providing any clarity as to the appropriateness of the allegations, however, the Goldstone Report avoided the vicinity of this spectrum altogether. This despite the urgings of the UN Special Rapporteur for the occupied Palestinian territory in advance of the Goldstone fact-finding mission:

It is further recommended that the underlying claim of Israel that it was acting in self-defence be evaluated in relation to the contention that such an attack violated Article 2 paragraph 4 of the Charter of the United Nations and amounted to an act of aggression under the circumstances, and whether the reliance on disproportionate use of force or the inherently indiscriminate nature of the military campaign should be treated as a criminal violation of international customary and treaty law.<sup>90</sup>

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<sup>86</sup> Falk, *March 2009 Report*, *supra* note 66, para. 28.

<sup>87</sup> The existence of an ongoing armed conflict was not clearly established in the precedents of India and the Portuguese colonies, for example, as most would claim it is in Israel and the occupied Palestinian territory.

<sup>88</sup> Jean Allain, *The Gaza Crisis: The Legal Issues*, paper presented to the Irish Society of International Law, Dublin, May 18, 2009.

<sup>89</sup> Definition of Aggression, *supra* note 82, Article 3(a); Assembly of States Parties, Resolution RC/Res.6, *supra* note 85, Annex I: Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Article 8bis(2)(a).

<sup>90</sup> Falk, *March 2009 Report*, *supra* note 66, para. 28.

Special Rapporteur Falk's response to the report's omission on this point was openly critical: "By ignoring Israel's initiation of a one-sided war the Goldstone report implicitly accepts the dubious central premise of Operation Cast Lead, and avoids making a finding of aggression."<sup>91</sup>

Where the notion of aggression with respect to Gaza remains debatable, it appears that the major shortcoming of the Goldstone Report is exposed even more palpably by its failure to address Israel's own explicit invocation of self-defence under the UN Charter as the basis for the sweeping offensive. Despite this formal invocation, and the contestations of the advocates that endorse it<sup>92</sup> (as well as of western government officials that repeated almost verbatim the common mantra about Israel's right to defend itself) the reasoning against the claim of self-defence is convincing.

In the first instance, the invocation of self-defence would appear to be barred in the case of the use of force by an occupying power against the territory or population of which it is in belligerent occupation. The Arab League Report stressed that there are "serious questions about the applicability of the doctrine of self-defence in the case of military action taken by an occupying power against an occupied people."<sup>93</sup> The Chatham House Principles of International Law on the Use of Force in Self-Defence indicate that the question of self-defence in the sense of Article 51 of the UN Charter does not normally arise where an attack emanates from a territory under the control of the defending state.<sup>94</sup> Although the Goldstone Report's examination of the events before, during and after 'Operation Cast Lead' explicitly proceeded on the basis that the Gaza Strip is occupied territory under Israel's effective control,<sup>95</sup> its authors failed to arrive at the conclusion that seems to follow: that Israel was not legally justified in relying on Article 51 to use force against the territory under its occupation.

Seeking to realign its prolonged occupation of Palestinian territory to the same plane as the post-September 11th global 'war against terrorism,' Israel has seized upon the suggestion that contemporary international law has evolved to give a broader construction to the concept of self-defence under Article 51 for states using force in response to transnational terrorism.<sup>96</sup> Established jurisprudence suggests that this argument does not hold in relation to the Palestinian situation in general, including the conflict in Gaza. The International Court of Justice has held that Israel was precluded from invoking an allegedly broadened Article 51 as justification for its construction of a Wall in the occupied West Bank:

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<sup>91</sup> Richard Falk, *The Goldstone report and the battle for legitimacy*, THE ELECTRONIC INTIFADA, September 22, 2009.

<sup>92</sup> See, e.g., Alan Dershowitz, *The Case Against the Goldstone Report: A Study in Evidentiary Bias*, HARVARD PUBLIC LAW WORKING PAPER No. 10-26 (January 2010).

<sup>93</sup> Arab League Report, *supra* note 58, para. 409

<sup>94</sup> *The Chatham House Principles of International Law on the Use of Force in Self-Defence*, 55 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 963 (2006).

<sup>95</sup> Goldstone Report, *supra* note 2, para. 276,

<sup>96</sup> Israeli Ministry of Foreign Affairs, *The Operation in Gaza, 27 December-18 January 2009: Factual and Legal Aspects* (July 2009), para. 69.

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.

The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.<sup>97</sup>

By failing to address this issue, the Goldstone Report leaves the door open for Israel to argue that an expanded self-defence doctrine for national security purposes under Security Council resolutions 1368 and 1373 may be brought to bear even in the context of territory under the effective control of the defending state.

Israel's à la carte espousal of apparently conflicting legal norms to support its position is further evidenced by its simultaneous claims that it resorted to force against Gaza in December 2008 in self-defence, but was nonetheless entitled to use force in the context of an ongoing conflict that had already been initiated, somewhat vaguely, 'years ago':

Israel's right to use force against Hamas was triggered years ago, when Palestinian terrorist organisations, including Hamas, initiated the armed conflict which is still ongoing. The current operation was another regrettable stage in this conflict.<sup>98</sup>

The ongoing conflict is claimed to justify Israel's resort to force under Article 51 "both previously and during the Gaza Operation,"<sup>99</sup> with the *jus ad bellum/jus in bello* distinction accordingly eliminated by the Israeli government's legal reasoning. Again the Goldstone Report fails to challenge these normative acrobatics, thereby risking leaving an impression that states may validly invoke self-defence under the UN Charter even in the context of a pre-existing conflict and legal framework governing the conduct of hostilities.

Leaving aside the questions of whether Israel can legitimately invoke self-defence in the context of a territory it occupies, or whether non-state actors have the legal capacity to perpetrate armed attacks giving rise to self-defence, there are still doubts as to whether the act of an 'armed attack' itself occurred against Israel that was of sufficient gravity to trigger the right to self-defence. Relying on the test adopted by the

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<sup>97</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] I.C.J. REP. 136, at para. 139.

<sup>98</sup> Israeli Ministry of Foreign Affairs, *The Operation in Gaza*, *supra* note 96, para. 72.

<sup>99</sup> *Id.*, para. 68.

ICJ<sup>100</sup> and the Eritrea-Ethiopia Claims Commission,<sup>101</sup> Kattan suggests that the firing of Qassam rockets from Gaza into Israel was probably not of sufficient “scale and effect” to amount to an armed attack within the meaning of Article 51, as opposed to a “mere frontier incident.”<sup>102</sup> Having caused very little damage and limited casualties, the rocket attacks were not, it is contended, of such gravity as to amount to an armed attack comparable to that which would be conducted by a regular army.<sup>103</sup> With regard to the precedent of Israel’s resort to force against Hezbollah in Lebanon in 2006, even commentators who endorse Israel’s invocation of self-defence in that context do so on the basis that the “combination of the rocket attacks on top of the attack of a military unit [in which eight soldiers were killed] would appear to go beyond a small border incident;”<sup>104</sup> suggesting that the firing of shorter-range rockets in Gaza may not in itself be sufficient to amount to an armed attack. Israel, for its part, insists that on account of the rocket attacks, “[t]here is no question that Israel faced an ‘armed attack’ within the meaning of customary international law or Article 51 of the U.N. Charter, and has the right to use force against Hamas in self-defence.”<sup>105</sup>

Despite the jurisprudence available, and the diverging views on the issue, the authors of the Goldstone Report opted not to engage with matters concerning the threshold of an ‘armed attack’ for the purposes of triggering the right to self-defence. The report also overlooked the related questions of whether Israel’s use of force was executed as an immediate imperative in the face of an urgent threat, as required for the necessity of self-defence since the *Caroline* case,<sup>106</sup> and whether it was a last resort after the exhaustion of diplomatic remedies and peaceful alternatives in accordance with the foundational principles of the UN.

The Arab League Report alludes to the fact that Israel “had endured rocket attacks for over a year before it acted, which makes it difficult to contend that there was any immediate necessity for action in self-defence.”<sup>107</sup> Arguments that “Israel’s action was

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<sup>100</sup> Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. US*) 1986 I.C.J. REP. 14; Oil Platforms (*Islamic Republic of Iran v. US*) 2003 I.C.J. REP. 161; Case concerning Armed Activities on the Territory of the Congo (*Democratic Republic of Congo v. Uganda*) 2005 I.C.J. REP. 53.

<sup>101</sup> Eritrea Ethiopia Claims Commission, Partial Award, *Jus Ad Bellum*, Ethiopia’s Claims 1–8, between The Federal Democratic Republic of Ethiopia and The State of Eritrea, The Hague, December 19, 2005.

<sup>102</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* [1986] I.C.J. REP. 14, at 103, para. 195.

<sup>103</sup> See Kattan, *Operation Cast Lead*, 95, 102–107, *supra* note 73. See also the assertion of the group of international lawyers in the SUNDAY TIMES letter, *supra* note 72: “The rocket attacks on Israel by Hamas deplorable as they are, do not, in terms of scale and effect amount to an armed attack entitling Israel to rely on self-defence.”

<sup>104</sup> Noam Lubell, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 251 (Oxford: Oxford University Press, 2010). Emphasis added. For a contrary argument that the initial Hezbollah-Israel engagement in July 2006 was a classic frontier dispute falling outside the scope of Article 51, cf Victor Kattan, *The Use and Abuse of Self-Defence in International Law: The Israel-Hezbollah Conflict as a Case Study*, 12 YEARBOOK OF ISLAMIC AND MIDDLE EASTERN LAW 31 (2005–6).

<sup>105</sup> Israeli Ministry of Foreign Affairs, *The Operation in Gaza*, *supra* note 96, para. 70.

<sup>106</sup> *The Caroline (Exchange of Diplomatic Notes between the United Kingdom of Great Britain and Ireland and the United States of America)* 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 82 (1938).

<sup>107</sup> Arab League Report, *supra* note 58, para. 411.



premeditated rather than self-defence” are also presented in the Arab League Report,<sup>108</sup> while the wording of the Israeli ambassador’s letter to the UN (“after a long period of utmost restraint”) is consonant with the suggestion that the situation was not one of instant, overwhelming urgency, and that Israel had been considering its assault for some time. In such a case where urgency is absent, international law views the recourse to force as a last resort to be availed of only after all alternatives have been exhausted. Prior to the formation of the Goldstone Mission, Falk had noted that in the context of “protecting Israeli society from rockets fired from Gaza, the evidence overwhelmingly supports the conclusion that the ceasefire in place as of June 19, 2008 had been an effective instrument for achieving this goal, as measured by the incidence of rockets fired and with regard to Israeli casualties sustained.”<sup>109</sup> According to another study, from the initiation of the ceasefire on June 19, until November 4, 2008, “the rate of rocket and mortar fire from Gaza dropped to almost zero.”<sup>110</sup> While the eyes of the world were fixed on US voters going to the polls to elect President Obama on November 4, 2008, Israel broke the ceasefire agreement with an attack on Gaza that killed six and injured seven Palestinians.<sup>111</sup> This resulted in a resurgence of Palestinian rocket fire while Israel apparently refused attempts to renew the truce.<sup>112</sup> The significance of this information for Israel’s claim that ‘Operation Cast Lead’ was an act of self-defence does not seem to have been given due regard by the authors of the Goldstone Report. While the report does describe the ceasefire process and its disruption by Israel,<sup>113</sup> it stops short of making the inference that logically follows, that the claim of self-defence in this light was highly questionable. Rather, the report “seems to avoid drawing any legal conclusions as to the bearing of this context in which the Gaza war was initiated.”<sup>114</sup> The report also fails to address the alleged disregard shown by Israel for seemingly available diplomatic alternatives to using force in its relations with Hamas and the Gaza Strip.

#### IV. Conclusion

The central thrust of the Goldstone Report’s recommendations relate to mechanisms of accountability for the perpetrators of crimes committed in the context of the hostilities in Gaza; the idea being to challenge the policies of the parties to the conflict

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<sup>108</sup> Id.

<sup>109</sup> Falk, *March 2009 Report*, *supra* note 66, para. 28.

<sup>110</sup> Nancy Kanwisher, Hohannes Haushofer, and Anat Biletzki, *Reigniting Violence: How Do Ceasefires End?* THE HUFFINGTON POST, January 6, 2009.

<sup>111</sup> UN Office for the Coordination of Humanitarian Affairs (OCHA), *Protection of Civilians Weekly Report No. 284* (October 29–November 4, 2008).

<sup>112</sup> Arab League Report, *supra* note 58, para. 411. See also *Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, Richard Falk, UN Doc. A/HRC/13/53/Rev.1, 7 June 2010, para. 12, noting the “frequent attempts by Hamas representatives to extend the ceasefire for as long as 10 years if Israel would lift the blockade and open the crossings.”

<sup>113</sup> Goldstone Report, *supra* note 2, paras. 223–267.

<sup>114</sup> Falk, *June 2010 Report*, *supra* note 112, para. 10.

through challenging impunity for specific war crimes or crimes against humanity. Success in this endeavour will at best lead to heightened restraint (or, more cynically, covering of tracks for legal purposes) in the execution of future attacks, but may be unlikely to deter such attacks themselves being launched in the first place where it is politically expedient to do so. It is here that the blind spot of the Goldstone Report in not dealing with the initial resort to force reveals itself. The focus on accountability for discrete violations gives the Israeli and Palestinian authorities the opportunity to abrogate international criticism through the prosecution of a small number of low-level scapegoats.<sup>115</sup> The overarching policies (and the higher echelons of the military apparatus responsible for formulating them) that are at the root of the use of unbridled military force over diplomatic alternatives may be able to go unchallenged in this process. Here, it is useful to recall Koskeniemi's observation that focusing only on individual crimes and individual guilt "instead of, say, economic, political or military structures, is to leave invisible, and thus to underwrite, the story those structures have produced by pointing at a scapegoat."<sup>116</sup>

By dodging the question as to whether 'Operation Cast Lead' was in itself a violation of the international law governing the use of force, the Goldstone Report can be understood as providing tacit approval for Israel's decision to attack the Gaza Strip. At best, it amounts to an eschewal of responsibility by a legal body as effectively independent as can be found in the context of the Israeli-Palestinian debates to make an objective pronouncement on a persistently divisive and constitutive question. Coming in the wake of a spate of wars in the first decade of the twenty-first century where the use of force has gravitated towards aggression rather than self-defence (Iraq the most prominent amongst them), the Goldstone Report represents an opportunity missed for a major international judicial mission to reinforce the primacy of the prohibition of the use of force in international law. The implications of the report choosing to apply itself solely to the regulation of force, and not the resort to force itself, are disquieting. Such a choice reflects the often misplaced preoccupation of many international lawyers with regulating rather than preventing war, and may ultimately play into the hands of those advocating a realignment of the rules of international humanitarian law to provide wider latitude to states conducting so-called 'asymmetrical' wars against non-state actors.

Much has changed in the dynamics of global politics and the nature of threats faced by states since the drafting of the UN Charter, but the absence of political will to abandon recourse to physical force on the part of state actors persists. Without wishing to proffer naïve arguments regarding the ability of international law to single-handedly provide an adequate alternative, it is distressing to witness interna-

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<sup>115</sup> For Israel's actions in this regard, see Israeli Ministry of Foreign Affairs, *Gaza Operation Investigations: An Update* (January 2010); Israeli Ministry of Foreign Affairs, *Gaza Operation Investigations: Second Update* (July 2010). For details of the Palestinian investigations, see the *Report of the Palestinian Independent Commission Investigating in Follow-up of the Goldstone Report* (July 2010) at <<http://www.picigr.ps/userfiles/file/EN.pdf>>.

<sup>116</sup> Koskeniemi, *International Law and Hegemony* 208, *supra* note 1.

tional lawyers themselves not taking advantage of opportunities presented to challenge the autonomy of states to so freely persist with violence as means of arbitration of disputes or domination of subaltern populations. It took a full 65 years after the first prosecution of crimes against peace at Nuremberg for the international community to agree on a definition for the crime of aggression. While such a belated achievement is commendable, the hegemonic contestation over the liberal use of force in the colonial present will continue to be lost, unless every available space in which to challenge it is filled.