

REGIONAL FOCUS & CONTROVERSIES

Israel's Claim of the "Legitimate Right of Self- Defence" regarding the Gaza Strip in Light of International Law *A Palestinian Lawyer's Position*

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Since the implementation of the disengagement plan in 2005, Israel has alleged that it no longer occupies the Gaza Strip and claimed its right to legitimate self-defence based on Article 51 of the United Nations Charter, including the suffocating blockade imposed there as well as the 'Cast Lead' military Operation and others. This paper analyzes Israeli's claim in light of international law and the objective facts taking place in the Gaza Strip resulting from the implementation of the disengagement plan.

Keywords

Israel, Gaza Strip, Disengagement Plan, Legitimate Self-Defence, Colonization, Blockade, International Humanitarian Law

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1. Introduction

Israel occupied the Gaza Strip and the West Bank including East Jerusalem after the end of the war in June 1967. It placed the Gaza Strip under direct military rule from within the Gaza Strip and lasted until Israel implemented its unilateral disengagement plan from the Gaza Strip in September 2005.¹ Upon the implementation of this plan, Israel declared that it finally relinquished the Gaza Strip and thus was no more responsible for the protection, care and welfare of its civilian population. Despite the disengagement plan, Israel has not actually given up effective control over the Gaza Strip judging that it has maintained full control of its land, sea borders, and airspace. In addition, Israel has imposed a strict military siege since Hamas took over authority in Gaza on June 19, 2007, declaring it 'enemy territory.'²

Under the disengagement plan, Israel has escalated its settlement activities in the West Bank including East Jerusalem. Furthermore, Israel has intensified military aggression and assaults in the Gaza Strip and its inhabitants through incursions and assassinations in public places and the homes of several resistance movement leaders causing many civilian deaths. Israel has also launched several large-scale military offensives in the Gaza Strip, including Operation Cast Lead,³ which left thousands either dead or wounded, destroyed tens of thousands of residential houses, schools, hospitals, places of worship and police stations, and caused massive destruction to infrastructure and all sources of livelihood in the Gaza Strip.

Israel attempts to justify its military operation in Gaza Strip (including Operation Cast Lead) as a right of self-defence in accordance with Article 51 of the UN Charter, which states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United

¹ Israel calls this the "Withdrawal Plan from the Gaza Strip (Disengagement Plan)," available at <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm> (last visited on July 2, 2010).

² The Israeli Security Cabinet declared the Gaza Strip 'enemy entity' on September 19, 2007. Israel declared that the Hamas-led National Authority was an 'enemy entity.' It also regarded Hamas as a terrorist movement on April 9, 2006, although Hamas won the general elections held on January 25, 2006 receiving 72 seats out of 132. The International community boycotted the Hamas-led National Authority and severed its financial aid, although the elections were democratic, civilized and enjoyed integrity and transparency, according to all international observers. See Talal Okal, *Gaza under the Triangle of Destruction: Division Siege and Aggression*, 74/75 J. PALESTINE STUD. 24 (2008).

³ This operation is also called the "War on Gaza." It was carried out between December 27, 2008 and January 17, 2009. Israel withdrew all its ground forces from the Gaza Strip on January 21, 2009 in accordance with the Security Council Resolution 1860.

Nations, until the Security Council has taken measures necessary to maintain international peace and security . . .

The primary aim of this paper is to critically analyze Israel's position regarding the right of self-defence of the Gaza Strip from an international legal perspective since the disengagement plan was implemented. A comprehensive study of this topic requires identifying the legal status of the Gaza Strip under the disengagement plan. The main purpose is to examine the legitimacy of the implementation of the disengagement plan from the perspective of international law, whether it changes the legal status of the Gaza Strip as an occupied territory, and what are the legal consequences irrespective of Israel's real intentions. There are two sub-topics: one discusses whether the Israeli occupation of the Gaza Strip has ended; the other examines the legitimacy of Israel's claim of the right to self-defence regarding the Gaza Strip.

2. The Legal Status of the Gaza Strip under the Disengagement Plan

The former Israeli Prime Minister Ariel Sharon announced the disengagement plan in mid-June 2004. Following its approval at the Knesset, the plan was implemented in September 2005 with a wide-scale Israeli media campaign asserting that Israel did not have any international obligations to the civilian population of the Gaza Strip.⁴ The plan contained the following points:

- Withdrawing all Israeli forces and settlers residing in the Gaza Strip, amounting to 7500 settlers;
- Evacuating seventeen settlements in the Gaza Strip and four settlements in the North West Bank, and dismantling all existing establishments;
- Maintaining Israel's full security control of the land borders, as well as the sea and airspace of the Gaza Strip; and
- Expanding settlement activity in the West Bank, asserting that any future solution must take into consideration Israel's demands to maintain major population gatherings, Israeli cities and villages and other land of security and strategic significance for Israel in the West Bank.

⁴ For the chronology of events, see Michel Esposito, *Israel's Unilateral Disengagement since the Inception of the Idea until the Eve of the War*, 80-81 J. PALESTINE STUD. 130-181 (2009, 2010).

Opinions varied about the legal nature of Israel's disengagement plan.⁵ While Israel announced that its real goal was to improve its security, political, economic and demographic conditions,⁶ Israel in fact aimed at aborting the idea of an independent Palestinian state in all of the 1967 Occupied Territories and separating the Gaza Strip from the West Bank. The ultimate goal of Israel was to completely settle down the so-called Palestine question through such conditions as enhancing settlement activity in the West Bank, judaizing Jerusalem, and imposing a political solution based on the Israel's military superiority.⁷

⁵ For details on this plan and its consequences, see Shlomo Brom, *The Disengagement Plan, the Day after*, 63 J. PALESTINE STUD. 143, 147 (2005); Raed Ne'irat, *The Withdrawal Plan from Gaza and its Impact on the Occupied West Bank*, BAHETH STUD. 69, 72-74 (Fall 2004); Ibrahim Jaber, *The Position of Israeli Parties towards the withdrawal from Gaza Strip*, 2004 BAHETH STUD. 119 (Fall 2004). Mamdouh Nofal, *The Unilateral Withdrawal in Service of Israel's Strategic Security*, THE PALESTINE MEDIA CENTER, Apr. 2005, available at <http://www.palestine-info.info/arabic/books/derash/ders6.htm> (last visited on July 2, 2010); Avi Shlaim, *How Israel put Gaza on the Verge of a Humanitarian Disaster*, July 1, 2009, available at <http://www.dctcrs.org/new744.htm> (last visited on July 2, 2010).

⁶ See the Disengagement Plan under 'Core Principles' item C. Regarding this Plan, Shlomo Brom says that: "Israel must seek to achieve full disengagement in Judea and Samaria too, including the dismantling of more settlements, and withdraw towards a line that relieves Israel from the Palestinian demographic problem, can be used as an appropriate defence line, and enables Israel to keep most settlements in the West Bank. Since it is in Israel's interest to disengage with Palestinians in order to maintain Israel as a Jewish and democratic state, there is no alternative but to continue with the unilateral disengagement from Judea and Samaria facing Palestinian violence. This is an inevitable approach that rules out any intention to reach a disengagement that is agreed with the Palestinians, and ignores the enormous impact of withdrawal on the Israeli public opinion." See Brom, *supra* note 5.

⁷ The Disengagement Plan expressed this indirectly, as it stated under "Future vision for Gaza Strip and the West Bank," item (1-C) that, "in any future permanent status arrangement, there will be no Israeli towns and villages in the Gaza Strip. On the other hand, it is clear that in the West Bank, there are areas which will be part of the State of Israel, including civilian settlements, security areas and installations and other places of special interest to Israel." In his letter of assurances to Sharon, George W. Bush warned that the implementation of the unilateral disengagement plan aims at aborting the Palestinian cause and eliminating the rights of the Palestinian people. See Azmi Khawaja, *Conditions of withdrawal from Gaza eliminate the legitimate rights of the Palestinian people*, AL-AYYAM DAILY, June 19, 2004. Several writers also asserted that as "the separation of the Gaza Strip shall reduce Palestinian resistance, reduce military costs, alleviate the huge demographic burden of the Strip to be released of international obligations towards them; strengthening and maintaining settlement activity and linking settlements to each other. The final separation of Gaza from the West Bank shall preclude the establishment of an independent and unified Palestinian state." See Ne'irat, *supra* note 5. "The separation of Gaza Strip from the West Bank is a plan to gather people in cantons and blow up all hopes for having a Palestinian homeland. These hopes are almost in oblivion. This is an atrocity in which we must not participate through our implicit approval (...). The full separation of Gaza Strip from the West Bank is one of the most important achievements of the Israeli policy whose main goal is to prevent reaching a settlement based on international resolutions and understandings in order to dictate a settlement that is based on military superiority instead." See Noam Chomsky, *The Middle East Peace: A Potential Peace that will Not Happen*, available at <http://www.safsaf.org/05-2010/art/naoum-chomski/24.htm> (last visited on July 2, 2010).

A. *The Legal Status of the Gaza Strip in International Law and Signed Agreements between Israel and the Palestinians*

Article 42 of the Hague Regulations of 1907 regarding the Laws and Customs of War on Land stipulates that:

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.

Following the regulation, the only decisive criterion to determine the land occupation is 'effective authority.' Such authority or control does not necessarily require the presence of armed military forces inside the occupied territories, but the ability to exercise authority in that territory. Occupation ends when the foreign army ceases to exercise authority over the occupied territories.

Given the status quo in the Gaza Strip after the implementation of the disengagement plan, Israel continues to exercise actual authority over the Gaza Strip through large-scale military operations,⁸ effective control over all land, sea, air border crossings and airspace of the Gaza Strip,⁹ and the stifling blockade imposed in 2007. Israel controls access of persons and goods and issues entry and exit permits to Gaza inhabitants, international missions and even convoys of humanitarian aid. It makes administrative decisions that accept or deny reunion petitions submitted by Gaza inhabitants. Therefore, it is undeniable that Israel remains an occupying power from an international legal perspective.¹⁰

In the Advisory Opinion on the Separation Wall case, meanwhile, the International Court of Justice ("ICJ") already confirmed the applicability of the description of occupied territory of the Gaza Strip. The ICJ stated that: "[T]he Gaza Strip and the West Bank including East Jerusalem remain occupied territories and Israel has continued to have the status of an Occupying Power. Subsequent events to 1967 in these territories have done nothing to alter this situation, that these are occupied territories."¹¹ Although

⁸ Between 2001 and 2008, Israel has launched sixteen military operations inside the Gaza Strip, of which eleven were wide-scale military operations launched after the implementation of the disengagement plan, and which killed and wounded thousands of civilians. For details on the operation, see Michel Esposito, *The Israeli Military Operations against Gaza: 2001-2008*, 80-81 J. PALESTINE STUD. 109 (2009-2010).

⁹ Suzan Aqel, *The Issue of the Border-crossings in Gaza Strip following the Israeli Withdrawal*, available at http://www.oppc.pna.net/mag/mag19/new_page_30.htm (last visited on July 2, 2010).

¹⁰ Yoram Denstein, *The War against Gaza from the Perspective of Israeli National Security Experts*, (The Inst. of Nat'l Security Stud. Special Report, trans. by Antoine Shalhat), (The Palestinian Centre for Israeli Studies ("MADAR"), Jan. 26, 2009).

¹¹ The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004

this Advisory Opinion is not binding on Israel, it is particularly important because it undermines the Israeli claim that the said Palestinian Territories are “not occupied, but disputed territories.”¹² Moreover, the Security Council Resolution 1860 of 2009, the International Committee of Red Cross, the UN Commission on Human Rights (currently, Human Rights Council) and other international agencies have recognized that Israel is still occupying the Gaza Strip even under the Disengagement Plan. It signifies that Israel continues to have ‘effective authority’ over the Gaza Strip.¹³ Hence, Israel's claim that it has ended its control over the Gaza Strip with the implementation of the Disengagement Plan is legally baseless. Furthermore, the Disengagement Plan is illegal *per se* based on the following evidences.

(1) Israel Has Not Actually Withdrawn Its Military Forces from the Gaza Strip, but Merely Redeployed or Re-positioned Its Forces.

Israel's occupation is not fully complete considering that Israel just evacuated its armed forces from the land territory of the Gaza Strip. Instead, Israel has maintained effective control over Gaza's airspace imposing a strict land, sea and air military siege. Such evacuation or disengagement has not resulted in exercising Palestinian sovereignty in the Gaza Strip. The Disengagement Plan itself, however, has illustrated the nature of the withdrawal from the Gaza Strip. The plan clearly states that:

The state of Israel will evacuate the settlements in the Gaza Strip and will redeploy outside the Strip . . . Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces in the land territory of the Gaza Strip which have been evacuated.¹⁴

As provided in Article 42 of the Hague Regulations of 1907, the absence of permanent military bases in occupied territories neither refutes the presence of effective control over that territory, nor consequently denies the existence of occupation. Regarding the

I.C.J. para. 78 (July 9). See Mohammad Khalil Musa, *The Opinion of the International court of Justice on the Separation Wall: Legal Dimensions*, 69 J. PALESTINE STUD. 5 (2007). See also *A Group of Studies*, 99 AM. J. INT'L L. (2005).

¹² Mohammad Khalil Musa, *supra* note 11, at 8 (2007).

¹³ See International Red Cross Committee (“ICRC,” Dec. 2009); Office of Coordination of Humanitarian Aid (“OCHA,” Apr. 2006); UN Commission on Human rights (“UNCHR,” Jan. 17, 2006).

¹⁴ Avi Shlaim stated: “The aim behind the implementation of the Disengagement Plan was an Israeli gesture to the world that it wants to establish peace in the region, but the truth is that it was mere redeployment, as during the next year, 2006, 12,000 Israelis have settled in the Israeli settlements in the West Bank,” *How Israel put Gaza on the verge of a Humanitarian Disaster*, Jan. 7, 2009, available at <http://www.dcters.org/new744.htm> (last visited on July 2, 2010).

real goals of this Plan, Noam Chomsky stated as follows:

The Sharon government realized that it is useless to support few thousands of Israeli settlers in Gaza, who required significant resources and the protection of a significant number of Israeli forces, so it decided to move them to the West Bank and the Golan Heights, both of which are more valuable to it.¹⁵

The Disengagement Plan has resulted in Israel's effective control over the Gaza Strip and its external space by way of imposing military siege. Israel expected that it could also restore effective control over the land of the Gaza Strip from within, as is often seen from the military operations that Israel launched in the Gaza Strip including Operation Cast Lead.

(2) The Disengagement Plan Itself Provides for Israel's Effective Control over the Gaza Strip.

Under "[T]he Security Situation Following the Disengagement," the Disengagement Plan provides that:

Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of Gaza Strip.

This text contradicts Israel's claim that it has ended effective control of the Gaza Strip¹⁶ and is no more responsible for its civilian population in accordance with international law. The text also indicates that the procedure was a mere formality, because Israel had no real intention to leave the Gaza Strip permanently.¹⁷ Israel had a clear position even before the implementation of the Disengagement Plan – that effective control over the Palestinian territories would mean the continuation of the occupation. The Israeli High Court of Justice Decision confirms this in the case of Beit Sourik Village Council v. Israel,¹⁸ which states that:

The legal status of the occupied Palestinian Territories stems from the fact of effective Israeli control over it, and the Israeli Military Governor derives his authority in accordance with international law on occupation, consisting mainly of the Hague

¹⁵ Chomsky, *supra* note 7, at 2.

¹⁶ This falls under Item 2/3 of the Plan: "As a result, there will be no basis for claiming that the Gaza Strip is occupied territory."

¹⁷ This also conflicts with Israel's depiction of the Gaza Strip as 'enemy territory.'

¹⁸ Beit Sourik Village Council v. Israel, HCJ; 2056/04, 2004, 43 ILM 1099 (para. 23).

Regulations on the laws and customs of war that reflect the International Customary Law, and which consequently bind Israel to work accordingly.¹⁹

(3) The Unilateral Disengagement Plan Is Violating International Law.

The unilateral Disengagement Plan is in contravention with international law regarding peoples' right to self-determination.²⁰ It is unacceptable for an occupying power to declare the end of an occupation unless such a step leads to exercise the occupied people's right to full sovereignty over their land, people and the right to self-determination. In another sense, both the Israeli and Palestinian sides would violate the obligation of the Washington Agreement of 1995 which stipulates that:

Neither party shall take any steps in the West Bank and Gaza that may prejudice the outcome of the final status negotiations.

The Disengagement Plan overlooks the principle of geographic unity between Gaza and the West Bank (including East Jerusalem), to which Israel commits itself in the signed agreements with the Palestinians and in several international resolutions. Article 4 of the Declaration of Principles of 1993 declares that the two sides, the West Bank and the Gaza Strip constitute one geographic unit whose unity and integrity must be preserved during the interim period.²¹ This has been maintained as follows. First, Article 11 of the Washington Agreement states that: "[t]he two parties consider the West Bank and the Gaza Strip one territorial unit whose integrity and status shall be preserved during the interim period." Second, the Security Council Resolution 1860 stipulates that: "[t]he Security Council, recalls all of its relevant resolutions, including resolutions 242 (1967), 338 (1973), 1397 (2002), 1515 (2003) and 1850 (2008), that the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state."²² Therefore, it is evident that Israel continues to occupy the Gaza Strip at both the legal and practical levels and is exercising effective control over the Gaza Strip even after the

¹⁹ *Id.*

²⁰ U.N. Charter art. 1, para. 2.

²¹ This is known as the Oslo Agreement (the Palestinian-Israeli Declaration of Principles) signed on September 13, 1993.

²² The content of this Resolution supports G.A. Res. 1514 (Dec. 14, 1960) about granting colonized countries and peoples and their independence, as para. 6 stated: "Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations." The first paragraph of the same Resolution also stated: "The subjugation of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation." This, in fact, supports that the Israeli occupation of the Palestinian Territories, which has exceeded forty years is in fact colonization, since it is not more temporary.

implementation of the Disengagement Plan.

B. Considering the Gaza Strip as an Occupied Territory

(1) The Illegitimate Occupation

If one considers the Gaza Strip as an occupied territory, first, the occupation shall be illegitimate because it violates the principle of prohibiting the use of force in international relations laid down at Article 2, paragraph 4 of the UN Charter as well as the General Assembly Resolution 2625.²³ In the Nicaragua case, the ICJ maintained that: “[T]he principle of the inadmissibility of the use of armed force in international relations, and the consequent illegitimacy of the acquisition of land through armed force constitutes an International Customary Law.”

On this premise, Israel’s recognition of the Gaza Strip as an ‘enemy territory’ has no foundation in international law. The use of the term itself would contravene international law from the following reasons. First, the term ‘enemy territory’ is not an international legal term, but is a political creation of Israel in order to evade its international obligations to the civilian population of the Gaza Strip as an occupying power. Second, the Gaza Strip is not a sovereign state rather an occupied region that cannot be given such a description. There is no ground in which an occupying power can exercise effective control over region regarded as an enemy territory. Third, if one considers the Gaza Strip as an enemy territory, it would constitute a threat of the use of force against the Gaza Strip which is prohibited under the UN Charter.

Furthermore, the blockade that Israel imposed on the Gaza Strip by the Operation Cast Lead is tantamount to ‘military aggression’ according to the UN General Assembly Resolution 3314²⁴ because armed force has been used in contravention with Article 51 of the UN Charter. It is not a legitimate right of self-defence. In fact, the siege of the Gaza Strip and the military operations that Israel conducted during the past years have constituted not only mere ‘aggression’ but also war crimes, crimes against humanity and other international crimes.

²³ Declaration of the Principles of International Law on Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. See G.A. Res. 2625 (XXV) (Oct. 24, 1970).

²⁴ G.A. Res. 3314 (Dec. 14, 1974). Article 3 of the Resolution addressed the practices that amount to an act of aggression in six paragraphs. Paragraph (a) states, “the invasion or attack by the armed forces of a state of the territory of another state, or any military occupation however temporary, resulting from such invasion or attack or any annexation by the use of force of the territory of another state or part thereof”; Paragraph (c) states that “the blockade of the ports or coasts of a state by the armed forces of another state” is an act of aggression. Article 2 addresses the verification of aggression. Article 4 specified that the enumerated acts of aggression are not exhaustive, and the Security Council may determine that other acts constitute aggression. Article 7 addressed the right of peoples to self-determination, freedom and independence.

Israel has declared the Gaza Strip as an 'enemy territory' in order to treat this region as an independent sovereign state in order to be free from the obligations of the occupying power to preserve the security and welfare of the civilian population under international law. Israel has been besieging the Gaza Strip for years and imposing collective punishments on its inhabitants. Israel is trying to transform the Gaza Strip into a huge prison under open sky.²⁵ Currently, residents of the Gaza Strip cannot easily access to water, medicine, food and clothing. Israel has been causing a devastating situation for the people of the Gaza Strip which has resulted in poverty and high unemployment.²⁶ Because no one can freely travel abroad many have died for failure to receive adequate medical treatment.²⁷ It is inappropriate for Israel to claim that the occupied territory is an 'enemy territory,' while Israel has been exercising acts of aggression against the Gaza Strip and other Palestinian Territories.

(2) *The Right of the Palestinians to Self-Determination.*

If one considers the Gaza Strip as an occupied territory, it is the violation of the right of the Palestinian people to self-determination.²⁸ The right to self-determination is a fundamental principle of international law which can be invoked by all territories and peoples that are not independent or autonomous. People in the Occupied Palestinian Territories should also enjoy this right. The right to self-determination is based on a set of *erga omnes*²⁹ which no state may evade or use any excuse to evade. Hence, Israel is bound to refrain from any act or conduct that may deprive the Palestinian people from their right to self-determination.

The right to self-determination is referred to in Article 1 of the UN Charter, the ICJ Advisory Opinion on the Wall³⁰ and UN General Assembly Resolution 2625 (1970) on Principles of International Law concerning Friendly Relations and Cooperation among

²⁵ Amnesty International Report for 2010 states that the siege has transformed the 1.5 million population of the Gaza Strip as 'actual prisoners.'

²⁶ Four out of every five Gazans have become dependent on humanitarian aid. *Id.* at 72.

²⁷ Israel's refraining from issuing permits for the sick persons from the Gaza Strip to travel abroad in order to receive medical treatment has caused the death of 28 persons during 2009. *See id.* at 70.

²⁸ This right is enshrined in Article 1, paragraph 2 of the UN Charter, Article 1 of the International Covenant for Civil and Political Rights, and Article 1 of the International Covenant for Economic, Social and Cultural Rights. The U.N. General Assembly Resolution 1514 (Dec. 14, 1960) addressed granting independence to colonized countries and peoples. Paragraph 2 of the Resolution stipulates that "all peoples have the right to self-determination," while paragraph 4 of the same resolutions states that "all armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence and the integrity of their national soils shall be respected."

²⁹ The ICJ referred to it in its decision in 1993 on East Timor (Portugal v. Australia). *See* 1993 I.C.J., para. 29 (July 1). The Court also asserted this in the case of the Separation Wall. *See* 2003 I.C.J., para. 88 (Dec. 3).

³⁰ *See* the Separation Wall case, *supra* note 29, para. 156.

States. In particular, General Assembly Resolution 2625 states that: “[E]ach state has the duty to work individually and collectively to realize the principle of equal rights and self-determination of peoples in accordance with the provisions of the Charter.”

Palestinian resistance shall be recognized as national liberation movements under international law. They have the right to struggle and resist against occupation until they recover full independence and sovereignty. Moreover, all attempts suppressing these movements are violations of international law because national liberation movements have been recognized as a legal person under the law.³¹ So long as the Gaza Strip is occupied, all Palestinian fractions and inhabitants are entitled to resist against this occupation.

(3) Applicability of International Humanitarian Law to the Occupied Territories.

If one considers the Gaza Strip as an occupied territory the region should be governed by the rules of International Humanitarian Law (“IHL”). These rules stem mainly from the following three legal instruments: The Hague Regulations of 1907 regarding the Laws and Customs of War on Land, the Fourth Geneva Convention relating to the Protection of Civilian Persons in Time of War of 1949, and the First Additional Protocol annexed to the Geneva Convention on the Protection of Victims of International Armed Conflicts of 1977. These instruments place obligations on the occupying power to protect citizens in the occupied territories, to maintain security and public order, to provide public health and various needs of the population (including food, clothing and medical care), to prohibit collective punishment or retaliation against civilians, and demand abstention from destruction and confiscation of property.

The Security Council Resolution 1860 (2009) and several other reports of international agencies³² indicate that Israel, as an occupying power, does not adhere to IHL provisions with respect to the Gaza Strip and its inhabitants. These documents regarded the Israeli blockade of the Gaza Strip as collective punishment that would cause a humanitarian disaster to the inhabitants of the Gaza Strip, and demanded lifting the blockade immediately because it might constitute a serious breach of IHL, in particular Article 33 of the Fourth Geneva Convention which prohibits collective

³¹ For the recognition of the legal person of national liberation movements, see G.A. Res. 3013 (1972) regarding the legal status of combatants fighting against foreign occupation and who struggle for a legitimate cause in accordance with international law.

³² OHCHR, *Report of United Nations Fact Finding Mission on the Gaza Conflict*, para. 1733; 309 Review of the Red Cross, at 583-594; *Résolution de l'assemblée parlementaire de l'Europe*, doc. 12308, para. 7 (June 22, 2010). Amnesty International Report, *Israel/Occupied Palestinian Territories: Suffocating: The Gaza Strip under Israeli Blockade*, Doc. No. MDE 15/002/2010, at 7 (Jan. 18, 2010) & *Suffocating Gaza* (June 1, 2010); UNCHR, Resolution A/HRC/14/L1, (June 2, 2010); and UNSC, Stockholm Convention on Persistent Organic Pollutants 27 (Jan. 2003).

penalties.³³ Moreover, several international and regional reports accuse Israel of committing war crimes, crimes against humanity and other international crimes during Operation Cast Lead against the Gaza Strip.³⁴

Despite the evident legal status of the Gaza Strip and other activities in this region, Israel has been denying its status as an occupying power in the Palestinian Territories. Israel insists that the land is disputed for two reasons: first, when Israel took control over the Gaza Strip, it was under Egyptian control, while the West Bank (including East Jerusalem) was under Jordanian rule; second, neither Egypt nor Jordan had legitimate authority on the Occupied Territories.³⁵

Israel's claim has not been supported by the international community mainly because Israel disregarded several international resolutions that, recognizing the Palestinian Territories as an occupied territory, often demanded Israel to withdraw from Gaza to uphold the rights of the Palestinian people to self-determination and to establish an independent state. Israel's claim is also inconsistent with the peace agreements signed between Israel and the Palestinians basically adopting the two-state solution and the right to self-determination of the Palestinian people. The establishment of the Palestinian National Authority and the continued negotiations between the two parties to reach a just and comprehensive settlement constitutes an implicit acknowledgement of the occupation.

Meanwhile, Israel's position regarding the inapplicability of the Geneva and Hague conventions to the Palestinian Territories contradicts the decision of the Israeli High Court of Justice. In the case of Beit Sourik Village Council, the High Court adjudicated that the Hague Regulations and the first three Geneva Conventions constitute a part of international customary law and are thus binding Israel. The High Court also recognized the Fourth Geneva Convention in its Military Order No. 3 issued in June 1967, but revoked this recognition on the ground that the Convention was not

³³ The Fourth Geneva Convention, art. 33. It states that: "[N]o protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited."

³⁴ Richard Goldstone, *Report of the Fact-Finding Mission on the Gaza Conflict* ("Goldstone Report"), U.N. Doc. A/HRC/12/48 (Sept. 25, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfindingmission.htm> (last visited on Oct. 10, 2010).

³⁵ To justify its position, Israel used Article 2, paragraph 2 of the Fourth Geneva convention, which states that: "[T]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Israel interprets this text to mean protection of the party that has legitimate sovereignty on the territory, and that Jordan and Egypt had no legitimate sovereignty in the Palestinian Territories when Israel took them over in 1967. Israel also claims that it had controlled these lands during its defence war against Jordan and Egypt, and consequently does not consider itself an occupying state. This claim of defensive control is not true since it is prohibited internationally, as it contravenes with the International Law principle of the inadmissibility of taking over the lands of others by force.

mentioned in its own laws. The Court's decision is a violation of international law, because it is inadmissible for any state to use its local laws as an excuse to refuse enforcing international treaties.³⁶

The Hague and Geneva Conventions are binding on all states because these regulations constitute an integral part of international customary law. The second common article in the four Geneva Conventions states that: "[T]he Fourth Geneva Convention shall apply to all cases of partial or total occupation, even if the said occupation meets with no armed resistance." Several international resolutions and commissions provided the applicability of the Fourth Geneva Convention to the Palestinian Territories on the ground that Israel is the occupying power of these territories. The Conference of High Contracting Parties to the Fourth Geneva Convention held in 2001 supported this position. The ICJ, in its Advisory Opinion on the Legal Consequences of the Construction of a Wall, also upheld the applicability of the Fourth Geneva Convention to all regions occupied within the framework of an armed conflict between two or more High Contracting Parties; the Occupied Palestinian Territories should be one of the regions.³⁷ Furthermore, Israel, by virtue of its occupation of Palestinian Territories, is obliged to abide by the Universal Declaration of Human Rights, the two International Covenants of 1966 and the Convention on the Rights of the Child.

3. The Legitimacy of Israel's Claim to the Right of Self-Defence

The general principle enshrined in the UN Charter is the prohibition of the use of force or the threat of the use of force in international relations.³⁸ The Charter, however, has permitted the exceptional use of force in Article 51 in the case of legitimate self-defence. Israel upholds the legitimate right of self-defence to justify its military operations in the Gaza Strip including the blockade and Operation Cast Lead.³⁹ Several Israeli politicians reiterate this principle. The Disengagement Plan provides it twice under the heading

³⁶ Vienna Convention on the Law of Treaties art. 27. May 23, 1969, 1155 U.N.T.S. 331. It reads: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."

³⁷ See the Separation Wall case, *supra* note 30, para. 101, *supra* note 29.

³⁸ U.N. Charter art. 2, para. 4.

³⁹ This is not the first time that Israel upholds its legitimate right of self-defence in confronting Palestinians. It used this right on several occasions to justify military operations against them, as it had used it to justify its occupation of

“Security Situation following the Disengagement,” which states that: “Israel reserves its right of self defence, both preventive and reactive, including the use of force, in respect of threats emanating in the region.”⁴⁰ If Israel is willing to claim the legitimate right to self-defence regarding the Gaza Strip, its military operations should meet the following conditions.⁴¹

A. Establishing the Legitimate Right of Self-Defence

The legitimate right of self-defence is recognized by international law in a limited situation whereby a state is subject to an ‘armed attack,’ which justifies the use of force to confront.⁴² The mere event of an armed attack by itself does not establish the right of self-defence. The attack should require the following conditions in order to make self-defence a legitimate argument.

(1) The Armed Attack Should Be Illegitimate.

In order to establish the right of self-defence, the armed attack should not be provoked, but unilaterally and intentionally initiated. If the state that upholds its legitimate right of self-defence has originally caused the incidence of the attack, or if it has unrightfully initiated the use of military force, then its right of self-defence is not acknowledged. In this case the attacking state is not considered the victim of an act of aggression, but perpetrator of international order. Thus, if the occupying state or the state that has violated the territorial integrity of other states is subjected to an armed attack by the inhabitants of the occupied territory or the attacked state, then the state would lose its right to self-defence. This is based on the general principle that prohibits the use of force or threats of the use of force in international relations. It means that legitimate self-defence against legitimate self-defence is unacceptable. Moreover, all acts of retaliation and reprisal⁴³ and pre-emptive military actions to

the Palestinian Territories in 1967 (the Gaza Strip and the West Bank including East Jerusalem), using the term ‘defensive war.’ Israel also used the right to justify the targeting and extrajudicial killing of members of the Palestinian resistance, to justify constructing the Separation Wall and in several other occasions.

⁴⁰ *Disengagement Plan*, Item a/3 on the Gaza Strip and Item b/2 on the West Bank.

⁴¹ Christian Mellon, *Gaza: legitimate defense?*, available at <http://www.ceras-projet.org/index.php?Id=3529> (last visited on July 1, 2010); Materneau Chrispin, *Israel, Gaza et le Droit International: Quelques Remarques*, available at <http://blog.multipol.org> (last visited on July 1, 2010).

⁴² MOHAMMAD KHALIL MUSA, *THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* 79 (1st ed. 2004); YORAM DENSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (2001).

⁴³ International Law jurisprudence distinguishes the right of self-defence from acts of reprisal. In both cases, force is used but the right of self-defence is legitimate as long as it aims at repelling an armed attack, while acts of reprisal are prohibited by international law when they hold a punitive nature. The Security Council Resolution 188 (1964) prohibited all acts of reprisal as they contravene with the objectives and principles of the UN. In fact, Israel has continuously perpetrated pre-meditated acts of reprisal and punitive acts following each operation that targets it, and

diffuse a potential armed attack⁴⁴ do not fall within the framework of legitimate self-defence. The following contains arguments against Israel's claim to the right of self-defence over the Gaza Strip.

First, as Israel is still occupying the Gaza Strip and other Palestinian Territories, it is thus violating several international resolutions demanding its withdrawal. Israel is considered in a state of continuous aggression against the Palestinian Territories and people since 1967. Furthermore, an occupation itself falls under the description of 'aggression,' according to the General Assembly Resolution 3314 (1974), which states that: "[N]othing in this definition could prejudice the right of people forcibly under colonial and racist regimes or other forms of alien domination to struggle for self-determination, freedom and independence." As a result, the Palestinian people have the right to resist against occupation and to self-determination.⁴⁵ Israel's claim of the legitimate right of self-defence has no legal foundation, because it is legally inadmissible for an occupying state to uphold a right of self-defence against the occupied people and to use the legitimate right of self-defence to perpetuate occupation or to prevent inhabitants of the occupied state from exercising their right to self-determination.⁴⁶ So long as the occupation is illegitimate, all the accompanying outcomes are illegitimate as well. Alternately, the acts of Palestinian resistance movements against Israel, in their capacity as national liberation movements, are undoubtedly legitimate under international law, because they are willing to repel occupation and forcing it to finally withdraw from the Occupied Palestinian Territories in full compliance with international resolutions.⁴⁷

Second, Israel's claim of the right to self-defence contravenes the right of the Palestinian's right to self-determination. This right is based on Article 1 of the UN Charter. The international community has recognized the Palestinian's right to self-determination. The Palestinian people have the right to resist against occupation in order to achieve independence and establish their independent state in the Gaza Strip, the West Bank and East Jerusalem. The Nuremburg Court maintained the applicability of the legitimate self-defence to use force by peoples to confront occupation by stating that: "[T]he enemy that unrightfully occupies the territories of another state shall not be hurt if the attacked people did not implement the laws and customs of war during clashes that occur between them and the occupying state, within the scope of their use

sometimes even for no reason.

⁴⁴ Regarding the preventive legitimate defence, see MOHAMMAD MAHMOUD KHALAF, *THE LEGITIMATE RIGHT OF SELF-DEFENCE IN INTERNATIONAL CRIMINAL LAW, A COMPARATIVE ANALYTICAL STUDY* 217 (1973).

⁴⁵ ABDUL FATTAH HJAZI, *INTERNATIONAL CRIMINAL COURT, SPECIALIZED STUDY OF INTERNATIONAL CRIMINAL LAW* (2005).

⁴⁶ Mohammad Khalil Musa, *supra* note 42, at 84.

⁴⁷ *Id.*

of the legitimate right of self-defence.”⁴⁸ Hence, Israel is not entitled to claim a right of self-defence against the people of the Gaza Strip, while the Palestinians are in a state of legitimate self-defence against Israeli occupation under the rule of “the inadmissibility of establishing legitimate self-defence against legitimate self-defence.” In fact, Israel’s use of military force against the people of the Gaza Strip falls within an act of aggression and the grave breach of Article 39 of the UN Charter.

Third, as Israel exercises effective control over the Gaza Strip, the rules of IHL including the Fourth Geneva convention of 1949 and the Hague Regulations of 1907 should be taken the primary consideration because the presence of occupation prevents the application of Article 51 of the UN Charter. Furthermore, international law prohibits occupation, annexation, hegemony and domination of the lands of others by force. The international community has also adopted tens of resolutions that condemn the Israeli occupation of the Palestinian Territories, *e.g.*, the West Bank, East Jerusalem and the Gaza Strip as one geographic and political unit. The international community demanded Israel’s withdrawal from those regions. However, Israel has maintained its occupation over the Gaza Strip. It continues to attack the lives and property of the Palestinian people, infringing on their freedom and humanity for decades.

(2) The Armed Attack of One State against Another State.

In order to establish the legitimate right of self-defence, the armed attack must come from one state against another state.⁴⁹ This has been asserted by the ICJ in the case of the Separation Wall, where the Court linked the application of Article 51 of the Charter to the existence of an armed attack launched by one state against another state.⁵⁰ It is noted that the ICJ has narrowly interpreted the right of self-defence.⁵¹ The Court aimed at restricting the conditions of legitimate self-defence to the narrowest possible scale as an exception to the general rule that prohibits the use of force in international relations. The ICJ adopted a similar approach in the Nicaragua case,⁵² pointing out that:

the exercise of the legitimate right of self-defence against armed attacks of unorganized forces is conditional to the presence of a link between these armed attacks and a certain state, while armed attacks conducted by non-state entities, such

⁴⁸ See Al-Haq, *Israeli Attack on Gaza Strip in light of International Humanitarian and Public Laws*, available at <http://www.alhaq.org/pdfs/release-Gaza-IHL.pdf> (last visited on Sept. 10, 2010).

⁴⁹ Mohammad Khalil Musa, *supra* note 11, at 10.

⁵⁰ ICJ on the Separation Wall, *supra* note 29, para. 139.

⁵¹ ICJ adopted this approach in more than one decision, including the case of the Corfu Channel of 1949 and the case of the Iranian Oil Platforms (Iran v. U.S.) of 2003. See *supra* note 47.

⁵² Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Report, at 14 (June 27).

as an organization or a group, do not justify, from the perspective of the Court, establishing the right of self-defence, unless these attacks are linked to a specific state.⁵³

As applied presently, the Gaza Strip is not an independent and sovereign state Israel may not grant itself the legitimate right of self-defence,⁵⁴ because Israel is therefore occupying a region as opposed to a state. Moreover, the right to self-defence under international law requires an actual act of aggression or armed attack from abroad. However, if the source is internal, as is the case with Palestinian resistance movements that struggle against Israeli occupation from within, Article 51 of the U.N. Charter is not applicable.⁵⁵

B. Exercising the Legitimate Right of Self-Defence

The legitimate right of self-defence is an exception to the principle of the UN Charter prohibiting the use of force or threats of the use of force in international relations. Hence its use has been restricted by specific determinants, so that the use of force neither become a means for aggression, nor served for purposes other than those to which it was legitimized. The most critical determinant is to use armed force after exhausting all the possible peaceful means. If such means do not succeed in repelling aggression and there was no other means but to the use of force, then the principles of proportionality and distinction must be adhered to.⁵⁶

(1) The Use of Force as the Last Resort to Repel Armed Attack.

Considering that the legitimate right of self-defence is an exception of the general principle of the UN Charter on the peaceful resolution of international disputes, the use of force is not admissible except when the measure is the last resort. If peaceful means⁵⁷ or intervention of the Security Council can be invoked to repel an armed attack, that should be the prior option.

⁵³ *Id.* para. 195. However, there is a trend, particularly in the United States and Israel considering that Article 51 of the UN Charter may be applied even when a State is not the source of the armed attack referring to the Security Council Resolution 1368 (2001) and Resolution 1371 (2001), that had been issued since the 9/11 attacks. This opinion has been criticized as, in both resolutions, the relations between these entities and other states had been examined, accordingly, Afghanistan was attacked on the basis of its relationship with Talibans. See *supra* note 47.

⁵⁴ Marko Milanovic, *A follow-up on Israel and Gaza*, available at <http://www.ejiltalk.org/a-follow-up-on-israel-and-gaza> (last visited on Sept. 10, 2010).

⁵⁵ G.A. Res. 1514(XV), U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960).

⁵⁶ In the case of Nicaragua v. U.S. of 1986, the ICJ added two more conditions to be the armed attack stipulated in Article 51 of the Charter. They are 'immediate necessity' and 'proportionate.' See 1986 I.C.J. (June 27).

⁵⁷ U.N. Charter art. 33.

In light of the prevalent situation and events in the Gaza Strip, no one denies that there were peaceful means to prevent attacks by the Palestinian liberation movements against Israel other than through the use of force. One way is to comply with international law and international resolutions which demand Israel end its occupation of the Palestinian territories and recognize the right of the Palestinian people to the right of self-determination to establish their own independent state.⁵⁸

As long as Israel refrains from implementing these international resolutions, besieges the population of Gaza, controls all its space, continues settlement activity in the West Bank, persists in the judaization of Jerusalem, violates the inadmissible rights of the Palestinian people and refuses to sign a peace agreement that preserves the rights and dignity of the Palestinian people, Israel can neither claim a right to self-defence against the Palestinians, nor uphold this right with regard to the Gaza Strip.

(2) Adherence to the Principles of Proportionality and Distinction.

Any use of force within the framework of international law, even in the case of self-defence, requires upholding two major principles: proportionality and distinction.⁵⁹ According to the principle of proportionality, a state that exercises its right of self-defence must not resort to excessive use of force with its military operations, but adopt reasonable defensive means that ensure proportionality between the act of aggression and the response such acts. It should also select the least harmful measure to respond to the attack and repel it. A State must refrain from launching military operations, under the guise of self-defence, that are not related to the act of aggression that established the right of self-defence.

The principle of distinction requires the state facing against a military attack and the exercise of the legitimate right of self-defence to distinguish military targets and combatants from civilians and civilian targets. It must avoid imposing collective punishment on the civilian population and attacking their lives and property.

The course of Israel's military action in the Gaza Strip, even after the implementation of the Disengagement Plan, proves that Israel has not adhered to the principles of proportionality and distinction in its operations including the blockade against the Gaza Strip and Operation Cast Lead and other military operations. The people of Gaza were afflicted with casualties and physical losses during Operation Cast Lead due to the random bombardment, deliberate targeting of civilians, the use of civilians as human shields and other practices.

The Goldstone Report confirmed that Israel deliberately targeted police stations,

⁵⁸ Mellon, *supra* note 42, at 2.

⁵⁹ Chrispin, *supra* note 42.

medical centres, ambulances, schools, mosques, hospitals, factories, houses, the electricity power plant and the infrastructure of the Gaza Strip, resulting in a human catastrophe there.⁶⁰ Israel was even accused of committing international crimes.⁶¹ Moreover, several international resolutions condemned the blockade imposed by Israel on the Gaza Strip, considering it illegitimate action. They also demanded ending the blockade immediately as it constitutes collective punishment against the people of the Gaza Strip. All of these military activities prove that Israel did not adhere to the principles of proportionality and distinction.

4. Conclusion

There is no international legal ground for Israel to claim a right of self-defence against the Palestinian people in the Gaza Strip. Although Israel has declared that it ended the occupation of the Gaza Strip upon the implementation of the Disengagement Plan in 2005, objective facts prove otherwise. Israel, *de jure* and *de facto*, is still an occupying power in Gaza considering that it exercises effective control over the land and sea borders and air space. A stifling military siege since 2007 has put the inhabitants of the Gaza Strip on the verge of a humanitarian disaster. The siege is a collective retaliation against the Palestinian liberation movement. Furthermore, the Israeli military practices in the Gaza Strip during Operation Cast Lead have unveiled the real face of Israel to the world, not only in terms of its disrespect to the internationally recognized rights of the Palestinian people, but also through the war crimes, crimes against humanity and other crimes it committed against the unarmed population under the pretext of the right of self-defence.

If Israel's occupation continues to effectively control the Gaza Strip even under the Disengagement Plan, the relationship between the two sides would be a point at issue with respect to IHL in the future. In particular, the Fourth Geneva Convention and the Hague Regulations of 1907 and Article 51 of the UN Charter do not apply to the relationship between Israel, the occupying power, and the occupied Palestinian people. Otherwise, the right of self-defence would become a tool to perpetuate occupation and domination of Israel. It may divert the purpose to which the right of self-defence was granted. In its Advisory Opinion on the Separation Wall, the International Court of Justice explicitly indicated that the right of self-defence that Israel claims does not apply

⁶⁰ *Supra* note 34.

⁶¹ *Supra* notes 32 & 34.

to the Occupied Palestinian Territories.

As long as Israel keeps occupying the Palestinian Territories in spite of condemnation from the international community, Israel is considered in a state of aggression against the Palestinian Territories, and consequently cannot claim a right of self-defence against the Palestinian people. The continuation of occupation grants the Palestinian people and its resistance the status of national liberation movements, the right to resist against the Israeli occupation according to the right of the Palestinian people living in freedom, independence and self-determination. These rights should be protected under international law.

For the past forty years of occupation, Israel has been successful in enjoying impunity by camouflaging its position as a victim, despite its violations of international law by establishing settlements in the West Bank, annexing Jerusalem, and violating the rights and the humanity of Palestinians in the Gaza Strip and in all the Occupied Territories. This was the result of explicit or implicit approval of the international community. In sum, Israel's claim of the right to self-defence is a series of allegations without any legal and factual ground.