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Israel-Gaza Conflict in 2008. Self-Defense?

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"The means of defense against foreign danger historically have become the instruments of tyranny at home."

- James Madison

Israel-Gaza Conflict in 2008. Self-Defense?

1. Introduction: Background on the Situation

The core of the Israeli-Palestinian conflict is the claim of two peoples to the same piece of land,¹ which can be traced back as far as the 19th century. Ever since the declaration of independence by the State of Israel in 1948, a small coastal strip along the Mediterranean Sea known as Gaza, has been a major issue for the world community. Not only had the territory been under constant occupation for almost 60 years, first by Egypt, then by Israel, but it also proved to be one of the largest breeding grounds for terrorism in the region. A series of friendly agreements were signed throughout the 1990-es between Israel and Palestine Liberation Organization, however the negotiations stalled, as after the failure to provide a Palestinian self-rule in the West Bank and Gaza Strip, the *al-Aqsa Intifada* (“the furthest uprising”) began in 2000.² Since then Israel and the Palestinians of the West Bank and Gaza Strip have become entangled in a bloody confrontation resulting in thousands of casualties on both sides. After countless efforts at mediation by the international community, the crisis has shown no sign of abating. In fact its intensity has been continuously heightened by the dynamics of escalation from one side and counter-escalation from another.³

The main adversary of Israel in the Gaza region is a militant organization Hamas. The organization is keen on rejecting the Israel’s very right to exist, and its main document, the Charter of 1988 calls for complete destruction of Israel.⁴ Hamas also fielded candidates for the parliamentary elections, but unlike, for example, its Lebanese counterpart Hezbollah, it actually won a majority of seats in the Palestinian Legislative Council and now is *de facto* in control of Gaza. Without necessarily endorsing its use of terror, many Palestinians consider Hamas a

¹ Dowty, A. *Israel and Palestine*. Second edition. Polity. Cambridge, 2008. p. 4.

² Gaza Strip. CIA’s World Factbook. <https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html>.

³ Naqib, F. Economic Aspects of the Palestinian-Israeli Conflict: The Collapse of the Oslo Accord. *Journal of international Development*, 2003, Vol. 15, pp. 499-500.

⁴ Stephens, B. The Sderot Calculus. February 26, 2008. *The Wall Street Journal*. <http://online.wsj.com/article/SB120398961080492299.html>.

legitimate resistance movement,⁵ although it is perceived as a terrorist organization by Israel, USA, Canada, Japan, as well as the European Union.⁶ Australia and the United Kingdom emphasize that only the military wing of Hamas is of terrorist-nature. It is widely accepted among scholars, that terrorism mainly includes acts, which are targeted against the civilian population. Such acts are openly adopted by Hamas, which aside from conducting the usual raids and carrying out suicide-bombings, gained a negative reputation by constantly attacking Israel's border towns and settlements with unguided *Qassam* rockets. Israel itself, according to the official statement of the Ministry of Foreign Affairs in 2005,⁷ will act with *all necessary force* and determination to halt the firing of these rockets at its citizens - as it will persist in its struggle against Hamas and the other terrorist organizations that seek to destroy any chance for peace and calm in the region. Ironically, Hamas issued very similar statements signifying, that their actions are a natural result of the continued Israeli crimes against Palestinians, and that it's actually they who are in a state of self-defense, which in turn gives them every right to use *all means* to defend themselves.⁸

2. Status Quo of Gaza

In August 2005 the government of Israel adopted a proposal of Ariel Sharon to recall all Israeli settlers from the Gaza Strip. By September 12, 2005 this plan was fully implemented, however the concomitant abandonment of the Egyptian-Gaza border have led to exponential growth in the number of rocket attacks, with ammunition, terrorists, manufacturing equipment and cash being smuggled through the tunnels and the porous Egyptian-Gaza border (the so-called Philadelphi corridor).⁹ This forced Israel to conduct additional military operations in the Strip, despite the disengagement.

In spite of the withdrawal, as of now Israel still controls Gaza's airspace, territorial waters, and land borders. It is also Gaza's primary supplier of electricity, which is essential for water

⁵ Mockaitis, T.R. The "New" Terrorism: Myths and Reality. Greenwood Publishing Group, Westport CT, 2006. p. 33.

⁶ The Council of the EU Decision 2005/930/EC. December 23, 2005. Official Journal of the European Union. http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/oj/2005/l_340/l_34020051223en00640066.pdf

⁷ Israeli Response to the Escalation of Gaza Terrorism. September 26, 2005. Israel Ministry of Foreign Affairs. <http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Israeli+Response+to+the+Escalation+of+Gaza+Terrorism+26-Sep-2005.htm>.

⁸ US Warns Hamas over Israel Blast. April 18, 2006. BBC News. http://news.bbc.co.uk/2/hi/middle_east/4917438.stm.

⁹ Cohen, A. The Real World: From Sderot to Jerusalem. March 7, 2008. Middle East Times. <http://www.heritage.org/Press/Commentary/ed030708a.cfm>.

availability and sewage treatment. In addition, Israel controls Gaza's telecommunications network, its population registry, and its customs and tax revenues.¹⁰ Currently there is a large debate on whether the Gaza Strip remains occupied in legal terms. The Arab world, mainly basing its arguments on the Human Rights Watch' findings¹¹ stresses that Gaza remains occupied territory, both legally and in reality,¹² while others point out, that "there is no need to resort to legal fiction of occupation to entail responsibilities on Israel".¹³ Legal theoretician Yuval Shany, for example, believes that the Israeli disengagement from Gaza has led to the transfer of effective control over the entire Gaza Strip from Israel to the Palestinian Authority (hereinafter PA), since Israel is in no position to execute the obligations arising under the laws of occupation to maintain law and order in Gaza and to provide for the basic services in the area. This, in his opinion, on the other hand, does not mean that Israel is released from all of its international obligations *vis-à-vis* Gaza as IDF operations in and around Gaza are still subject to the laws of armed conflict.¹⁴ American scholar Michael Walzer goes even further and calls the current situation in Gaza an *indirect* occupation, in which Israel follows a deliberate policy of collective punishment and impoverishment of the Palestinian civilian population.¹⁵ The problem is further exacerbated by the fact that the PA is not a state, and even if its control of Gaza will allegedly fulfill, in the course of time, the factual conditions of statehood in international law, the West-Bank and the Gaza Strip have been always conceived by Israel, the PA, and the international community as a single territorial unit.¹⁶ Nevertheless law does not accept or envision half occupations: either a territory is occupied or it is not. "Disengagement" from parts of occupied territory does not end occupation, though the degree to which the Occupying Power remains responsible for the well-being of the population depends on the extent, to which the occupier can exercise power,¹⁷ therefore, taken into account the amount of control Israel has over the civilian welfare in Gaza,

¹⁰ Israeli Blockade Unlawful Despite Gaza Border Breach. January 28, 2008. Kansan City Infozine News. <http://www.infozine.com/news/stories/op/storiesView/sid/26693/>.

¹¹ The Legal Status of the Gaza Strip. 5 June, 2007. Arab Media Watch. <http://www.arabmediawatch.com/amw/Articles/Analysis/tabid/75/newsid395/3928/The-legal-status-of-the-Gaza-Strip/Default.aspx>.

¹² Milne, S. West Blames Victims for Gaza Killing Spree. March 6, 2008. Arab News. <http://arabnews.com/?page=7§ion=0&article=107536&d=6&m=3&y=2008>.

¹³ Panelists Disagree Over Gaza's Occupation Status. November 17, 2005. University of Virginia School of Law. http://www.law.virginia.edu/html/news/2005_fall/gaza.htm.

¹⁴ Shany, Y. Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement. Yearbook of International Humanitarian Law, 2005, Vol. 8, p. 383.

¹⁵ Was Lebanon a Just War? Debate: Michael Walzer vs. Jerome Slater. Institute for Public Policy Research. June-August 2007. <http://ideas.repec.org/a/bla/neweco/v14y2007i2p97-110.html>.

¹⁶ Noam, G. Territorial Aspects of the Israeli-Palestinian Conflict: A Legal Perspective on Some Historical and Contemporary Issues. Acta Societatis Martensis, 2005, Vol. 1, p. 235.

¹⁷ Mari, M. The Israeli Disengagement from the Gaza Strip: An End of the Occupation? Yearbook of International Humanitarian Law, 2005, Vol. 8, p. 367.

one must admit that this land is still occupied up to this day.

Though the terror activity which emerges from occupied territories usually concerns the fight for self-determination and hence is not considered by everyone as terror activity, whoever supports the view that such activity qualifies as terrorism still has to consider whether the requirement of an ‘external link’ is satisfied. Since Israel denies that the Occupied Palestinian Territory possesses the qualifications needed to become a country, it can not argue that terrorism coming from the Occupied Palestinian Territory is an armed attack directly stemming from a state. But, as it is well known, a state does not cease to exist as a legal entity even if its entire territory is occupied by the enemy, because the occupant does not automatically displace the territorial sovereign,¹⁸ therefore referring to the sanctioned *post-9/11* Afghanistan intervention, an argument of self-defense against a state harboring terrorism can be brought up. And since Hamas, being a terrorist-organization, has effective control over the Gaza Strip and enjoys an overwhelming majority in the Palestinian parliament, one should conclude, that Israel has full right to use such arguments in regard to this particular territory.

3. Gaza Blockade of 2007-2008

3.1 Humanitarian Blockade as a Defensive Measure

On September 19, 2007, following the increase in Hamas rocket attacks on Israeli border cities, Israel declared Gaza as “hostile territory” and imposed restrictions on the supply of fuel and electricity.¹⁹ According to the National Lawyers Guild²⁰ by January 2008, the cutoff of the necessities has reached genocidal implications. The Guild also referred to Professor John Dugard, the UN Special Rapporteur for Human Rights in the Palestinian Territories who called the Israeli government’s actions serious war crimes and acts of aggression. The blockade was met with much criticism, most notably international human rights organizations like Human Rights Watch²¹ and Amnesty International, which called Israel’s move a “collective punishment”.²²

¹⁸ Canor, I. When *Jus ad Bellum* Meets *Jus in Bello*: The Occupier’s Right of Self-Defense Against Terrorism Stemming from Occupied Territories. *Leiden Journal of International Law*, 2006, Vol. 19, p. 136.

¹⁹ Cooper, H., Erlanger, S. Israel Pressures Hamas Ahead of Rice’s Arrival. September 20, 2007. *New York Times*. http://nytimes.com/2007/09/20/world/middleeast/20mideast.html?_r=1&scp=3&sq=Gaza+fuel+Qassam&st=nyt&oref=slogin.

²⁰ National Lawyers Guild Deplores Humanitarian Crisis in Gaza Caused by Israeli Blockade and Fuel Cutoff. January 22, 2008. National Lawyers Guild. <http://www.nlg.org/news/index.php?entry=entry080123-090512>.

²¹ Gaza: Israel’s Energy Cuts Violate Laws of War. February 7, 2008. Human Rights Watch. <http://hrw.org/english/docs/2008/02/07/isrlpa17994.htm>.

Israeli officials, however, claim that the situation is only the consequence of the wrong choice, made by the Palestinians, to adopt terrorism and violence over peace and negotiations with Israel. In their opinion, Hamas had exaggerated the humanitarian plight in Gaza and that the sudden reduction in rocket fire was proof that the blockade had reduced the risk of hitting its citizens.²³ Although some domestic Israeli politicians, like Effie Eitam or vice-minister Haim Ramon openly proclaimed that the price paid by the Gaza population will only benefit Israel, as it is a legitimate and moral price,²⁴ and “Israel must not make do with only symbolic power cuts, thus, if they [Gazans] fire a rocket, there should be no electricity, water or fuel”,²⁵ Israeli representatives on the world arena, backed by international lawyers chose a more careful approach and relied once again on the right of self-defense under Article 51 of the UN Charter. In his statement of January 22, 2008, to the president of the Security Council,²⁶ Counselor Gilad Cohen for example, pointed out that “With Hamas in control of the Gaza Strip and its rocket launchers pointed at Sderot,²⁷ Israel faces an impossible situation. Israel must and will protect its civilian population from these rocket attacks. It is the duty of all States to ensure the right to life and safety of its people”, clearly referring to Article 51. According to his words, Israel chooses to ensure the humanitarian welfare of the Palestinians in Gaza, even as Hamas tries to abuse those efforts and works closely with the humanitarian organizations and relevant agencies on the ground to ensure that the needs are met”. 8 days later Israel Ambassador Dan Gillerman to the UN Security Council once again reaffirmed: “Israeli government has been clear – in words and in deeds – that it will do everything possible to ensure the humanitarian needs of all civilian populations”.²⁸ UN ambassador Daniel Carmon in his letter to the Secretary-General Ban Ki-moon even directly asserted that “Israel will not stand idly by as its citizens are under constant attack and reserves the right to defend itself from all armed attacks, as any other nation would,

²² Israel Cuts Electricity and Food Supplies to Gaza. January 21, 2008. Amnesty International. <http://www.amnesty.org/en/news-and-updates/news/israel-cuts-electricity-and-food-supplies-gaza-20080121>.

²³ McGirk, J. The Lancet: Gaza’s Humanitarian Crisis Deepens. January 31, 2008. <http://gess.wordpress.com/2008/02/01/the-lancet-gazas-humanitarian-crisis-deepens/>.

²⁴ Eitam, E. Continue the Siege. January 27, 2008. Ynet News. <http://www.ynet.co.il/english/articles/0,7340,L-3499092,00.html>

²⁵ Olmert Resists Pressure to Invade Gaza. February 10, 2008. Khaleej Times. http://www.khaleejtimes.com/DisplayArticle.aspx?file=data/middleeast/2008/February/middleeast_February102.xml§ion=middleeast.

²⁶ Statements to the Security Council: The Situation in Gaza and Sderot. January 30, 2008. Israel Ministry of Foreign Affairs. <http://www.mfa.gov.il/MFA/Foreign+Relations/Israel+and+the+UN/Speeches+-+statements/Statements+to+the+Security+Council+The+situation+in+Gaza+and+Sderot+22-Jan-2008.htm>.

²⁷ Sderot is an Israeli town, only 1 kilometer from the Gaza border, which has recently become the most frequent target for the *Qassam* rocket attacks emanating from the Strip.

²⁸ Statement by Ambassador Dan Gillerman. Situation in the Middle East including the Palestinian Question. 30 January 2008. Israel Ministry of Foreign Affairs. <http://israel-un.mfa.gov.il/mfm/Data/131223.doc>.

according to its inherent right under Article 51 of the United Nations Charter”.²⁹ The United States, a staunch ally of Israel, also insists that the Israeli blockade of Gaza is a “self-defense” move in the face of rockets fired from the impoverished territory controlled by Hamas.³⁰

Indeed it is true that the blockade of Gaza at certain degree falls under UNGA Resolution 3314 Article 3(c), which defines blocking of a state’s ports or coasts as an act of aggression. Although the question whether Gaza can be considered an individual state or part of such is a controversial one, it is not relevant in this case, since as the 2002 Commentary on the Charter of the United Nations³¹ specifies, if maintained effectively, the blockade can be considered if not aggression, then at least “an armed attack”, regardless of whether the obstruction is carried out by land, air or naval forces. Therefore would the blockade start off from a “clean sheet” and not as a response to the Hamas’ previous actions, Gaza would certainly enjoy a right of self-defense against Israel, although not under Article 51, but under customary law (as neither the Gaza Strip nor PA are members to the UN). However, since Hamas chose to resort to indiscriminate attacks on civilian regions, i.e. to use an illegal mean, such right in any case should be rejected and the original privilege to invoke arguments of armed self-defense belongs to Israel.

As was concluded by ICJ in the advisory opinion on the *West Bank Barrier Case*, the notion of self-defense in Article 51 is not limited to counter-attacks with armed force and blockade can be a legitimate tool in responding to armed attacks (or in anticipatory self-defense cases, to threats of such attacks). It is important, that unlike the armed operation in Gaza in 2006, prior to the Second Lebanon War, during which Israel used the killings of two Israeli soldiers and capture of a third by Hamas as an excuse to invade Gaza with overwhelming military force and knocked out Gaza’s main power plant,³² triggering almost identical response from the world community, the humanitarian pressure in 2007 and 2008 is carried out separately from military action, therefore in the current case self-defense bears different nature, than it had in the 2006-operation.

²⁹ Israeli UN Ambassador Daniel Carmon’s Letter to the Secretary-General of the UN Ban Ki-moon of 15 January 2008. Israel Ministry of Foreign Affairs. <http://israel-un.mfa.gov.il/mfm/Data/130193.doc>.

³⁰ End Gaza Misery: FT. January 25, 2008. Association of Muslim Scholars in Iraq. <http://heyetnet.org/en/content/view/2502/30/> and US Defends Gaza Siege as Israeli “Self-Defense”. January 24, 2008. Al Arabiya News Channel. <http://www.alarabiya.net/articles/2008/01/24/44640.html>.

³¹ Simma, B. *The Charter of the United Nations. A Commentary*. Second Edition. Vol. 1. Oxford University Press, Oxford, 2002, p. 797.

³² Cohn, M. Israel’s Gaza Problem. *Alternet*. <http://www.alternet.org/story/38488/>.

3.2. Is Gaza Blockade Permissible and is It a Proportionate Response?

Recalling the Security Council resolution 1368, which reaffirmed the possibility to use the right of armed self-defense against terrorist organizations, there is no doubt that Israel does enjoy such right in case Hamas rocket strikes amount to armed attack in the meaning of Article 51 of the Charter. Although a single *Qassam* rocket usually is not capable of causing massive casualties, thousands of such rockets were launched throughout the years by Hamas and damage done to Israel is substantial. This is where the Needle Prick Theory comes into play, according to which the totality of incidents caused by terrorist strikes emanating from Gaza Strip accumulates to an armed attack, necessary for Israel to invoke the right of self-defense.

But can economical and other non-military sanctions be disproportionate to armed aggression at all? In one of his speeches Joe Stork, the acting director of Human Rights Watch's Middle East division, said that "Israel's rightful self-defense against unlawful rocket attacks does not justify a blockade that denies civilians the fuel and food needed to survive, a policy amounting to collective punishment".³³ Indeed, both during the conflict and in times of peace a state in control of an occupied territory has a positive obligation to ensure adequate food, services and supplies to the population under its control, but the word *adequate* already implies that its amount will be limited. Israel policy has been to use blockade against the Hamas administration as an anti-terrorist act of self-defense while allowing sufficient supply of food, fuel and electricity to prevent starvation or a humanitarian crisis. Every action against the Hamas administration inevitably harms the civilian population, but Israel has attempted to minimize it by ensuring a minimum necessary supply. This would appear to be a reasonable and logical interpretation of obligations under international law,³⁴ therefore the Gaza blockade should be considered a *proportionate* mean to the Hamas attacks against the civilian population of Israel.

4. Operation "Warm Winter"

4.1. Breach of Gaza-Egypt Border and Strike on Ashkelon

On January 23, 2008, Hamas demonstrators managed to blow up a hole in the border-wall near

³³ *Supra* note 10.

<http://www.alertnet.org/thenews/newsdesk/HRW/2a01233f287e8ab405c38d6524c70692.htm>.

³⁴ Sabel, R. Is Gaza Blockade a Legitimate Tool of War? February 10, 2008. The Jerusalem Post. <http://www.jpost.com/servlet/Satellite?cid=1202657415718&pagename=JPost%2FJPArticle%2FShowFull>.

the Rafah Border crossing, which separates Gaza Strip from Egypt. Hundreds of thousands of Palestinians rushed into Egypt to buy different items of need. Using the confusion and chaos, Hamas terrorists also crossed the border, as suggested by some Israeli officials,³⁵ and allegedly managed to smuggle new weapons and equipment, including some long range Grad missiles.

Almost a month later, on the 27th of February, 2008, Hamas besides conducting its usual *Qassam*-barrage of Sderot also fired a few Grad rockets at a bigger Israeli city – Ashkelon. Although Israel has previously frequently carried out small operations and mini-incursions into Gaza Strip in response to terror-attacks, the existence of long range missiles in Hamas’ arsenal forced Israel to initiate a serious campaign named operation “Warm Winter”.

4.2. The First Phase and Reactions

At first glance operation “Warm Winter” did not differ much from previous Israeli campaigns in terms of weapons or tactics. It started on February 29 and lasted only 5 days, nevertheless the resonance it created on international arena is comparable to the one from the July War. This was caused mainly by the fact that out of over a hundred deceased during the 5-days battle, more than a half were civilians, and almost all of them Palestinians.

A few countries openly condemned Israel for the operation, including Turkey, one of Israel’s few Muslim allies,³⁶ while others, such as Spain, expressed concern over the high number of civilian casualties and asked Israel to show restraint in its actions.³⁷ European Union, which previously underlined the need for careful weighing of the negative impact on civilians population, while at the same time condemning the “unacceptable and continued attacks on Israel’s territory” and recognizing Israel’s legitimate right to self-defense,³⁸ responded quite harshly and condemned Israel for its military act as “disproportionate use of force”.³⁹ Israeli Prime Minister Ehud Olmert rejected the criticism and stated that “No one has the moral right to preach to Israel for taking the

³⁵ Sharp, J.M. CRS Report for Congress: The Egypt-Gaza Border and its Effect on Israeli-Egyptian Relations. February 1, 2008. p. 9. <http://www.fas.org/sgp/crs/mideast/RL34346.pdf>.

³⁶ International Community Rips Israel over Gaza. March 7, 2008. Daily Star. http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=89461.

³⁷ *Ibid.*

³⁸ EU Urges Israel to Reconsider Cuts to Gaza Energy Supply. October 31, 2007. Haaretz. <http://www.haaretz.com/hasen/spages/918684.html>.

³⁹ Gaza: EU Slovenian Presidency Condemns “Disproportionate Use of Force” by Israel. ECJ Press. <http://www.ejpress.org/article/24795>.

elementary step of self-defense”.⁴⁰ Not so surprisingly the argument of self-defense was upheld by USA,⁴¹ but also by Germany’s Foreign Ministry spokesman Martin Jäger.⁴²

On the third day of the conflict, before the battle ended, UNSC held an emergency meeting, during which the Secretary General Ban Ki-moon condemned the relentless Palestinian rocket attacks against southern Israel and called for “the immediate cessation of such acts of terrorism”.⁴³ At the same time he criticized the “disproportionate and excessive use of force that has killed and injured that many civilians”.⁴⁴ In spite of Libya’s efforts to push a resolution “strongly condemning the killing of innocent civilians, including children”,⁴⁵ the USA delegation clearly indicated, that it will veto it.⁴⁶ Instead, the Security Council came up with a neutral statement condemning the escalation of the fighting and urging Israelis and Palestinians “to immediately cease all acts of violence”.⁴⁷

Pakistan, acting on behalf of the Organization of the Islamic Conference,⁴⁸ nevertheless, managed to convince the Human Rights Council to pass resolution A/HRC/7/L.1, by which the UNHRC condemned the “persistent Israeli military attacks and incursions in the Occupied Palestinian Territory, particularly the recent ones in the occupied Gaza Strip, which resulted in the loss of more than 125 lives and hundreds of injuries among Palestinian civilians, including women, children and infants”, as well as expressed “its shock at the Israeli bombardment of Palestinian homes and the killing of civilians therein and at the Israeli policy of inflicting collective punishment against the civilian population, which constitute a war crime”, and “called for bringing the perpetrators to justice”.

⁴⁰ Boudreaux, R. Israel Pulls Its Troops From Gaza. March 3, 2008. Los Angeles Times. <http://www.latimes.com/news/nationworld/world/la-fg-mideast3mar03,1,1795086.story?track=rss&ctrack=1&cset=true>.

⁴¹ Barzak, I. 54 killed in Gaza as Israel fires barrage of rockets. March 2, 2008. The Arizona Republic Central. <http://www.azcentral.com/arizonarepublic/news/articles/0302Mideast0302.html?&wired>.

⁴² Berlin Justifies Israelis Atrocities in Gaza as “Self-Defense”. March 4, 2008. Mathaba News Agency. http://www.mathaba.net/0_index.shtml?x=584154.

⁴³ Mitnick, J. Gaza Siege Halts Peace Talks. March 2, 2008. The Washington Times. <http://www.washingtontimes.com/apps/pbcs.dll/article?AID=/20080302/FOREIGN/702550681/1001>.

⁴⁴ Al-Mughrabi, N. UN Chief Condemns Israel After Bloody Day in Gaza. March 2, 2008. Reuters. <http://www.reuters.com/article/topNews/idUSL2868601720080302?feedType=RSS&feedName=topNews&rpc=22&sp=true>.

⁴⁵ Aziakou, G. Security Council mulls condemnation of Israeli Assault on Gaza. March 2, 2008.

<http://haaba.com/news/2008/03/01/7-99171/security-council-mulls-condemnation-of-israeli-assault-on-gaza.html>.

⁴⁶ UN Fails Gaza Children, Again. March 2, 2008. Islam Online. http://www.islamonline.net/servlet/Satellite?c=Article_C&cid=1203757593355&pagename=Zone-English-News/NWELayout.

⁴⁷ U.N. Urges Israel, Palestinians to Cease Violence. March 2, 2008. NPR. <http://www.npr.org/templates/story/story.php?storyId=87837153>.

⁴⁸ Nebehay, S. UN Rights Body Condemns Israel Over Gaza Attacks. March 6, 2008. Reuters. http://www.reuters.com/article/homepageCrisis/idUSL06899144._CH_.2400.

4.3. Collateral Damage in Self-Defense

Recalling the three pre-requisites necessary in order for self-defense to be in accordance with international law – necessity, proportionality and lack of other means, it is beyond reasonable doubt that Israel is experiencing a strong need to eliminate terrorist-menace in the Middle East region, including Gaza Strip, which threatens its national security. Since Israel withdrew its forces from Gaza, tried to fight terrorism in the Strip through diplomatic channels, imposed a blockade, and all these means deemed to be inefficient in stopping the bombardment of Israeli border-towns, the lack of other remedies other than a military operation should in this case be obvious as well. Thus only the question of proportionality arises.

Interestingly, Hamas claimed during the conflict, that they fire rockets in self-defense and that they would stop, if Israel halted all military activity in the Gaza Strip, the occupied West Bank and ended a Gaza Blockade,⁴⁹ but, as stated above, Hamas cannot enjoy a right of armed self-defense, because it is deliberately targeting civilian population. The situation for Israel is more complex, however, since Hamas is operating from within the built-up areas effectively using civilians as human shields,⁵⁰ therefore making it almost impossible for Israel to avoid collateral damage while attacking military targets. Although indirect damage to civilian targets during such operations is not forbidden, if the collateral damage is excessive in relation to the military need, it becomes illicit. Moreover, the rule of proportionality in such cases relies upon intent.⁵¹ According to Professor Efraim Inbar, Israeli military units do their best to minimize the collateral damage when attacking military targets in the midst of civilian concentrations. Israel follows strict legal standards for military procedures and legal authorities are invariably consulted before the approval of military operational plans, while all military actions are subject to stringent judicial review by the Israeli High Court of Justice.⁵² Israel Ministry of Foreign Affairs even asserts, that operations are frequently cancelled because the risk of injury to civilians might not

⁴⁹ Special Report: Israel Responds to Hamas's Escalation. March 2, 2008. Honest Reporting. http://www.honestreporting.com/articles/45884734/critiques/new/Special_Report_Gaza_-_Israel_Responds_to_Hamass_Escalation.asp.

⁵⁰ Al-Mughrabi, N. Hamas Claims Gaza "Victory" as Israel Pulls Back. March 3, 2008. http://www.boston.com/news/world/middleeast/articles/2008/03/03/israel_hits_new_gaza_targets_after_us_urges_halt_1204521194/.

⁵¹ Bell, A. International Law and Gaza: The Assault on Israel's Right to Self-Defense. Jerusalem Center for Public Affairs, 2008, Vol. 7, No. 29. <http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DBID=1&LNGID=1&TMID=111&FID=378&PID=0&IID=2021>.

⁵² Inbar E. Israel's Moral War Against Hamas. March 8, 2008. The Jerusalem Post. <http://www.jpost.com/servlet/Satellite?cid=1204546432230&pagename=JPost%2FJPArticle%2FShowFull>.

be proportional to the military goals of the operations,⁵³ however not only direct intent to harm civilian population must be excluded in order for the operation to be proportionate, but indirect intent as well. As was shown before, when it comes to fighting terrorism, according to the needle prick theory, proportionality cannot be measured against a single specific attack, but must be weighed objectively, taking into consideration the overall threat, thus Israel's response is disproportionate not because by the end of the 5-day skirmish only two Israelis were killed, compared to over 100 Palestinians,⁵⁴ but because Israeli command's conscious actions have led to more civilian casualties than terrorist fatalities during the "Warm Winter" operation.

Though international law does not set a concrete proportion of how many civilians can be placed in jeopardy for each legitimate target, and this question should be decided solely on case-by-case basis, the author of this work would suggest that an attack, in which more than one third of victims are civilians (under humanitarian law) or will most likely be civilians (under *jus ad bellum*), can by default be assumed disproportionate, although not necessarily such. Even if the Israeli commanders did not know that their actions would lead to high civilian casualties, they *should have known* that such scenario was possible, thus acted with indirect intent. Therefore in this case, Israel's self-defense arguments should be disregarded as pretence rather than reason and operation "Warm Winter" should be considered a disproportionate and illegal response to the threat, falling short of Article 51 of the UN Charter.

5. Conclusion: Lessons Learned

When Gaza incursion ended, within first hours of the Israeli army's withdrawal from the Strip, Hamas was declaring victory. To punctuate their point more than a dozen rockets were launched at nearby Israeli towns.⁵⁵ A few days later, eight students were shot at a Jewish seminary in Jerusalem, for which Hamas claimed responsibility.⁵⁶ In such climate, it is easy to understand why Israel has no wish to differentiate between proportionate Gaza blockade and disproportionate Gaza incursion, claiming that both are permissible as self-defense under Article

⁵³ Responding to Hamas Attacks From Gaza: Issues of Proportionality. March 3, 2008. Israel Ministry of Foreign Affairs. <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hamas+attacks+from+Gaza+-+Issues+of+Proportionality+-+March+2008.htm>.

⁵⁴ Bauer, G. Israel's Appropriate Response. March 7, 2008. Human Events. <http://www.humanevents.com/article.php?id=25377&s=rme>.

⁵⁵ Khalil, A. Hamas Cries Victory in Gaza. March 4, 2008. <http://www.baltimoresun.com/news/nation/bal-te.mideast04mar04,0,4827935.story>.

⁵⁶ Hamas Claims Deadliest Attack in Israel in 2 years. March 9, 2008. Portland Tribune. http://www.portlandtribune.com/us_world_news/story.php?story_id=L05284366.

51 of the UN Charter. Nevertheless the constant terrorist threat that is emanating from the Strip (as well as West Bank territories) does not provide Israel with a permanent self-defense right. Hamas action are not aggression, because an act of aggression traditionally can only be attributed to an existing state, whereas the terrorist attacks should be considered a set of separate episodes, each providing possibility to invoke Article 51, but within reasonable time, to avoid retaliations having the nature of reprisals.

Both the blockade and operation “Warm Winter” are *de facto* two different acts of self-defense by Israel, which are continuing the pattern of Israel’s behavior in regards to terrorism in the Middle East region. Neither set a real legal precedent, since UNSC was unable to issue any resolution on the situation because of the US veto threat, while International Court of Justice was not provided with such opportunity. Despite that, Gaza operation in 2008 remains a good example of Israel’s inflexibility in international law and its disability to depart from its “unbendable” position of constant self-defense, when relying on such arguments is not justified even from the viewpoint of preventive warfare. This, in turn, not only creates bad image for Israel on the world arena, but also undermines the previous work of international lawyers and politicians, who sought to justify Israel’s right to retaliate in situations, which in terms of self-defense were controversial at least.