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The Great Oxymoron: *Jus In Bello* Violations as Legitimate Non-Forcible Measures of Self-Defense: The Post-Disengagement Israeli Measures towards Gaza as a Case Study

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Abstract

Modern warfare and the war on terror against mainly non-State actors have obliged States to resort to innovative measures which blur the limits between *jus in bello* and *jus ad bellum* and create a legal oxymoron where the same measures constitute international law violations should they be perceived under *jus in bello* and legitimate means of self-defense should they be seen under the lens of self-defense and *jus ad bellum*. In order to demonstrate the particular axiom the note will use the Israeli–Palestinian conflict as a factual and normative framework and will put under its kaleidoscope the post-disengagement Israeli measures towards Gaza.

I. Introduction

1. In September 2005, Israel withdrew its army from the Gaza Strip and evacuated all of its settlements, leading to a debate among Israelis and Palestinians, as well as among international legal scholars, as to whether the Israeli occupation of the Strip had come to an end.[1]

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1 See below Section III.A.

2. In June 2007, after violent clashes in Gaza between the Palestinian factions, Hamas managed to prevail over Fatah and take control over the Strip.[2] Following a daily barrage of rocket attacks against the Israeli South, the Israeli Cabinet declared the Gaza Strip as an "enemy entity".[3] Pursuant to that decision, the Israeli Defense Minister restricted passage of persons and goods to and from the Strip[4] and announced that electricity and fuel supplies provided by Israel to the Strip would be reduced but not to a point that could cause a humanitarian crisis for Gaza's inhabitants.[5]

3. Israeli humanitarian organizations, arguing that such measures constituted collective punishment and as such should be halted, petitioned the Supreme Court for an injunction. The Court refused to grant such an injunction and in the subsequent main hearing of the case, based on the State's assurances that the latter would not permit these electricity and fuel reductions to cause a humanitarian crisis in the Gaza Strip, refused to declare such policies as *ipso facto* illegal and did not order the State to halt them.[6] In September 2009, after an extensive Israeli military operation in the Gaza Strip, a relevant UN Fact Finding Mission, headed by Justice Richard Goldstone, stated in its report that Israel should lift its

2 Khaled Abu Toameh, Abbas Accuses Hamas of Staging a "Bloody Coup", Jerusalem Post (12 June 2007) (http://www.jpost.com/servlet/Satellite?cid=1181570255159&pagename=JPost%2FJPArticle%2FShowFull (last accessed 8 March 2010)).

3 See below Section III.A.

4 See notable cases where such permission has been denied even to high-level foreign politicians such as the Belgian Minister for International Development, the Turkish Foreign Minister, the French Foreign Minister and the European Union's foreign policy chief. Javier Solana, Israel Denies Belgian Minister's Request to Visit Gaza Strip, Jerusalem Post (24 January 2010) (http://www.jpost.com/servlet/Satellite?cid=1263147968910&pagename=JPost%2FJPArticle%2FShowFull (last accessed 8 March 2010)); Barak Ravid, Israel to Turkey: We Will Not Allow the Minister's Entry to Gaza, Haaretz (9 September 2009) (http://www.haaretz.co.il/hasite/spages/1113203.html (last accessed 8 March 2010)); Barak Ravid, Israel Refuses to Let French FM Visit Gaza, Haaretz (20 October 2009) (http://www.haaretz.com/hasen/spages/1122381.html (last accessed 8 March 2010)); Gisha Legal Center for Freedom of Movement, Gaza Closure Defined: Collective Punishment: Position Paper on the International Law Definition of Israeli Restrictions on Movement in and out of the Gaza Strip (9 December 2008) (http://www.gisha.org/UserFiles/File/publications_english/Publications%20and%20Reports_English/Gaza%20Closure%20Defined%20Eng(1).pdf (last accessed 8 March 2010)). Yet for instances when such permission was granted, see Barak Ravid, The Ministry of Foreign Affairs Allowed the UN Secretary-General Ban Ki Moon and the Foreign Minister of the European Union, Kathrin Ashton, to Visit Gaza, Haaretz (8 March 2010) (http://www.haaretz.co.il/hasite/spages/1154938.html (last accessed 8 March 2010)).

5 Al-Bassiouni et al. v. Prime Minister of Israel, Respondents' Writ (1 November 2007), 5 (http://www.gisha.org/UserFiles/File/Legal%20Documents%20/fuel%20and%20electricity_oct_07/state_response_2_11_07.pdf (last accessed 10 March 2010)).

6 HCJ 9132/07, Al-Bassiouni et al. v. Prime Minister of Israel, Judgment of 30 January 2008 (http://elyon1.court.gov.il/files/07/320/091/N25/07091320.n25.pdf (last accessed 10 March 2010)).

blockade and noted that the discretion enjoyed by the Israeli government in the supply of fuel and electricity to the Strip appeared to have been exercised "arbitrarily".[7]

4. The present paper will try to delve into the rationale of the post-disengagement Israeli measures towards Gaza. It will argue that the measures should not be seen as *jus in bello* violations, but in conjunction with the rocket attacks stemming from the Strip, as non-forcible self-defense measures, embedded in *jus ad bellum*.[8] As such, the whole analysis will presuppose the use of force by the Palestinians in Gaza against Israel, in which case these measures would serve as a response. Yet, it has to be noted that absent such an initiation of hostilities from the Palestinian side, the Israeli measures would not be judged according to *jus ad bellum*, but according to conceptions pertaining to relations between neighbouring States such as economic sanctions and the closing of borders.[9]

5. Although prior to its disengagement from the Strip, Israel had explicitly stated that it reserved its inherent right of self-defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip,[10] there are some questions regarding the right of self-defense

7 Report of the UN Fact Finding Mission on the Gaza Conflict, Human Rights Council, 12th Sess., A/HRC/12/48 (15 September 2009), paras.326, 1769 (http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf (last accessed 10 March 2010)).

8 Along this line, see also the remark on the relevant positions taken in the Goldstone Report that "the Mission focuses on the laws in war, rather than the laws of war, how the war was conducted rather than whether or not Israel was justified in going to war". David Matas, The Goldstone Report: Stone or Gold? (http://www.goldstonereport.org/pro-and-con/critics/495-david-matas-the-goldstone-report-stone-or-gold#_ftn2 (last accessed 10 March 2010)).

9 Indeed, the policy of border closing was first introduced after Fatah was ousted in 2007 by Hamas from the Palestinian side of the crossings between Israel and Gaza. On this, see Tovah Lazaroff, UN Coordinator Demands Israel Reopen Gaza Crossings, Jerusalem Post (4 March 2010) (http://www.jpost.com/MiddleEast/Article.aspx?id=170154 (last accessed 15 March 2010)). For the fact that the closing of borders is a step that can be taken in the framework of bilateral sanctions, see the cases of Turkey and Azerbaijan against Armenia, and Greece against FYROM. On these, see Artak Dabaghyan and Mkhitar Gabrielyan, Keeping Border Market Afloat: On Drivers and Constraints of Cross Border Cooperation in the South Caucasus (http://www.crrc.am/store/files/Article_on_border_market.pdf (last accessed 15 March 2010)); Azerbaijani MP Offers Iran to Close Borders with Armenia, Armenia.Az (12 February 2010) (http://news.az/articles/8967 (last accessed 15 March 2010)); Deputy Foreign Minister: Closed Borders in 21st Century Are Unnatural, panorama>>am (30 March 2009) (http://www.panorama.am/en/politics/2009/03/30/agn/ (last accessed 15 March 2010)); Macedonia Embargo Is Halted by Greece, The New York Times (16 October 1995) (http://www.nytimes.com/1995/10/16/world/macedonia-embargo-is-halted-by-greece.html?pagewanted=1 (last accessed 15 March 2010)).

10 Israel Revised Disengagement Plan, Cabinet Decision, Addendum B (6 June 2004), 3 (http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm (last accessed 15 March 2010)).

whose answers serve as preliminary steps before any discussion on non-forcible measures towards the Strip should be launched: first, the right to self-defense presupposes an armed attack by a State and the Palestinians are not such; second, the armed attack has to have a particular intensity in order to trigger the right to self-defense and it is dubious whether the Kassam rocket firing can reach that level; and third, self-defense presupposes a wrongful act, but in the case of the Israeli policies towards Gaza, their inclusive character does not presuppose always such an act by many of the recipients of their negative consequences.

6. While the first two parameters are relevant only to a scenario of recourse to force[11] and the present note aspires to examine non-forcible defence measures, the note will examine them for two reasons; first, because on an *argumentum de maiore ad minus*, if Israel can resort to forcible defensive measures towards Gaza, this will hold true for any non-forcible measures and second, because the International Court of Justice (hereinafter the ICJ) has opted to relate to Article 51 even in cases of non-forcible measures. In particular, in its advisory opinion on Israel's security fence, the Court, in the contour of a deliberation of a non-forcible defensive measure, such as the fence, while ascertaining in general Israel's right to defend its citizens, examined also the application or not of Article 51 of the UN Charter.[12] As such, the Court entered Article 51 in the reservoir of potential applicable provisions, although the issue did not refer to recourse to use of force.

7. As such, and before any analysis on the paradox of the Israeli measures, a brief analysis of these three aspects of the right of self-defense will be provided. It will be argued that not only the right of self-defense applies in the case of the Israeli measures towards Gaza, but also that such measures should be perceived as in tandem with a line of similar measures that Israel has taken in the last decade in the realm of its war against terror.

II. The right of self-defense

II.A. Non-State actors as holders of the right

8. The requirement that an armed attack has to be launched by a State in order for the right of self-defense to apply is deeply entrenched in international law.[13] Yet,

11 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, ICJ Reports 1986, 127–128, paras.248–249, 252.

12 Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 194, paras.138–139. But see also the separate opinion of Judge Higgins stating that "I remain unconvinced that non-forcible measures fall within self-defense under article 51 of the Charter as that provision is normally understood". Ibid., 215–216, para.35 (sep. op. Higgins).

13 Ian Brownlie, International Law and the Use of Force by States (1963), 272–275; Antonio Cassese, International Law in a Divided World (1986), 230; Alfred Verdross and Bruno Simma, Universelles Volkerrecht (3rd edn. 1984), para.470. For other cases of invocation

there is no consensus in the international community if attacks by non-State actors can also trigger the right of self-defense.

9. Since the UN Charter is based on the State system, traditional forms of State-to-State violence were the drafters' major concerns. The Charter did not include forms of violence that mark modern terrorism incidents.[14] The ICJ has repeatedly asserted in its jurisprudence that an armed attack has to be launched by a State or be attributed to a State.[15] Yet, such an assertion has received the fierce criticism of international

of the right of self-defense, such as anticipatory attack, attacks on citizens abroad and humanitarian intervention, see, inter alia, Myres McDougal, Harold Lasswell and Lung-Chu Chen, Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity (1980), 238–242; Oscar Schachter, The Right of States to Use Armed Force, 82 Michigan LR (1984), 1620, 1638; G.K. Walker, Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said?, 31 Cornell ILJ (1998), 321; Thomas Franck, Recourse to Force, State Action against Threats and Armed Attacks (2002), 75, 96, 107–108.

14 Josef Kunz, Editorial Comments: Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations, 41 AJIL (1947), 878; Note: Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad, 5 Duke JCIL (1995), 481; Amos Guiora, War Crimes Research Symposium: "Terrorism on Trial": Targeted Killing as Active Self-Defense, 37 Case Western Reserve JIL (2005), 319, 323; Antonio Cassese, Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law, 12 EJIL (2001), 995.

15 In the Nicaragua Case, the Court expressed the opinion that no armed attack was capable of triggering the right of self-defense if the former did not occur, inter alia, in the framework of a State sending armed bands, groups, irregulars or mercenaries to carry out acts of armed force against another State, of such gravity as to amount to an actual armed attack by regular forces. Thus a State could not launch counter-attacks against terrorist bases in another State, unless the terrorists were agents of the State or controlled by its government. Military and Paramilitary Activities (Nicaragua v. United States of America), above n.11, 60–61, paras.103–104. In the Oil Platforms case, the Court reiterated again its requirement for an armed attack to be launched by a State, in order for Article 51 of the United Nations' Charter to apply. On this, see Oil Platforms Case (Islamic Republic of Iran v. United States of America), Merits, ICJ Reports 2003, 186, para.51. In the Advisory Opinion on the Consequences of the Construction of a Wall in the Occupied Palestinian Territories, the Court pronounced the non-application of Article 51 on the grounds that "Article 51 of the Charter recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State." Legal Consequences of the Construction of a Wall, above n.12, 194, para.139. One year later, in the Case of Armed Activities on the Territory of the Congo, the Court asserted its doctrine, rejecting Uganda's stance of exercise of her right to self-defense as a response to armed attacks perpetrated by rebels operating from within the territory of the Democratic Republic of the Congo, since the actions of the rebels could not be attributed to the Democratic Republic of Congo. Yet the Court also left the question open whether international law provides for a right of self-defense against large-scale attacks by irregular forces. On these, see Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda), Merits, ICJ Reports 2005, para.147. See also the decision on Application of the Convention on the Prevention and Punishment of the Crime of Genocide where the Court reaffirmed its doctrine of State attribution as promulgated in the Nicaragua Case, yet at the same time deliberated over the ruling of the ICTY Chamber in the Tadic Case which called for less stringent criteria for attribution (overall

publicists[16] and the international community,[17] as well as members of the Court itself.[18] As such, it is not at all clear that such a requirement exists in international law.[19]

10. Article 51, which incorporated the right in the United Nations' Charter,[20] does not seem to condition the attack to be launched by a State; neither the linguistic

control instead of effective control). On this, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Merits, ICJ Reports 2007, 143–145, paras.401–406. For opponents of the State attribution criterion, see Sean Murphy, Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?, 99 AJIL (2005), 92; Sean Murphy, Terrorism and the Concept of "Armed Attack" in Article 51 of the UN Charter, 43 Harvard ILJ (2002), 41; Christopher Greenwood, International Law and the Pre-emptive Use of Force: Afghanistan, Al Qaeda and Iraq, 4 San Diego ILJ (2003), 17. For the fact that this attribution requirement of the ICJ is gradually being made less tense, see Christian Tams, The Use of Force against Terrorists, 20 EJIL (2009), 359, 386.

16 Murphy, Agora: ICJ Advisory Opinion on Construction of a Wall, above n.15; Ruth Wedgwood, Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense, 99 AJIL (2005), 58; Michla Pomerance, Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: The ICJ' s Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial, 99 AJIL (2005), 26–27, 37–38; Michla Pomerance, A Court of "UN Law", 38 Israel LR (2005), 134, 154; Fr. Robert J. Araujo, S.J., Implementation of the ICJ Advisory Opinion—Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory: Fences (Do Not) Make Good Neighbors?, 22 Boston University ILJ (2004), 397; Antony Malone, Water Now: The Impact of Israel's Security Fence on Palestinian Water Rights and Agriculture in the West Bank, 37 Case Western Reserve JIL (2005), 663; Robert Caplen, Mending the "Fence": How Treatment of the Israeli–Palestinian Conflict by the International Court of Justice at the Hague Has Redefined the Doctrine of Self-Defense, 57 Florida LR (2005), 762; Christian Tams, Light Treatment of a Complex Problem: The Law of Self-Defense in the Wall Case, 16 EJIL (2005), 963.

17 The remark of the United States Permanent Representative to the United Nations, that if the Court's requirement of a State launching an armed attack in order for the right of self-defense to be triggered was an authentic interpretation of the Charter, then the Charter would be irrelevant in those cases in which terrorist organizations rather than States posed threats to peace, is rather illustrative (cited in Araujo, above n.16, 390). The European Union also asserted Israel's right to self-defense. Ibid., 396.

18 Military and Paramilitary Activities, above n.11, 533 (diss. op. Jennings); Legal Consequences of the Construction of a Wall, above n.12, 215, para.33 (sep. op. Higgins); ibid., 242–243, para.6 (decl. Buergenthal); ibid., 229–230, para.35 (sep. op. Kooijmans); Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda), ICJ Reports 2005, para.12 (sep. op. Simma); ibid., para.30 (sep. op. Kooijmans).

19 As Judge Higgins put it eloquently, the rendering of such a normative status is "rather a result of the Court so determining in Military and Paramilitary Activities in and against Nicaragua". (Legal Consequences of the Construction of A Wall, above n.12, 215, para.33 (sep. op. Higgins).

20 It is has been held that the right of self-defense exists also irrespectively of positive law on a customary law basis. On this, see Military and Paramilitary Activities, above n.11, 94, para.176.

nor the historical interpretation of the article provide for the assumption of such a linkage.[21]

11. The phenomenon of hostilities involving non-State entities is largely a recent development, which drafters not only of the UN Charter, but also of other important international legal instruments such as the Hague Regulations and the Geneva Conventions, could not have taken at that time into account.[22]

12. With the emergence of terrorism in the international arena, variables changed. Non-State terrorist groups, acting from the territory of a State, started to launch attacks against other States. The latter responded using armed force, not targeting the infrastructure of the State from which the attacks were launched but the infrastructure of the terrorists themselves. Israel,[23] France,[24] Portugal[25] and South Africa,[26] and in the decade of the 1990s Tajikistan,[27] Senegal[28] and

21 Araujo, above n.16, 383; John Cohan, Formulation of A State's Response to Terrorism and State-Sponsored Terrorism, 14 Pace ILR (2002), 102; Murphy, Terrorism and the Concept of "Armed Attack", above n.15, 50; Jordan Paust, Symposium: Terrorism: The Legal Implications of the Response to September 11, 2001: Use of Armed Force against Terrorists in Afghanistan, Iraq and Beyond, 35 Cornell ILJ (2002), 534. For the fact that in the travaux preparatoires of the specific article, nothing is found as evidence of an armed attack being connected to a State as a condition for the application of the right of self-defense, see Murphy, Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory, above n.15, 64. Yet this does not mean that self-defense has to be read outside the State context. It just means that this context is broadened to include also actions of non-State actors, which do not have necessarily to be attributed to a State in order to trigger the right of self-defense of the attacked State. On this, see Tams, above n.15, 385.

22 Roy Schondorf, Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?, 37 NYU JILP (2004), 10. Thus it is interesting that in major works dating from the early second half of the twentieth century, analysing the United Nations' Charter article by article, no dilemmas regarding the identity of the aggressor are raised. In contrast to issues like the definition of an armed attack or if Article 51 requires only an armed attack, it is taken for granted that the aggressor is a State. For characteristic examples, see Hans Kelsen, The Law of the United Nations (1951), 791 et seq.; Leland Goodrich, Edvard Hambro and Anne Patricia Simons, Charter of the United Nations: Commentary and Documents (3rd edn. 1969), 345.

23 Israel, having to respond to waves of terror, resorted many times to this practice, attacking Palestinian terrorists residing in Lebanon, Jordan and Tunisia. For a thorough description of the Israeli bombings of PLO terrorist camps in Tunisia, see Wallace Warriner, The Unilateral Use of Coercion under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986, 37 Naval LR (1988), 67; Anthony Clark Arend and Robert Beck, International Law and the Use of Force (1993), 152–153.

24 Mario Giuliano, Tullio Scovazzi and Tullio Treves, Diritto Internazionale (1991), 457.

25 Jean Combacau, The Exception of Self-Defense in UN Practice, in: Antonio Cassese (ed.), The Current Legal Regulation of the Use of Force (1986), 23.

26 Ian Brownlie, International Law and the Activities of Armed Bands, 7 ICLQ (1958), 733.

27 Murphy, Terrorism and the Concept of "Armed Attack", above n.15, 69.

28 Franck, above n.13, 63.

the United States,[29] all invoked their right of self-defense to act against non-State actors.[30] All the aforementioned actions were condemned by the Security Council.[31]

13. Nevertheless, this should not be seen as a denial of the exercise of the right of self-defense against non-State actors.[32] Even during the nineteenth century, at the heyday of the "Statist" assumption, the right of self-defense was not headed only against States.[33] After the September 11 attacks, this norm of non-State actors being subject to the right of self-defense was crystallized.[34] Convening in order to condemn the attacks, the Security Council described them not only as "a threat to the peace and security of mankind", terminology already used from the decade of the 1990s,[35] but

29 Francis Bisone, Killing a Fly with a Canon: The American Response to the Embassy Attacks, 20 New York Law School JICL (2000), 94.

30 Francis Biggio, Notes: Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism, 34 Case Western Reserve JIL (2002), 33.

31 Antonio Cassese, Article 51, in: Jean Pierre Cot and Alain Pellet (eds.), La Charte des Nations Unies (1985), 779.

32 Tams, above n.15, 368 (noting that self-defense against armed attacks by non-State actors was admitted in principle, but only under narrow conditions). The Security Council's position should be rather seen as a phenomenon stemming from the tension between the exercise of the particular right and the infringement of State sovereignty, an important parameter in classical international legal thought. Thus, for example, although the Security Council condemned Portugal's response, it stopped short of saying that the actions of which Portugal had complained did not constitute armed attack. This being the case, it is not possible to say for sure that the grounds for Portugal's condemnation were that it had not been defending itself against an armed attack. Nothing also in the debates or in the text of the Security Council Resolution condemning the Israeli attacks on Jordan and Lebanon makes it possible to conclude that in the eyes of the Council or its members, the actions, against which Israel was reacting, did not constitute armed attack. On these, see Combacau, above n.25, 23; Christine Gray, International Law and the Use of Force (2000), 116.

33 Thomas Gill, The Eleventh of September and the Right of Self-Defense, in: Wybo Heere (ed.), Terrorism and the Military: International Legal Implications (2003), 26.

34 Franck, above n.13, 54; Thomas Franck, Editorial Comments: Terrorism and the Right of Self-Defense, 95 AJIL (2001), 840; Antonio Cassese, Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law, 12 EJIL (2001), 996; Maogoto Jackson, War on the Enemy: Self-Defense and State-Sponsored Terrorism, 4 Melbourne JIL (2003), 430; Ilias Bantekas, International Law of Terrorist Financing, 97 AJIL (2003), 317. As such, for example, in the realm of the Middle East Conflict, Israel in 2003, in response to a suicide attack in Haifa, bombed Palestinian camps north of Damascus and in 2006, in response to repeated Hezbollah attacks, invaded Lebanon. While arguments were raised against the disproportionate use of force by Israel, most States asserted its right to self-defense. The same holds true for Turkey's operations in North Iraq in 2008, Russia's bombing of Chechen bases in Georgia, and Colombia's pursuit of rebels in the territory of Ecuador in 2008. On these, see Tams, above n.15, 379, 380, 392.

35 The first time the specific phraseology was used was in Security Council Resolutions 731 and 748 regarding Libya. See SC Res 731, UN Doc S/RES/731 (1992); SC Res 748, UN SCOR, 47th Sess., 3063rd meeting, UN Doc S/RES/748 (1992), 52. Hence, the phraseology became a cliché. See for example, SC Res 1044, UN SCOR, 3627th meeting, UN Doc S/RES/1044 (1996); SC Res 1214, UN SCOR, 39527th meeting, UN Doc S/

went also one step further, connecting terrorism with the right of self-defense and Article 51.[36]

II.B. The requirement of a "large scale" armed attack as a pre-condition for the assertion of the right

14. Traditionally, the ICJ has stipulated that not any attack is prone to the exercise of the right to self-defense by the attacked State. Thus, in 1986, the Court pronounced that an "armed attack" occurs when regular armed forces cross an international border or when a State sends armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State, of such gravity as to amount to an actual armed attack by regular forces. The Court maintained that it was necessary to distinguish the gravest forms of the use of force (those constituting an armed attack) from other less grave forms.[37]

15. According to this stance, the key to whether an attack should be deemed as prone to the right of self-defense is its scale. If the attack does not reach a certain level, it may constitute an unlawful use of force, yet not an "armed attack" which could trigger the right of self-defense.[38]

16. In the *Oil Platforms* case,[39] a contentious case between Iran and the United States that reached the court and was judged on its merits in 2003, the Court made an extensive reference to its decision in the *Nicaragua* case, and reduced even more the scope of Article 51, requiring *inter alia* that the attack must have been carried out with the intention of harming a specific State before that State can respond in

RES/12124 (1998); SC Res 1267, UN SCOR, 4051st meeting, UN Doc S/RES/1267 (1999); SC Res 1333, UN SCOR, 4251st meeting, UN Doc S/RES/1333 (2000).

36 SC Res 1368, UN SCOR, 56th Sess., 4370th meeting, UN Doc S/RES/1368 (2001), Preamble, 1. In the same line of considering the September 11 attacks as an "armed attack" triggering the right of self-defense, stood also NATO and the Organization of American States. On this, see NATO Press Release (12 September 2001), 12 (http://www.nato.int/docu/pr/2001/p01-124e.htm); Organization of American States, OEA/Ser.G., CP/RES. 796 (1293/01) (19 September 2001) (http://www.oas.org/OASpage/crisis/cp_res796en.htm). Although it was argued that the specific resolutions sanctioned the use of self-defense against Afghanistan as a State entity, the resolutions themselves refer to "terrorist attacks" in general, without any specification. Moreover, a Security Council Resolution would not have been necessary to ascertain the United States' right of self-defense against a State entity. On these, see Jonathan Charney, Editorial Comments: The Use of Force against Terrorism and International Law, 95 AJIL (2001), 836; Human Rights Watch, Legal Issues Arising from the War in Afghanistan and Related Anti-Terrorist Efforts (October 2001) (http://www.hrw.org/campaigns/september11/ihlqna.htm/ihlqna.pdf); Franck, Terrorism and the Right of Self-Defense, above n.34, 840; George Aldrich, The Taliban, Al Qaeda and the Determination of Illegal Combatants, 96 AJIL (2002), 893.

37 Military and Paramilitary Activities, above n.11, 101, para.191.

38 Rosalyn Higgins, Problems and Process: International Law and How We Use It (1994), 250.

39 Oil Platforms Case, above n.15.

self-defense and that measures taken in self-defense must be proportional to the particular attack immediately preceding the defensive measures rather than proportional to the overall threat being addressed.[40] Moreover, the use of force has to have a certain intensity to qualify as an armed attack and thus justify self-defense, the Court persisting in its negative stance regarding the accumulation of low intensity violent incidents constituting accumulatively an "armed attack".[41] Thus, the Court made it more difficult for States that want to combat terrorism, yet crave to act in the framework of international legitimacy, to justify attacks against terrorist targets each time they are victimized, since the argument can be put forth that the attacks are not so intense in order to justify the application of Article 51.[42] In the case of Armed Activities on the Territory of Congo, the Court asserted that it contemplated self-defense only if directed against "large scale attacks".[43] The threshold required has been maintained also by the Eritrea/Ethiopia Boundary Commission, which distinguished between "geographically limited clashes" and armed attacks triggering a right of self-defense.[44]

17. While the threshold requirement is deeply entrenched in international jurisprudence, it does not seem to derive from the UN Charter itself or customary

40 See ibid., paras.40, 43, 51, 60, 74.

41 Ibid., 186, 191, paras.51, 64; Dominic Raab, "Armed Attack" after the Oil Platforms Case, 17 Leiden JIL (2004), 725. For a better understanding and thorough analysis of the aforementioned construction and the problems it creates, see the Separate Opinion of Judge Simma, who contends that "on one hand the Court's Judgment might create the impression that if offensive military actions remain below the considerably high-threshold of Article 51, the victim of such actions does not have the right to resort to strictly proportionate defensive measures equally of a military nature. What the present Judgment follows at this point are some of the less fortunate statements of the Court's Nicaragua Judgment of 1986.... Against such smaller scale use of force, defensive action by force also short of Article 51 is to be regarded as lawful. In other words, I would suggest a distinction between (full-scale) self-defense within the meaning of Article 51 against an 'armed attack' within the meaning of the same Charter provision on one hand and on the other, the case of hostile action ... below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defense expressly reserved in the United Nations Charter." And referring to the Nicaragua case and the Court's reference to counter-measures in cases of use of violence which do not constitute an armed attack, Judge Simma comments that: "In view of the Court's above dictum, by such proportionate counter-measures, the Court can not have understood mere pacific reprisals, more recently and also in the terminology of the International Law Commission called 'counter-measures'. Rather in the circumstances of the Nicaragua case, the Court can only have meant what I have just referred to as defensive military action short of full-scale self-defense." On these, see Oil Platforms Case, above n.15, 331, para.12 (sep. op. Simma). See also Military and Paramilitary Activities, above n.11, 127, para.249.

42 For discussion of this point, see William Taft IV, Symposium: Reflections on the ICJ's Oil Platform Decision: Self-Defense and the Oil Platforms Decision, 29 Yale JIL (2004), 299–301; Tams, above n.15, 371.

43 Armed Activities on the Territory of Congo, above n.15, 147.

44 Partial Award—Jus ad bellum—Ethiopia's Claims 1–8, 45 ILM (2006), 430.

law[45] and as such, due to its encouragement of low-grade terrorism, against which—according to the ICJ doctrine—the attacked State would not be able to exercise its right of self-defense met the criticism of international publicists as well as members of the Court itself.[46] Moreover, the international community has affirmed the right of self-defense in response to incidents that did not meet the cumulative standard of the ICJ,[47] indicating that there may be a new trend developing that would favour the adoption of an "accumulation doctrine" where a series of minor attacks, taken together, can be deemed as reaching the threshold.[48]

III. The right to self-defense and the question of its interaction with *jus in bello* and human rights law

18. When Kenneth Anderson articulated the idea that targeted killings should be seen in the framework of the law of self-defense,[49] a major objection was raised in the international community on the suitability of the particular legal

45 See, for example, Christian Tams, noting that while the particular doctrine could stem from the differentiation in the phraseology of Articles 2(4) and 51 of the UN Charter, the first referring to any use of force and the latter to an "armed attack", still such a line of thought would lead to the absurd conclusion of States having to turn the other cheek when faced with lesser breaches of Article 2(4), a conclusion that remains controversial. Tams, above n.15, 369–370.

46 Abraham Sofaer, Terrorism and the Law, 64 Foreign Affairs (1986), 919; Michael Reisman, Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice, 13 Yale JIL (1988), 195–196; John Hargrove, The Nicaragua Judgment and the Future of the Law of Force and Self-Defense, 81 AJIL (1987), 135, 139; Bruno Simma (ed.), The Charter of the United Nations: A Commentary (2nd edn. 2002), 801. See also the dissenting opinions of Judges Schwebel and Jennings in the Military and Paramilitary Activities in and against Nicaragua case, arguing respectively that "the Court appears to offer—quite gratuitously—a prescription for overthrow of weaker governments by predatory governments while denying potential victims what in some cases may be their only hope of survival" and that "it seems dangerous to define unnecessarily strictly the conditions for lawful self-defense, so as to leave a large area where both a forcible response to force is forbidden and yet the United Nations employment of force, which was intended to fill that gap, is absent". Military and Paramilitary Activities, above n.11, 350, para.177 (diss. op. Schwebel); ibid., 544 (diss. op. Jennings).

47 Such is the case with the Israeli use of force against Hezbollah in Lebanon in 2006, where the rocket attacks against Israel did not meet that threshold. On this, see Enzo Cannizzaro, Contextualizing Proportionality: Jus ad bellum and Jus in bello in the Lebanese War, 88/864 International Red Cross (2006), 782.

48 Tams, above n.15, 388 (mentioning towards this direction also the fact that the ICJ, although affirming the necessity of the threshold, dedicated a lot of discussion on it).

49 Kenneth Anderson, More Predator Drone Debate, in the Wall Street Journal, and What the Obama Administration Should Do as a Public Legal Position, The Volokh Conspiracy (9 January 2010) (http://volokh.com/2010/01/09/more-predator-drone-debate-in-the-wall-street-journal-and-what-the-obama-administration-should-do-as-a-public-legal-position/).

framework.[50] Since targeted killings were seen as violating human rights law, the question was raised of how invocation of the self-defense doctrine could justify such a violation. Proponents of this stance pronounced that since in humanitarian law self-defense cannot preclude wrongfulness,[51] such should be the case also with human rights law.[52] Since the right of self-defense requires that the target against which it is being exercised is also a launcher of an armed attack, in other words, responsible for a use of force possessing the characteristics of an international wrongful act,[53] the question that arises is which wrongful act is being perpetrated by the object of policies, like targeted killings, that violate human rights law, in that case the person's right to life, without the person at the moment of the infliction being associated with any wrongful act.

19. Indeed, this line of thought is valid should we separate the action that seeks to be baptized as "defensive" from any act that may have triggered it. In other words, should all the measures be perceived outside the framework of a conflict and not as answers to certain acts of the other side, then indeed they are violations of international humanitarian law and human rights law, which cannot be undertaken. Yet, the wrongful act should not be searched for necessarily at the exact time of the infliction. A State exercising its right to self-defense does not have to immediately resort to force in order to argue that such force is taken in the realm of such a framework, although apparently there has to be a timely connection between the attack and the act of self-defense.[54]

20. As stated above, while in traditional international law "instant" terrorist attacks completed before the victim State could react did not merit acknowledgement of the right of self-defense, this is beginning to change.[55] Similarly, a wrongful act does not necessarily have to be undertaken exactly at the moment the defensive measure is being undertaken. It is enough that the person or the persons that are

50 Marko Milanovic, Drones and Targeted Killings: Can Self-Defense Preclude Their Wrongfulness? EJIL:Talk! (10 January 2010) (http://www.ejiltalk.org/drones-and-targeted-killings-can-self-defense-preclude-their-wrongfulness/#more-1859 (last accessed 11 February 2010)).

51 As Ian Scobbie notes, "to state the proposition that measures taken in self-defence may exculpate a State from responsibility for violations of international humanitarian law is . . . to claim that the law designed to restrain the exercise of force does not apply when force is being exercised". Ian Scobbie, Smoke Mirrors and Killer Whales: The International Court's Opinion on the Israeli Barrier Wall, 5 German LJ (2004), 1107 (http://www.germanlawjournal.com/print.php?id=495 (last accessed 11 February 2010)).

52 Milanovic, above n.50.

53 Pierluigi Lamberti Zanardi, Indirect Military Aggression, in: Antonio Cassese (ed.), The Current Legal Regulation of the Use of Force, above n.25, 112.

54 Thomas Gill, The Temporal Dimension of Self-Defense: Anticipation, Pre-Emption, Prevention and Immediacy, 11 Journal of Conflict and Security Law (2006), 361, 368–369; Tarcisio Gazzini, The Changing Rules of the Use of Force in International Law (2005), 143.

55 Tams, above n.15, 391.

being harmed are planning to get involved in wrongful acts, to which the State with its policies puts an end.

21. Taking as an example the case of targeted killings that sparked the debate, if the targeted killing is seen as an action aimed at a person who does not intend to attack, it is indeed a violation of international humanitarian law and human rights law. But if this targeted killing comes as a response to actions or evidenced intentions of a person to actually initiate an attack, it should be seen more as an exercise of a pre-emptive right of self-defense. In that case, the State is not acting to invade the person's humanitarian and human rights capsule, which is hermetically detached from any interaction with the specific State entity sphere, but reacting to a previous opening of this capsule by the person itself in order to inflict harm on the State and its citizens. Moreover, the requirement that a person is taking "direct part in hostilities" does not necessarily mean that he should be harmed at the moment he is ready to launch an attack. Even preparations for such an attack can satisfy the requirement of direct participation.[56] This parallels contemporary evolutions in the law of use of force, which have led to a more flexible handling of the immediacy criterion.[57]

22. The debate on targeted killings refers to all the measures that will be discussed in this article. The problem behind it, how *jus in bello* or human rights violations can constitute legitimate defensive measures, forms the core of this note and is most evident in the realm of the Israeli–Palestinian conflict and the various measures to which Israel has resorted. In the war against terror, counter-terrorism defensive measures are all measures that aim not only at thwarting a terrorist attack or diminishing its effects but also at deterring its perpetrators from committing it and enhancing the feeling of personal safety of the nation's citizens.[58] As such, the note will try to underline the paradox behind these measures which, although constituting violations of humanitarian law or human rights law *per se*, when seen as a response to terrorist attacks can be hailed as non-forcible defensive measures.[59]

III.A. The question of Gaza's status as an occupied territory and the Israeli post-disengagement measures as international law violations

23. The Gaza Strip, the most densely populated area in the world,[60] between 1948 and 1967, was controlled, but never annexed, by Egypt.

56 On this, see the discussion below on the decision of the Israeli Supreme Court on the policy of targeted killings.

57 Tams, above n.15, 389.

58 Boaz Ganor, The Counter-Terrorism Puzzle: A Guide for Decision Makers (2005), 141.

59 The fact that non-forcible measures are in tandem with the contemporary trend in the international community is also evident from the fact that the United Nations Security Council opted many times for the implementation of Article 41 of the Charter in place of the use of force. Tams, above n.15, 376.

60 Yuval Shany, Faraway, So Close: The Legal Status of Gaza after Israel's Disengagement, 8 YIHL (2006), 369.

Based on this, Israel argued—especially in the first years of the Israeli occupation of the Strip—that the Fourth Geneva Convention did not apply.[61] In 1967, after the Six Day War, the area passed to Israeli control. Despite the Israeli position, according to which the territories captured in 1967 were "disputed"[62] and the Geneva Conventions applied *de facto* and not *de jure*,[63]

61 The Israeli argument was that since Article 2(2) of the Fourth Geneva Convention states that the provisions of the convention relate only to the occupation of territories of a High Contracting Party, and the West Bank and the Gaza Strip were not part of Egypt and Jordan, because the former did not annex the Gaza Strip and Jordan's annexation of the West Bank was not acknowledged except by the United Kingdom and Pakistan, the provisions of the convention did not apply regarding Israel's activities in the particular territories. For an analysis of the Egyptian and Jordanian positions towards the Gaza Strip and the West Bank, respectively, see Julius Stone, No Peace–No War in the Middle East (1969), 39; Eyal Benvenisti, The International Law of Occupation (1993), 108; Barry Feinstein and Justus R. Weiner, Israel's Security Barrier: An International Comparative Analysis and Legal Evaluation, 37 George Washington ILR (2005), 391. For a more thorough analysis of the Israeli argument on the non-applicability of the Geneva Conventions in the territories captured in 1967, see the classical article of Yehuda Blum, The Missing Reversioner: Reflections on the Status of Judea and Samaria, 3 Israel LR (1968), 279. See also Meir Shamgar, The Observance of International Law in the Administered Territories, Israel Yearbook on Human Rights (1971), 262; Nissim Bar-Yaacov, The Applicability of the Laws of War to Judea and Samaria (the West Bank) and to the Gaza Strip, 24 Israel LR (1988), 485; Julius Stone, Israel and Palestine: Assault on the Law of Nations (1981), 177–178, 209 n.2; Eyal Benvenisti, The West Bank Data Base Project, Legal Dualism: The Absorption of the Occupied Territories into Israel (1990), 51; Amnon Rubinstein, 1 The Constitutional Law of the State of Israel (5th edn. 1996), 262–266; Adam Roberts, Prolonged Military Occupation: The Israeli Occupied Territories Since 1967, 84 AJIL (1990), 44, 62–66. For condescending approaches towards the Israeli stance and the fact that the non-application of the Fourth Geneva Convention in the case of the West Bank should be pronounced, see Nicolas Haupais, Les Obligations De La Puissance Occupante Au Regard de La Jurisprudence Et De La Pratique Recentes, 111 RGDIP (2007), 117, 123–124; David John Ball, Toss The Travaux? Application of the Fourth Geneva Convention to the Middle East Conflict—A Modern (Re)Assessment, 79 New York University LR (2004), 990.

62 Meir Shamgar, Legal Concepts and Problems of the Israeli Military Government—The Initial Stage in Military Government in the Territories Administered by Israel 1967–1980—The Legal Aspects (1982), 13.

63 Legal Consequences from the Construction of a Wall, above n.12, 173, para.93; Harvard Program on Humanitarian Policy and Conflict Research: International Humanitarian Law Research Initiative, Policy Brief: Legal Aspects of Israel's Disengagement Plan under International Humanitarian Law (2004), 3 (http://www.reliefweb.int/library/documents/2004/hvu-opt-20oct.pdf (last accessed 15 February 2010)). For the fact that the Israeli Supreme Court did relate to provisions of the Fourth Geneva Convention in various cases concerning the legality of Israel's measures in the specific territories, see the Court's assumption in the Beit Sourik case that "the parties agree that the humanitarian rules of the Fourth Geneva Convention apply to the issue under review". HCJ 2056/04, Beit Sourik Village Council v. The Government of Israel, PD 58 (5) (2004), 807 para.23. For a similar stance of the Israeli Supreme Court, holding that the Fourth Geneva Convention applies to the Israel Defense Forces' (IDF) operations in the Gaza Strip, see also HCJ 4764/04, Physicians for Human Rights v. Commander of IDF, Judgment of 30 May 2004, para.19. For the Court's established jurisprudence of rejecting the de jure application of

the international community always viewed the territories as "occupied" and the Geneva Conventions as applying, not only *de facto*, but also *de jure*.[64] The legal certainty around the status of the Gaza Strip as that of an Israeli occupation ended in 2005.[65]

24. In September 2005, Israel terminated all civilian and military presence in Gaza and the IDF order of 1967, which established military rule, was revoked.[66] As such, Israel contended that with the completion of the disengagement any Israeli responsibilities for the Palestinian residents of the Gaza Strip would also cease.[67] Similar contentions were voiced not only by Israeli

the Geneva Conventions, see HCJ 606/78, Ayoub v. Minister of Defense, PD 33(2) (1978), 113; HCJ 390/79, Dwaikat v. Israel, PD 34(1) (1979), 1; HCJ 698/80, Kawasme v. Minister of Defense, PD 35(1) (1980), 617; HCJ 393/82, Jam'iyat Ascan El Malmun el Mahduleh el Masauliyeh v. Commander of IDF Forces, PD 37(4) (1982), 785, 794; HCJ 7015/02, Ajuri v. IDF Commander, PD 56(6) (2002), 352, 364; HCJ 3278/02, Ctr. for the Defense of the Individual v. Commander of IDF Forces, PD 57(1) (2002), 385, 396.

64 See Security Council Resolution 237, stating that all the obligations [of the Fourth Geneva Convention] should be complied with by the parties involved in the conflict, and Security Council Resolutions 271, 446, 681, 799 and 904, all urging the Israeli government to accept the de jure application of the Geneva Conventions. See also GA Res 2252 (ES-V) (4 July 1967). See also the US position in favour of the de jure application of the Geneva Conventions in US Department of State, Country Reports on Human Rights Practices for 1987 (1988), 1189. For the position of the Red Cross, see International Committee of the Red Cross, Annual Report 1987 (1988), 83–84. See also the position of the ICJ in Legal Consequences of the Construction of a Wall, above n.12, paras.94–95. Within international literature, for criticism of the Israeli stance of the non-de jure application of the Fourth Geneva Convention, see Roberts, above n.61, 85; Richard Falk and Burns Weston, The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza, in: Emma Playfair (ed.), International Law and the Administration of Occupied Territories (1992), 132; Yuval Shany, Israeli Counter-Terrorism Measures: Are They "Kosher" Under International Law?, in: Michael Schmitt and Gian Luca Beruto (eds.), Terrorism and International Law: Challenges and Responses (2003), 96, 101–102 (http://web.iihl.org/iihl/Album/terrorism-law.pdf (last accessed 16 February 2010)).

65 An example of the nebulous post-disengagement status of the Gaza Strip can be traced in the remarks of the Deputy-Attorney General of the State of Israel in front of the Knesset's Constitution and Law Committee, requesting the Committee approve the exemption of the Gaza Strip from those territories captured in 1967, where Israeli law provisions were extended to Israeli citizens, stressing that "from a legal point of view [the Gaza Strip] has to be closed, so that a soldier will know that he should refrain from going out there, since it is not like Judea and Samaria, where there has to be free movement, but it [the Gaza Strip] is something else", without though elaborating more on the legal status of the area. Mike Blass, Deputy Attorney General, Comments to the Knesset Constitution and Law Committee, Protocol No. 225 (18 June 2007) (in Hebrew).

66 IDF Spokesperson Office, Declaration Regarding End of Military Rule in Gaza Strip (12 September 2005) (http://www1.idf.il/DOVER/site/mainpage.asp?sl=EN&id=7&docid=45427&Pos=1&last=0&bScope=False).

67 Israel Revised Disengagement Plan, above n.10, Section 1, para.6; Harvard Program on Humanitarian Policy and Conflict Research, above n.63, 5.

officials[68] but also by international legal experts in the academic world, stressing that the Israeli occupation of the Gaza Strip had thus come to an end.[69]

25. The Palestinians continued to view the Gaza Strip as occupied by Israel, even after the Israeli disengagement. This, because Israel continued to control its air space and territorial sea waters as well as the international border crossings.[70] Moreover, according to the Palestinian stance, the West Bank and the Gaza Strip should be seen as one unit on the issue of the occupation status; so long as the West Bank continued to be occupied, no change in the occupation status of the Gaza Strip could take effect.[71] Similar opinions were also

68 See the position taken by Captain Osnat Davidson, Head of the Infrastructure Section of the International Law Department in the Israeli Defense Forces Military Advocate General Corps, in: Virginia Law School: Panelists Disagree Over Gaza's Occupation Status (17 November 2005) (http://www.law.virginia.edu/html/news/2005_fall/gaza.htm (last accessed 9 March 2010)).

69 Ruth Lapidoth, Unity Does Not Require Uniformity (22 August 2005) (http://www.bitterlemons.org/previous/bl220805ed30.html#pal2 (last accessed 9 March 2010)).

70 PLO Negotiation Affairs Department, The Israel "Disengagement" Plan: Gaza Still Occupied (September 2005) (http://www.nad-plo.org/inner.php?view=disengagement_Fact_GAZA%20STILL%20OCCUPIED (last accessed 9 March 2010)); Panelists Disagree over Gaza's Occupation Status, above n.68; Saeb Erekat, Gaza Remains Occupied (22 August 2005) (http://www.bitterlemons.org/previous/bl220805ed30.html#pal2 (last accessed 9 March 2010)); Palestinian FM: Pull Out Will Not End Gaza Occupation, Daily Star (9 August 2005) (http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=17458 (last accessed 9 March 2010)).

71 See, for example, Ghassan Khatib, emphasizing that the disengagement should be a step towards a gradual end of the occupation of all territory and that only the final outcome of a negotiations process can lead to a change in the legal status of the occupied territories. Ghassan Khatib, No Change (2005) (http://www.bitterlemons.org/previous/bl220805ed30.html#pal2 (last accessed 9 March 2010)). Indeed, under the Oslo Agreements, any Israeli withdrawal from parts of the Gaza Strip or the West Bank, categorized as "A", where all responsibility in civilian and security matters passed to the Palestinian authority, did not signal the termination of occupation, even though no Israeli army or civilians resided in these territories. The difference between the Oslo framework of "A" areas and the status of Gaza after the disengagement is that under the Oslo framework Gaza was characterized as an "A" area, with regard to 80% of its area, and Israel claimed residual jurisdiction. After the disengagement, Israel marked a conceptual difference in this policy, by stressing that the plan signals the end of all permanent Israeli presence in the Strip and thus consists a denunciation of claims of residual jurisdiction. On these, see Yoel Singer, The Oslo Process: A View From Within, in: Amos Shapira and Mala Tabory (eds.), New Political Entities in Public and Private International Law: With Special Reference to the Palestinian Entity (1997), 17, 26; Israel Revised Disengagement Plan, above n.10, para.6. For the fact that before the disengagement, even Israeli jurisprudence regarded the Gaza Strip as a whole as an occupied territory, despite being characterized in its large part as area "A", see HCJ 1661/05, Regional Council Gaza Beach et al. v. Knesset, PD 59(2) (2005), 481, 514. For more on the fact that the West Bank and the Gaza Strip continued to be deemed "occupied" also under the Oslo Accords, see inter alia Peter Malanczuk, Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law, 7 EJIL (1996), 485, 487. For the argument that the Israeli withdrawal in 2005 constitutes a substantial legal difference in comparison with the Oslo Accords and does not only mark the change of status of the specific

expressed mainly by scholars[72] and international bodies,[73] as well as various NGOs.[74]

26. In June 2007, almost two years after the Israeli disengagement from Gaza, Hamas took control over the territory and Southern Israel became exposed to a daily barrage of rocket attacks.[75] In an attempt to cope with the situation, Israel

territories from "C" to "A" in order for them to still be deemed as occupied, see Yuval Shany, Binary Law Meets Complex Reality: The Occupation of Gaza Debate, 41 Israel LR (2008), 68; Benjamin Rubin, Gaza, Occupation and Post-Occupation Duties, 42 Israel LR (2010), 546.

72 Bibliography on the issue is still scarce but so far expressed opinions by non-Israeli publicists lead to this direction. See indicatively, Nicholas Stephanopoulos, Israel's Legal Obligations to Gaza after the Pullout, 31 Yale JIL (2006), 524.

73 Yet in the realm of the United Nations, the question does not seem to be clear. Thus, although the UN Rapporteur for the Occupied Palestinian Territories did hold that Gaza continues to be "occupied", the UN Secretary General when asked on the matter replied that he was not in a position to say anything on these legal matters. A day after the statement, a UN Spokesman clarified that the issue would be solved only through a new Security Council Resolution. Similarly, although the UN Human Rights Council Resolution, establishing a Fact Finding Mission in April 2009 for the Israeli military operation "Cast Lead" and the alleged perpetration of war crimes and crimes against humanity, referred to an "occupied Gaza Strip", Justice Richard Goldstone, the Head of the fact-finding mission, despite the resolution's terminology, referred in his common press conference with the President of the Human Rights Council to "Gaza and the Occupied Territory". Asked whether he thought there was a distinction between the two, Justice Goldstone preferred not to provide a direct answer. On these, see Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, UN Doc A/HRC/4/17 (January 2007); Josh Levs, Is Gaza "Occupied" Territory?, CNN (6 January 2009) (http://www.cnn.com/2009/WORLD/meast/01/06/israel.gaza.occupation.question/index.html (last accessed 9 March 2010)); United Nations Human Rights Council, Resolution S-9/1, A/HRC/S-9/L.1, 9th Special Sess. (12 January 2009); See near-verbatim transcript of press conference by the President of the Human Rights Council, Martin Ihoeghian Uhomoibhi (Nigeria) and Justice Richard J. Goldstone on the announcement of the Human Rights Council fact-finding mission on the conflict in the Gaza Strip, Geneva (3 April 2009) (http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/PC_Transcript_3_April.doc (last accessed 9 March 2010)).

74 See, for example, the manual of Gisha, an Israeli NGO holding this position, in: Gisha (ed.), Disengaged Occupiers: The Legal Status of Gaza (2007), 49–55 (http://www.gisha.org/english/reports/Report_for_the_website.pdf (last accessed 9 March 2010)); Human Rights Watch, Israel: Disengagement Will Not End Gaza Occupation (28 October 2004) (http://www.hrw.org/en/news/2004/10/28/israel-disengagement-will-not-end-gaza-occupation (last accessed 9 March 2010)); B'Tselem (Israeli Information Center for Human Rights in the Occupied Territories), One Big Prison: Freedom of Movement to and from the Gaza Strip on the eve of the Disengagement Plan (March 2005), 74–75 (http://www.btselem.org/Download/200503_Gaza_Prison_English.PDF (last accessed 9 March 2010)).

75 The severity of these rocket attacks can be seen in the fact that Israel was obliged to declare "a special situation", granting the army to take emergency decisions for the civilian population near the border with Gaza. See Rebecca Anna Stoil, "Special Situation" Declared for Sderot, Jerusalem Post (14 December 2007) (http://www.jpost.com/servlet/Satellite?cid=1196847330565&pagename=JPost%2FJPArticle%2FShowFull (last accessed 2 March 2010)).

decided in September 2007 to proceed to the restriction of passage of persons and goods to and from the Strip and to the reduction of the Israel-provided electricity and fuel supplies, in the hope that such a step would serve as a pressure to the Palestinians that would lead to the halt of the rocket attacks.[76] Moreover, since much of the gas provided to Gaza ended up serving the needs of the terrorist groups launching rockets inside Israel, the latter found itself confronted with an awkward position where in essence it strengthened its enemies. It was that reality that the Israeli policy also tried to alter.[77]

27. On 25 October 2007, the Israeli Minister of Defense announced that pursuant to the government's decision on the issue, he had authorized reductions in the electricity and fuel supplies to the Strip.[78] Three days later, Palestinian residents of Gaza, along with Israeli NGOs, petitioned the Supreme Court, on the argument that such a policy if perpetrated would harm irreversibly the humanitarian facilities of the Strip.[79] Moreover, they constituted collective punishment and thus violated international humanitarian law.[80]

76 Israeli Ministry of Foreign Affairs, Security Cabinet Declares Gaza Hostile Territory (19 September 2007) (www.mfa.gov.il/MFA/Government/Communiques/2007/Security+Cabinet+declares+Gaza+hostile+territory+19-Sep-2007.htm (last accessed 9 March 2010)); Herb Keinon, Government Declares Gaza "Enemy Entity", Jerusalem Post (19 September 2007) (http://www.jpost.com/servlet/Satellite?cid=1189411435664&pagename=JPost%2FJPArticle%2FShowFull (last accessed 9 March 2010)); Yaakov Katz, Gaza Plan: Fill Tankers, Cut Supplies, Jerusalem Post (14 January 2008) (http://www.jpost.com/servlet/Satellite?cid=1199964915463&pagename=JPost%2FJPArticle%2FShowFull (last accessed 9 March 2010)). See also the relevant statements of senior Israeli defense officials that "we need to show the residents of Gaza that life does not carry on freely when Kassam rockets fall in Israel. If rockets are fired, then the Palestinians will pay a price". (Quoted by Yaakov Katz, Barak Set to Approve List of Sanctions against Gaza, Jerusalem Post (23 October 2007) (http://www.jpost.com/servlet/Satellite?cid=1192380628338&pagename=JPost%2FJPArticle%2FPrinter (last accessed 9 March 2010)).) See also this statement made in the plaintiff's writ to the Supreme Court, Al-Bassiouni et al. v. Prime Minister of Israel, Plaintiff's Writ, (28 October 2007), 14 (http://www.gisha.org/UserFiles/File/Legal%20Documents%20/fuel%20and%20electricity_oct_07/petition-fuel%20and%20electricity%20-%20final-no%20details.pdf (last accessed 9 March 2010)). See also, in the same spirit, the statements of various Israeli Members of the Knesset, after the terrorist attack in Nahal Oz fuel terminal from where fuel and gas are transferred from Israel to the Strip. Israel: Responsibility Lies on Hamas and It Will Pay (in Hebrew), Haaretz Online (9 April 2008) (http://www.haaretz.co.il/hasite/spages/973353.html (last accessed 9 March 2010)).

77 This emerges from the Supreme Court's wording that ". . . in our decision we considered also the stance of the state that . . . part of the fuel that is provided to the Gaza Strip, actually serves the different purposes of the different terrorist groups and for these reasons, the reduction in the fuel supplies . . . is meant to inflict a blow to the capacities of the terrorist groups . . . ." Al-Bassiouni Judgment, above n.6, para.4; see also ibid., para.6.

78 Al-Bassiouni Plaintiff's Writ, above n.76, 2.

79 Al Bassiouni Judgement, above n.6, paras.1, 7.

80 Ibid.

28. From its part, the State clarified that it did not view the Gaza Strip any more as an occupied territory, but rather under the same lens it would view any other international actor, which should be related by the standards applicable to sovereign States.[81]

29. As such, since economic sanctions are a measure provided by the UN Charter for the peaceful solution of international disputes and have been undertaken in the past by the United Nations,[82] as well as by individual members of the international community, also for *inter alia* the combat of terrorism,[83] Israel claimed that such should be the case also with Gaza and the reduction in electricity and gas supplies should be seen under this light.[84]

30. The Supreme Court held a series of hearings on the case. At the beginning of November, a hearing was held with the presence of the parties. In that hearing, the State argued before the Court that it had not reached a final decision on the issue of the electricity supply. As a result, the hearing focused only on the reduction of the fuel supplies.[85]

31. On this particular issue, the State held the view that it recognized it had the duty not to cause a humanitarian crisis in Gaza and that the proposed cuts could not cause such a crisis.[86] The Court not only did not reject such an argument, but in the spirit of the argument itself, it ordered the State to submit in a week's time all the relevant data that would prove that such a crisis would not emerge. In fact, on 29 November 2007, on the issue of the fuel supplies, the Court held that it had not been persuaded that the Israeli decision harmed, at that phase, the essential Palestinian humanitarian needs. As such, it turned its attention to the reduction of the electricity supplies.[87] On this, the Court ordered the State to submit more data on the proposed reduction, which would not take place until the handling of such data.[88]

32. At the hearing held at the end of January, the Court became entangled in highly technical exercises regarding the amount of electricity supplied to Gaza by Israel and concluded that the electric energy provided by Israel to Gaza was enough, even after the purported cuts, in order not to lead to a humanitarian crisis.[89] In the rationale of the decision, Judge Beinisch held that Israel has no

81 Al-Bassiouni Respondents' Writ, above n.5.

82 Oscar Schachter, The UN Legal Order: An Overview, in: Christopher Joyner (ed.), The United Nations and International Law (1997), 16; August Reinisch, Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions, 95 AJIL (2001), 851.

83 Andreas Lowenfeld, Unilateral versus Collective Sanctions: An American Perception, in: Vera Gowland-Debas (ed.), United Nations Sanctions and International Law (2001), 95.

84 Al-Bassiouni Respondents' Writ, above n.5, 2.

85 Al-Bassiouni Judgment, above n.6, para.3.

86 Ibid.

87 Ibid, para.4.

88 Ibid., para.8.

89 Ibid., para.11.

duty to allow the unrestricted provision of fuel or electricity to the Gaza Strip at a time when part of these provisions serve the purposes of terrorist groups.[90] According to the judge, the obligation that falls upon Israel stems from the essential humanitarian needs of the Gaza residents. He said:

> It is on the respondents to fulfill their obligations under international humanitarian law and in this framework, it is their duty to permit the supply to the Gaza Strip, only of the goods that are essential for the necessary humanitarian needs of the civilian population.[91]

33. In other words, according to the Court, Israel's obligations towards the Gaza Strip are minimal and focused on basic humanitarian aspects of the civilian population. The rhetoric clearly reminds one of the approach taken above that any post-disengagement Israeli obligations should be traced to the value of a human being as such. The reason this is the case is that, according to the Israeli Supreme Court, Gaza after the Israeli disengagement is not under occupation. In the words of Judge Beinisch:

> Let us state that hence September 2005, Israel does not exert an effective control over the Gaza Strip. . . . For these reasons there is no obligation for Israel to worry for the welfare of the residents of the Gaza Strip and to keep public order in the Strip, according to the international laws of occupation. . . . For these reasons, the main obligations that fall upon Israel in relation to the residents of the Gaza Strip stem from the state of warfare between Israel and Hamas, that rules the Strip; these obligations also stem from the extent of the control that Israel exercises to its border crosses with the Strip and also from the situation . . . that has been created after years of Israeli dominion over the Strip, in the aftermath of which, there has been nowadays created an almost absolute dependence of the Strip on Israel for the providing of electricity.[92]

34. Thus after the Israeli disengagement, *jus in bello* does not apply to Gaza without the initiation of any conflict. As such, any Israeli obligations towards Gaza's residents are based on humanistic, natural law reasons on account of the fact that Israel does exert a certain degree of control over the territory, which although not rendering it an occupying power, at the same time does not absolve it from any responsibilities, which relate to the core nucleus of basic human rights awarded to all human beings due to their nature. The pronouncement that the Gaza Strip cannot be deemed to be under Israeli occupation and thus *jus in bello* does not apply *a priori* without the initiation

90 Ibid.
91 Ibid.
92 Ibid, para.12.

of hostilities,[93] leads to the conclusion that in light of the barrage of rocket attacks against Southern Israel, the legality of cutting electricity and gas supplies should be viewed under *jus ad bellum*.[94]

35. Indeed, by noting that *inter alia* Israeli obligations stem from the State of warfare between Israel and Hamas,[95] Judge Beinisch in essence incorporates such measures in the *jus ad bellum*, as an expression of Israel's right of self-defense[96] and a response to the daily rocket attacks launched by the Strip.[97]

36. This is reinforced also by the fact that the Court did not relate to arguments focusing on alleged violations of *jus in bello* provisions *per se*, such as

93 As noted, once there is resort to force, jus in bello constitutes the norms of international humanitarian law of war that dictate how this force should be used. For more, see Brian Foley, Avoiding a Death Dance: Adding Steps to the International Law on the Use of Force to Improve the Search for Alternatives to Force and Prevent Likely Harms, 29 Brooklyn JIL (2003), 129, 144.

94 On the distinction between jus ad bellum and jus in bello, see the remark of Professor Marco Sassoli that the two are distinct and completely separate branches of international law and that while jus ad bellum prohibits and exceptionally authorizes the use of force, jus in bello regulates that use of force, independently of whether it is lawful or unlawful under jus ad bellum. Marco Sassoli, Terrorism and War, Journal of International Crime and Justice (2006), 959. From the vast bibliography elaborating on the distinction along these lines, see, e.g., Marco Sassoli and Antoine Bouvier, How Does Law Protect in War? (1999), 115; William Fenrick, Should Crimes against Humanity Replace War Crimes?, 37 Columbia Journal of Transnational Law (1999), 770, 776; Judith Gardam, Legal Restraints on Security Council Military Enforcement Action, 17 Michigan JIL (1996), 285, 287, nn.5, 6.

95 Such a conclusion also stems from paragraph 11 of the decision where Judge Beinisch connects the reduction in electricity and gas supplies with the rocket attacks launched from Gaza. See also paragraph 20 of the decision, where Beinisch cites Judge Barak's dictum that Israel is finding itself under heavy fighting against terrorist groups and that in the framework of this fighting it acts in accordance with the right to self-defense, as embodied in Article 51 of the UN Charter, implying that the legal framework that should apply in the first place is jus ad bellum.

96 For the fact that according to the ICJ, attacks have to have an intensity in order to trigger the right of self-defense and this intensity cannot be deemed to be "cumulative", see Military and Paramilitary Activities, above n.11, 104; Oil Platforms Case, above n.15, 51.

97 For the fact that this was the stance of the Israeli government from the first moment, see the decision of the Inner Security Cabinet, dated 5 September 2007, where all relevant factors in the Ministries of Justice and Foreign Affairs are instructed to form a plan, intended to harm the services provided to the Gaza Strip by the State of Israel "as a response to the continuation of the armed attacks against the civilian population inside Israel". Decision of the Israeli Inner Security Cabinet (5 September 2007), cited in: Al Bassiouni Plaintiff's Writ, above n.76, 46. See also the response of the State to the particular petition, where the legality of the proposed cut supplies is argued on account of the war waged against Israel by the terrorist groups that rule in Gaza. Al-Bassiouni Respondents' Writ, above n.76, 2. Such is the stance also taken by various international scholars. On this, see, e.g., Abraham Bell, The Assault on Israel's Right to Self-Defense, Jerusalem Issue Brief (January 2008) (http://www.ambisrael.be/mfm/Web/main/document.asp?SubjectID=115456&MissionID=110&LanguageID=0&StatusID=0&DocumentID=-1 (last accessed 9 March 2010)).

that of collective punishment, although such arguments were raised by the petitioners.[98] Instead, the Court restricted itself to reference to *jus in bello* provisions, conceded also by Israel and closely related to an Israeli obligation to provide for the basic humanitarian needs of the enemy civilian population,[99] in order for the Court to sum up that:

> ... Israel is obligated to act according to international law and abstain from causing harm intentionally to the civilian population that resides in Gaza.[100]

37. The same should be held true for the restriction of persons and goods that Israel imposed. Whereas there have been attempts to describe the Israeli policy with existent terms of international law, it has to be contended that the use of terms such as "blockade"[101] or "siege"[102] has not been successful for disengaging from the *jus in bello* framework.[103] Although their characterization as "economic measures" is problematic,[104] the particular measures should be perceived as incorporated in *jus ad bellum* and as an Israeli attempt to induce the Palestinians to refrain from launching rockets inside Israel. While the measure is impersonal and as a result innocent people are also being affected, it does not constitute collective punishment, because it is being taken only as a response to use of force by the other side and with the purpose not of collectively punishing the Palestinian population but of eliminating a threat emanating from the Gaza Strip.[105]

98 On this, see Al-Bassiouni Plaintiff's Writ, above n.76, 2, 14.

99 Ibid., 13–15.

100 Ibid., 22.

101 Report of the United Nations Fact Finding Mission on the Gaza Conflict, above n.7, para.17.

102 Yuval Shany, The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel, Hebrew University International Law Research Paper No. 13-09 (27 February 2009), 9 (http://ssrn.com/abstract=1350307 (last accessed 11 March 2010)).

103 See also the additional fact that the laws pertaining to the siege require that civilians will be able to leave the besieged area, whereas in the case of Gaza, very few residents of the Strip have been allowed to leave it and this only after Israeli authorization. On this, see Yoram Dinstein, Siege Warfare and the Starvation of Civilians, in: Astrid J.M. Delissen and Gerald Tanja (eds.), Humanitarian Law of Armed Conflict: Challenges Ahead (1991), 148–149.

104 See below n.109.

105 The fact that through economic sanctions it is often the civilian population and not the ruling elites that get mostly affected is a dire reality which has been acknowledged and has even led some to argue that use of force should be preferable over economic sanctions. On this, see Iain Cameron, Targeted Sanctions and Legal Safeguards, 6 (http://resources.jur.uu.se/repository/5/PDF/staff/sanctions.pdf (last accessed 11 March 2010)); B.D. Lepard, Rethinking Humanitarian Intervention—A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions (2002), 232, quoted in: Dan Kuwali, Persuasive Prevention: Towards a Principle for Implementing Article 4(h) and R2P by the African Union, 42 Current African Issues (2009), 13 (nai.diva-portal.org/smash/get/diva2:272950/FULLTEXT01 (last accessed 11 March 2010)). For whether a military

38. The fact that the policy of reduction of electricity and fuel supplies has to be examined under *jus ad bellum* is of cardinal importance. Under *jus in bello*, the particular Israeli measures could not but be proclaimed illegal as collective punishment.[106] The absolute wording of the prohibition, which allows for no exceptions in cases of military necessity, as well as the spirit of *jus in bello* itself, interested in complicity with its provisions without relation to the justness of the use of force by one of the conflicting parties,[107] would result in the denouncement of the specific Israeli policy.

39. Yet, by being incorporated in *jus ad bellum*, the Israeli measures towards post-disengagement Gaza are not *a priori* illegal and their legality is linked to whether they abide by the principles of necessity and proportionality, as requested by any resort to use of force.[108] Moreover, not only are such measures not *a priori*

intervention in the case of the Gaza Strip would be less painful for the Strip's residents than economic sanctions, see below n.116 regarding the number of casualties from various recent Israeli operations. Based on the fact that both general economic sanctions as well as military solutions harm the civilian population, Iain Cameron expresses his support for "targeted" sanctions, namely sanctions headed against certain persons in the military or political echelon. On this, see Iain Cameron, ibid., 14. The position that the intent of the Israeli policy is to target the civilian population is held by "Gisha", an Israeli NGO, according to which the measures do constitute "collective punishment". In its analysis, the NGO states that the measures "constitute a closure aimed at civilians. . . ." Gisha Legal Center for Freedom of Movement, Gaza Closure Defined: Collective Punishment: Position Paper on the International Law Definition of Israeli Restrictions on Movement in and out of the Gaza Strip (December 2008), 1 (http ://www.gisha.org/UserFiles/File/publications_english/Publications%20and% 20Reports_English/Gaza%20Closure%20Defined%20Eng (last accessed 11 March 2010)). The fact that the closure of Gaza has dire consequences for the entire civilian population of the area is probably the reason why international publicists have been tempted to compare it with laws of war notions such as "siege" and "blockade". Yet a "siege" or a "blockade" is aimed at the enemy's capitulation in the realms of an armed conflict and, as such, their relevance is dubious in the case of the Gaza Strip, where Israel has declared it does not intend through these measures to re-occupy the Strip. On this, see David Matas, above n.8; James Fry, Contextualized Legal Reviews for the Methods and Means of Warfare: Cave Combat and International Humanitarian Law, 44 Columbia Journal of Transnational Law (2006), 453, 512; Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict (2004), 136; US Department of the Army, Field Manual 27–10, The Law of Land Warfare (1956), 20. The same is true as far as "blockade" is concerned. The blockade is the equivalent notion of "siege" in the sea and refers to the right of a belligerent under the laws of war to proclaim such a blockade of all or part of the enemy's coast and use warships to enforce that blockade, aiming at the cutting off of all maritime commerce between its enemy and the rest of the world. On this, see Christopher Greenwood, Blockade as Act of War, in: Roy Gutman, David Rieff and Anthony Dworkin (eds.), Crimes of War: What the Public Should Know (2007), 64–65; Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (2004), 137.

106 Yuval Shany, above n.102.

107 David Kretzmer, The Light Treatment of International Humanitarian Law, 99 AJIL (2005), 88, 92, n.43.

108 See Military and Paramilitary Activities, above n.11, para.103; Lori Damrosch, Enforcing International Law through Non-Forcible Measures, 269 RCADI (1997), 57. These criteria

illegal, but they could be also deemed preferable as a non-violent solution to a military operation in the Strip that would leave behind many victims. Although the resemblance of the Israeli policy to economic sanctions taken towards sovereign States[109] is hard to uphold due to Gaza's dependency on Israel,[110] these measures

were established in an exchange of letters between Webster and Ashburton, the US Secretary of State and British Minister of Foreign Affairs, respectively. The issue concerned the boarding of British forces on the vessel Caroline, which served the supply of ammunitions to the rebels against the British Crown in Canada and the resulting death of two American citizens. In light of American protests regarding the operation, the British contended inter alia that the operation was taken on grounds of self-defense. In his response to his British counterpart, Secretary of State Webster emphasized that the exercise of self-defense, in order to be deemed legal should reflect a necessity and be proportional. On these and for an application of the Caroline incident to the exercise of the right to self-defense in contemporary warfare, see Michael Reisman, International Legal Responses to Terrorism, 22 Houston JIL (1999), 3, 43–46.

109 Although from the various definitions of economic sanctions usually applied by international scholars, the requirement of the international actors involved being sovereign States is not a prerequisite, the fact that economic sanctions take for granted that the State that imposes them does not hold any responsibilities towards the targeted actor that could impede their imposition as unlawful and since, as noted, this is not the case under an occupation regime, in essence economic sanctions are headed towards States and such a presumption is evident also in various definitions of the term. For more, as well as a list of definitions of economic sanctions, some of them speaking about a "targeted country" or as being taken "against one or more countries" and others just as actions initiated by one or more international actors against one or more others, see Justin D. Stalls, Economic Sanctions, 11 University of Miami ICLR (2003), 119, n.17. For the fact that also non-State entities can be "recipients" of a sanctions policy, see Damrosch, above n.108, 50.

110 Israel controls Gaza's aerial space and territorial waters and its frontiers. While such control does not render Gaza independent, it cannot be deemed to be still under Israeli effective control and Israeli occupation. Sanctions have been parallelized with the imposition of fines and other punishments by members of a guild who do not meet certain agreed criteria. As such, they refer to situations where States do not meet obligations under international law. On this, see Eiichi Fukatsu, Coercion and the Theory of Sanctions in International Law, in: R. St. J. MacDonald and Douglas Johnston (eds.), The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory (1983), 1187, 1188; Todd Wynkoop, The Use of Force against Third Party Neutrals to Enforce Economic Sanctions against a Belligerent, 42 Naval LR (1995), 91, 98. Even if the particular construction was expounded also to non-State actors, it is difficult to fathom how it would apply in the case of Gaza, where the non-State actor acts from a territory which is not a separate State, was once occupied by Israel and towards which Israel still holds certain obligations. For the fact that control has to be "physical" and "actual" in order to be effective, see also the decisions of the European Court of Human Rights in Bankovich v. Belgium et al., 41 ILM (2001), 517, paras.59–61 (there the Court arguing that control over aerial space does not constitute by itself "effective control") and Ocalan v. Turkey, Judgement of 12 March 2003, para.93 (the Court emphasizing that the fact that Ocalan was physically forced to return to Turkey by Turkish officials and was subject to their authority and control following his arrest and return to Turkey constituted "effective control"). See also the ruling of the European Commission on Human Rights, which on the occasion of the consolidated complaints of Cyprus against Turkey, noted that in order for the criterion of effective control to be satisfied, armed forces of a State should not only belong to that

could be sanctioned once seen as non-forcible measures taken in an attempt to avoid resort to armed force.[111]

40. Resort to such non-forcible defensive measures is deemed nowadays as the second step in a three-step decision process concerning resort to the use of force and, together with the first step that addresses the question of whether force is one of the allowable responses in a particular situation, they address *jus ad bellum* concerns.[112]

41. The UN Charter explicitly stresses that the preference of the international community should be for non-violent defensive measures, before any resort to force, by stating in Article 41 that:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions and it may call upon the Members of the United Nations to apply such measures . . . .[113]

42. Article 42 advocates resort to "other operations by air, sea or land forces", a euphemism for actual force,[114] only in case the measures of Article 41 do not bear fruit. As such, resort to non-violent defensive measures does not constitute a mere option available to international leaders, but the option primarily envisioned by the drafters of the international legality after World War II.[115] Unwillingness or incapability of policy makers to take advantage of it could not but be deplored by international publicists.[116]

State's jurisdiction when abroad, but the criterion applies to the persons who are actually brought into the State's jurisdiction, to the extent that the armed forces exercise authority over these persons in Cyprus v. Turkey, App.6780/74, 6950/75, Yearbook of European Convention of Human Rights (1975), 112, reprinted in: 62 ILM (1982), 86. These two cases from the European Court jurisprudence point to the fact that the concept of effective control should not be seen as monolithic, but should be divided into various aspects and the scope of application of the Convention should be modified in light of the scope of control actually exercised by the State parties. On this, see also Orna Ben Naftaly and Yuval Shany, Living in Denial: The Application of Human Rights in the Occupied Territories, 37 Israel LR (2003–2004), 82. For the fact that effective control should be exercised over a territory in order for it to be deemed "occupied", see Gerhard von Glahn, Law among Nations: An Introduction to Public International Law (6th edn. 1992), 774; Harvard Program on Humanitarian Policy and Conflict Research, above n.63, 9.

111 Stalls, above n.109, 115, 116–117. See also Professor Damrosch stating that economic sanctions can be taken with the purpose of terminating a wrongful act or redressing its consequences. If that is the case with economic sanctions, there is one reason for this not to apply also to other non-forcible measures. See Damrosch, above n.108, 55.

112 Foley, above n.93, 130–131. The third step, belonging to jus in bello, is the question whether the force used as a response is disciplined and necessary. Ibid.

113 UN Charter, art. 41.

114 Foley, above n.93, 141–142.

115 On various examples where the United Nations has imposed sanctions and on the fact that this has often involved issues of international terrorism, see Benedetto Conforti, The Law and Practice of the United Nations (2005), 186–191.

116 See Foley, above n.93, 152–157 (proposing requiring on the decision makers' part to engage in searching for alternatives to force).

43. As such, the particular case of the Israeli measures towards post-disengagement Gaza holds a certain importance not only for its political or legal humanitarian repercussions, but also because it poses a great oxymoron, where measures which constitute violations under *jus in bello*, under *jus ad bellum* are seen as non-violent defensive measures and as thus not only legitimate but even preferable to the use of force.[117]

44. Yet, from that aspect, the measures should not be perceived as a legal novelty, but as the most recent example in the history of the Israeli–Palestinian conflict, where measures, legitimate and even appraisable under *jus ad bellum* as trying to completely eliminate or minimize the loss of enemy civilian lives, have been denounced by the international community as *jus in bello* violations. In the following section, the cases of targeted killings and the erection of the security fence will be briefly discussed. Targeted killings and the erection of the security fence hold a difference from the case of the measures towards Gaza, in the sense that while the latter have been deemed as falling in the scope of *jus ad bellum*, the former were perceived as pertaining to *jus in bello*.[118]

45. The following sections will examine axiomatically the particular measures, in the sense that they would bear the same similarities with the post-disengagement Gaza measures were they to be undertaken, under *jus ad bellum*, as purely defensive measures against attacks. Additionally, the non-forcible character of targeted killings, despite the use of force they entail,[119] is based on the fact that they involve

117 Indicative of the grave consequences of the use of force in the case of Gaza is the high numbers of casualties in two instances of broad Israeli post-disengagement military operations in the Strip. In the first one, in 2008, about 60 Gazans were left dead while in the second, in the beginning of 2009, an estimated number of 1100 to 1400 Palestinians, including combatants, and 13 Israelis were killed. On these, see Griff Witte, 60 Gazans Killed in Incursion by Israel, Washington Post (2 March 2008), A1 (http://www.washingtonpost.com/wp-dyn/content/article/2008/03/01/AR2008030100497.html). For the disagreement over the exact number of the Palestinian casualties as well as the percentage of the combatants, included in the aforementioned figures, see Steve Weizman, Israeli Soldiers: "No Clear Red Lines" in Gaza War, AP (16 July 2009) (http://news.yahoo.com/s/ap/20090715/ap_on_re_mi_ea/ml_israel_palestinians). For the fact that numbers cited by international organs do not clarify the fact that a big percentage of these casualties were combatants, see Alan Baker, The Forgotten Factor That So Skews Goldstone's Mission, Jerusalem Post (28 July 2009) (http://www.jpost.com/servlet/Satellite?cid=1248277915423&pagename=JPost%2FJPArticle%2FShowFull).

118 See below Sections III.B. and III.C. Although in the case of the security fence the ICJ examined the application or not of Article 51 of the UN Charter, this should not lead to the conclusion that the Court examined the Israeli project from a jus ad bellum point of view. For the fact that the Court applied the parameters of jus in bello, see Legal Consequences of the Construction of a Wall, above n.12, para.121. For the fact that jus in bello was the correct legal framework in the case of the security fence, see Ian Scobbie, Words My Mother Never Taught Me—"In Defense of the International Court", 99 AJIL (2005), 76; Aeyal Gross, The Construction of a Wall between the Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation, 19 Leiden JIL (2006), 393, 402.

119 Nils Melzer, Targeted Killing in International Law (2008), 3.

or mean to involve the minimal use of force in order to inflict a blow on a legitimate target according to the laws of war.

III.B. Targeted killings

46. Targeted killings are a practice that has been used in the past, mainly by States facing major terror threats, such as the United States and Israel.[120]

47. Although there is a tendency in the international community to blend the notion of "targeted killings" with those of extra-judicial killings or assassinations,[121] this should not be so. Extra-judicial killings take place in the course of peacetime,[122] while targeted killings happen in the course of armed conflict and are subject to the

120 In the past, the United States has thus assassinated Al Harethi, an Al Qaeda member, while authorization for the targeted killing of terrorist group leaders has been reportedly granted to the CIA. See CNN Report, Sources: U.S. Kills Cole Suspect (5 November 2002) (http://archives.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html (last accessed 3 February 2010)); CIA Expands Authority to Kill Qaeda Leaders, New York Times (15 December 2002), A2; Mark Mazzetti and Eric Schmitt, U.S. Takes to Air to Hit Militants inside Pakistan, New York Times (27 October 2008); Amos Guiora, above n.14, 322, 339; Richard Murphy and Afsheen John Radsan, Due Process and Targeted Killing of Terrorists, 31 Cardozo LR (2009), 405, 406. As for Israel, it first resorted to the particular policy with the assassination of Hussein Abayat. For these, see Steven R. David, Israel's Policy of Targeted Killing, 17 Ethics and International Affairs (2003), 111,115; B'Tselem, The Israeli Information Centre for Human Rights in the Occupied Territories, Israel's Assassination Policy: Extra-Judicial Executions, Position Paper (January 2001) (http://www.btselem.org/Download/200101_Extrajudicial_Killings_Eng.doc (last accessed 3 February 2010)); HCJ 769/02, Public Committee Against Torture in Israel v. Gov. of Israel, Judgment of 11 December 2005, para.2 (http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (last accessed 3 February 2010)) (noting that it is official Israeli policy to kill members of terrorist organizations involved in the planning, launching or execution of terrorist attacks against Israel).

121 Yael Stein, Position Paper: Israel's Assassination Policy: Extra-Judicial Executions (2001) (Maya Johnston trans.) (http://www.btselem.org/Download/200101_Extrajudicial_Killings_Eng.doc (last accessed 3 February 2010)); Amnesty International, Israel and the Occupied Territories: Israel Must End Its Policy of Assassinations (2003) (http://web.amnesty.org/library/pdf/MDE150562003ENGLISH/$File/MDE1505603.pdf (last accessed 3 February 2010)); UN Comm'n on HR, Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine: Report of the Human Rights Inquiry Commission, UN Doc E/CN.4/2001/121 (16 March 2001), paras.53–64 (http://documents-dds-ny.un.org/doc/UNDOC/GEN/G01/118/72/pdf/G0111872.pdf?OpenElement (last accessed 3 February 2010)). Extra-judicial killings are punitive measures aimed at regime dissenters, who are killed by the regime of a country during peacetime without a trial. "Assassinations" are the selected killing of an individual enemy by treacherous means. On this, see Antony Carillo-Suarez, Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict, 15 American University ILR (1999), 133; Benjamin Gorelick, The Israeli Response to Palestinian Breach of the Oslo Agreements, 9 New England JICL (2003), 670.

122 Carillo-Suarez, above n.121.

laws of war.[123] As such, extra-judicial killings violate international law,[124] while the legality of targeted killings is measured according to international humanitarian law and human rights standards in two phases: first, as a response to an armed attack, namely as part of *jus ad bellum*, and second, after the initiation of hostilities as a practice that could possibly negate the rules that conduct the waging of war, in other words, as to whether they comply with *jus in bello* requirements.[125]

48. While their adherence to *jus in bello* or the laws of war render targeted killings legitimate, in other words, the laws of war interact with the notion horizontally on a "legal–non-legal" axis,[126] the adherence of the practice to *jus ad bellum* influences it vertically in a substantive way by altering its offensive character and rendering it a self-defensive measure.[127]

123 This was explicitly stated in the decision of the Israeli Supreme Court on the legality of the particular policy. On this, see Public Committee Against Torture v. Israel Judgment, above n.120, paras.26, 31, 33, 37, 39. See also Ralph Ruebner, Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel—A Comparative Perspective, 31 Georgia JICL (2003), 541; Emmanuel Gross, Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights versus the State's Duty to Protect Its Citizens, 15 Temple ICLJ (2001), 224; Nicholas Kendall, Israeli Counter Terrorism: Targeted Killings under International Law, 80 North Carolina LR (2002), 1073–1074.

124 Inter alia, the right to life and the right to a fair trial. On this, see Amy Howlett, Getting "Smart": Crafting Economic Sanctions that Respect All Human Rights, 73 Fordham LR (2004), 1199, 1225; Richard Murphy and Afsheen John Radsan, Due Process and Targeted Killing of Terrorists, 31 Cardozo LR (2009), 405, 445–447.

125 On this, see the opinion of Professor Cassese, who holds that "to hold that killing civilians suspected of terrorism, while they are not engaged in military action, is internationally lawful would involve a blatant departure from the fundamental principles of international humanitarian law. . . ." Antonio Cassese, Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists Is Consonant with International Humanitarian Law (http://www.stoptorture.org.il/files/cassese.pdf). See also the decision of the Israeli Supreme Court in the case of the Public Committee Against Torture v. Israel, above n.120 (concluding that terrorists are "civilians" who may be targeted only when they take "direct part" in hostilities as stipulated by international humanitarian law, yet at the same time the Court expanded the notion of "direct participation"). For criticism of the Court's approach, see Kristen Eichensehr, On Target? The Israeli Supreme Court and the Expansion of Targeted Killings, 116 Yale LJ (2007), 1873 (arguing that the Israeli Supreme Court lowered the burden for demonstrating that a civilian can be an object of an attack).

126 David Kretzmer, Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?, 16 EJIL (2005), 171 (arguing that targeted killings can be legal under the laws of war but that these laws should incorporate elements of international human rights law).

127 Guiora, above n.14, 319, 334; Solon Solomon, Targeted Killings and the Soldiers' Right to Life, 14 ILSA JICL (2007), 99, 102–03. For an analysis of the view that the customary law of self-defense and not international humanitarian law should apply to targeted killings, see Kenneth Anderson, Targeted Killing in U.S. Counterterrorism Strategy and Law, in: Benjamin Wittes (ed.), Legislating the War on Terror: An Agenda for Reform (2009), 346.

49. This dual dimension of the policy of targeted killings is evident in the relevant case before the Israeli Supreme Court. Adjudicating after a petition from the Public Committee against Torture in Israel, the Court indulged in a thorough analysis of the laws of war in order to reach the conclusion that the lawfulness of a targeted killing depends on whether *in concreto* it abides by the standards of the customary international law of armed conflict.[128] Thus, the Court opted to examine the issue from a *jus in bello* perspective.[129] Yet, interestingly enough, in its response to the petition, the Israeli government referred to Article 51 and to the right of self-defense as justifying recourse to the particular policy, perceiving thus the measure as embedded in *jus ad bellum.*[130]

50. Moreover, modern warfare is very often conducted amidst a civilian population, and a military ground operation inescapably leads to the death of many innocent non-combatants and brings misery and destruction to people who are minimally involved in terror or military attacks.[131] Under these circumstances, the decision to resort to a policy like that of targeted killings, whose object is combatants and which thus respects the cardinal principle of the laws of war, namely the principle of discrimination or distinction and the proportionality

128 Public Committee Against Torture v. Israel Judgment, above n.120, para.23.

129 Yet, it has to be noted that all the analysis of the Court took place on the canvas of the existence of an armed conflict between Israel and the Palestinians. The Court thus did not negate the possibility of targeted killings constituting part of jus ad bellum in cases where an armed conflict did not pre-exist, as could be the case with targeted killings as response to the launching of rockets from post-disengagement Gaza. On this, see ibid., para.1 (conc. op. Vice-President E. Rivlin).

130 Ibid., para.10. See also UN General Assembly, Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, including East Jerusalem, GA Res 59/124, 59th Sess., 71st plenary meeting, UN Doc A/RES/59/124 (10 December 2004); Commission on Human Rights, Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine: Report of the Human Rights Inquiry Commission Established Pursuant to Commission Resolution S-5/1 of 19 October 2000, 57th Sess., Agenda Item 8, UN Doc E/CN.4/2001/121 (16 March 2001); Amnesty International, Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings (February 2001); ICRC, Implementation of the Fourth Geneva Convention in the Occupied Palestinian Territories: History of a Multilateral Process (1997–2001), 847; International Review of the Red Cross (2002), 661; UN Security Council, Security Council Urged to Condemn Extrajudicial Executions Following Israel's Assassination of Hamas Leader: Keep Focus on Palestinian Terrorism, Not Acts of Self-Defence, Says Israel's Representative, UN Doc SC/8063, 4945th meeting Press Release (20 April 2004) (Statement of Dan Gillerman).

131 Daniel Statman, Targeted Killings, 5 Theoretical Inquiries in Law (2004), 179, 187. This was rendered evident also through the large number of dead during the last ground military operation of the IDF in the Gaza Strip, where previously targeted killings took place. Although a considerable number of the casualties were combatants, still the high civilian casualties due, inter alia, to the nature of the Gaza Strip and of modern warfare, with combatants inside the civilian population, demonstrate that ground operations have a high civilian toll.

principle,[132] poises the specific policy, under certain conditions,[133] not only as a legitimate defensive measure, but also as a preferable one vis-à-vis a large-scale military operation[134] and as a choice that is in tandem both with international humanitarian law and human rights law.

51. The careful planning that targeted killings entail ensures not only that the target is a legitimate one under international humanitarian law, but also that civilian collateral casualties will be minimized or even absent.[135] As such, targeted killings are in tandem with the principle of distinction and causing minimum harm to enemy civilians, two of the main pillars of international humanitarian law.[136] Moreover, targeted killings involve the use of force to the extent necessary to thwart the threat presented, and from this aspect they conform with the

132 The principle of discrimination or distinction refers to the combatant's duty to discriminate during use of force between combatants and enemy civilians. Proportionality refers to the fact that unintended civilian damage should not be excessive compared with the military value of the objective. On these, see indicatively David Luban, Was the Gaza Campaign Legal?, 31 American Bar Association National Security Law Report (January/February 2009), 5; Geneva Academy of International Humanitarian Law and Human Rights, Rule of Law in Armed Conflicts Project, Israel: Applicable International Law (http://www.adh-geneva.ch/RULAC/applicable_international_law.php?id_state=113 (last accessed 4 February 2010)).

133 These conditions are the non-possibility of arrest of the targeted person, due for example to non-control over the territory from where that person launches his attacks, the proportionality principle, i.e. the minimization or even total absence of civilian casualties and the conduct of an ex post investigation each time there is resort to the particular policy. For more on these, see David Ennis, Pre-emption, Assassination and the War on Terrorism, 27 Campbell LR (2005), 255; Kretzmer, above n.126, 171–212; Amichai Cohen and Yuval Shany, A Development of Modest Proportions: The Application of the Principle of Proportionality in the Israeli Supreme Court Judgment on the Lawfulness of Targeted Killings, 5 Journal of International Criminal Law (2007), 310.

134 Ganor, above n.58, 118. See also the statement of the Israeli Chief of Staff that "each time we carry out a killing we also think about the 29 fatalities of the Park Hotel and the 22 dead at the Dolphinarium and about the bus that blew up in Jerusalem. We take that into account as well." (Cited by Boaz Ganor, ibid.)

135 Guiora, above n.14, 319, 322; William Wagner, As Justice and Prudence Dictate: The Morality of America's War against Terrorism—A Response to James V. Schall, S.J., 51 Catholic University LR (2001), 50; Amos Guiora, Legislative and Policy Responses to Terrorism: A Global Perspective, 7 San Diego ILJ (2005), 145; Emmanuel Gross, Terrorism and the Law: Democracy in the War against Terrorism—The Israeli Experience, 35 Loyla LR (2002), 1194; Kretzmer, above n.125, 204. On this point, see also the fact that collateral civilian casualties in the targeted killings perpetrated by the Israeli Air Force have been drastically diminished during the last few years. Alan Dershowitz, Double Standard Watch: The International Media's Silence on Targeted Killings, The Jerusalem Post (6 January 2008) (http://cgis.jpost.com/Blogs/dershowitz/entry/the_int_l_media_s (last accessed 4 February 2010)).

136 Public Committee Against Torture v. Israel Judgement, above n.120, para.23. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS (12 December 1977), art. 35(1)(2).

standards that should characterize recourse to the use of force in the realms of self-defense.[137]

52. The consistency of the policy with human rights law lies in the fact that targeted killings, which take place in lieu of the sending of ground forces in a hostile area that the attacking army does not control, can save the lives of many soldiers, whose right to life their State has a duty to ensure and protect. In cases in which an army commander is almost sure that the sending of troops to a particular area will result in their almost certain death, while a targeted killing will save these lives and will result in no or minimum enemy civilian casualties, the army commander has a duty to opt for the second.[138]

53. Under this prism, targeted killings become a preferable defensive measure in contrast to resort to force, but not because they themselves do not involve the use of force like other non-forcible defensive measures, but because in their case, the use of force obeys the rule of distinction, leads to the death of mainly combatants and does not spread the chaos and the havoc to the civilian population that a ground operation or a heavy bombardment could cause.[139]

III.C. The case of the security fence

54. Preventing the entrance of terrorists into one's country territory is one of the basic presumptions and measures in counter-terrorism policy. To this end, every State needs to secure that its borders are not porous. In this sense, Israel has always had a problem with regard to its eastern borders, for two reasons: first, the topographic conditions do not give Israel the chance to rely on natural physical obstacles[140] and second, the fact that, due to the complex political reality of the Middle East, the so-called Green Line is not actually a border with the West

137 Such was the case with the Caroline case, where use of force was permitted to the extent necessary to thwart the threat. On this, see Ian Brownlie, above n.13, 257.

138 Solomon, above n.127; Guiora, above n.14, 319, 322; Eyal Benvenisti, Human Dignity in Combat, 40 Israel LR (2006), 5. See also, for example, the case of the Israeli army in Jenin, where the Israeli army had to pass between booby-trapped buildings, while the Palestinian snipers targeted them among the civilian population, this having as a result the death of 23 Israeli soldiers, a heavy toll for the Israeli army. See also the case of the Yemeni forces in December 2001, which in their attempts to capture major Al Qaeda figures, engaged in fierce ground battles that resulted in the death of 18 Yemeni soldiers and the escape of the terrorists. On these, see HCJ 3114/02, Isr Barake v. Minister of Defense, SC 56 (3)11 (2002) (stating that "in Jenin, there was a battle—a battle in which many of our soldiers fell. The Army fought house to house and in order to prevent civilian casualties [to the greatest extent possible] did not bomb from the air. Twenty three IDF soldiers lost their lives. Scores of soldiers were wounded."). See also Gregory Johnsen, Terrorists in Rehab: Yemen Uses the Pages of the Qur'an to Re-educate Its Jihadis, 17 World Magazine Online (Summer 2004), 3 (http://www.worldviewmagazine.com/issues/article.cfm?id=139&issue=34 (last accessed 4 February 2010)).

139 Guiora, above n.14, 329.

140 Ganor, above n.58, 144.

Bank, where a population largely hostile to Israel resides, make it more difficult to secure the non-infiltration of terrorists into the territory of the State of Israel.[141] Thus, after a barrage of almost daily Palestinian terrorist attacks undertaken in the realm of the Second Intifada and emanating from the West Bank,[142] the Israeli cabinet approved *inter alia* the construction of a security fence as a physical barrier between Israel and the West Bank.[143] While the fence was not erected at all points on the Green Line, but in some cases also intruded into the West Bank, it was denounced by the Palestinians as well as by a large part of the international community as an Israeli attempt to annex *de facto* part of the West Bank.[144]

55. Such a view was also shared by the ICJ, which in its advisory opinion issued in July 2004, ordered Israel to refrain from continuing with the project and dismantle any parts that had already been built.[145] Thus the project was perceived as a great infringement of certain rights embodied in the Fourth Geneva Convention and, as such, of *jus in bello* itself.

56. On the contrary, the Israeli Supreme Court, dealing with the project in the course of a petition, did not announce *ab initio* its illegality, but accepting its defensive purpose, examined the fence's route in detail, in order to reach the conclusion that in some cases such a route did not meet the requirement of the proportionality principle and as thus it should be altered.[146]

57. The different approaches of the two courts towards the security fence can be attributed partly to the different basis on which the two courts decided to build their conclusions. The International Court opted to relate to the project mainly from a *jus in bello* point of view.[147] For the International Court, there was no issue of *jus ad*

141 Ibid.

142 Suicide attacks constituted a consistent method of perpetration of terrorist strikes even from 1983 in Lebanon, when Hezbollah murdered about 300 American and French Marines. Although such attacks were also committed by the Tamil Tigers in Sri Lanka and by the Kurds of PKK, it is in the State of Israel that they reached their peak, already from the mid-1990s and especially after the start of the second Palestinian Intifada in 2000. On these, see Scott Atran, Understanding Suicide Terrorism: Genesis and Future of Suicide Terrorism (www.interdisciplines.org/terrorism/papers/1/23/4 (last accessed 8 February 2010)); Suicide Terrorism: Martyrdom and Murder, The Economist (10 January 2004). For the fact that suicide attacks have been condemned as a "crime against humanity", see Amnesty International, Israel and the Occupied Territories, State Assassinations and Other Unlawful Killings (21 February 2001) (http://www.web.amnesty.org/ai/nsf/Index/MDE150052001/OpenDocument&of=COUNTRIES=ISRAEL/OCCUPIEDTERRITORIES (last accessed 8 February 2010)).

143 Guiora, above n.135, 125, 150.

144 See, for example, the relative resolution of the United Nations General Assembly, condemning the project. UN GA Res Es-10/13 (27 October 2003).

145 Legal Consequences of the Construction of the Wall, above n.12, para.163.

146 See the Beit Sourik case, above n.63, para.62.

147 Legal Consequences of the Construction of the Wall, above n.12, 184, para.121.

bellum and any possibility of the fence to be perceived as a defense measure, since Article 51 of the UN Charter did not apply in the case of the attacks emanating from the West Bank.[148] Although Israel had not argued in its memorial to the Court for the application of Article 51, a statement of Israel's Representative in the United Nations gave the impression that the State perceived the security fence as a milder means of self-defense, which should be promoted as an option over the use of force and the entering of the Israeli army into the Palestinian cities, in exercise of the right of self-defense and its efforts to stop the waves of terrorist attacks.[149]

58. Thus, by negating the application of Article 51 in the first place, the Court may have wanted to signal that, in its eyes, the erection of a security fence is not the second-direst measure Israel could take, thus being preferred over a military operation, but the first one. The use of force against Palestinian terrorism is not taken at all into consideration; Article 51 does not apply. Israel cannot present the erection of the security fence as a "humanistic" measure. While the project of the security fence may also have political aspects which the Court probably wanted to underline by refusing to award to it a defensive character,[150] in light of the fact that indeed after its erection suicide attacks were diminished, it would be a travesty to ignore this facet of the project altogether.[151]

148 As the Court itself put it in its Advisory Opinion: "Under the terms of Article 51 of the Charter of the United Nations: 'Nothing in the present Charter shall impair the inherent right of individual or collective self–defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.' Article 51 of the Charter thus recognizes the existence of an inherent right of self–defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by Security Council resolutions 1368 (2001) and 1373 (2001), and therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right of self–defence. Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case." See ibid., 194, para.139.

149 See statement made to the General Assembly by Israel's Permanent Representative to the United Nations, UN Doc. A/ES-10/PV-21 (20 Oct. 2003), 6 (cited also by the Report of the Secretary General Prepared Pursuant to General Assembly Resolution ES-10/13 of October 2003, para.6). Such was the argumentation also in Amicus Curiae submitted to the Court. See, for example, Friends of the Court Brief, Submitted by the Foundation for the Defense of Democracies (30 January 2004), 9 (http://www.gees.org/documentos/Documen-031.pdf (last accessed 8 February 2010)).

150 Legal Consequences of the Construction of the Wall, above n.12, 184, para.121; Solon Solomon, The Justiciability of International Disputes: The Advisory Opinion on Israel's Security Fence as a Case Study (2009), 76.

151 Guiora, above n.135.

59. International human rights instruments, which the International Court held applied also in the West Bank,[152] not only entitle, but oblige Israel to protect its citizens living in the particular territory and their right to life, while according to the laws of occupation, Israel would be entitled to erect a security fence based on military necessity. This conclusion was conceded also by the Court, which explicitly stated that military exigencies could sanction the building of a fence in the West Bank, although the Court itself was not persuaded that such exigencies existed in the particular case.[153]

60. As such, the Court cited Article 53 of the Fourth Geneva Convention, as still applying and governing *inter alia* the status of military necessity that could justify a possible erection of the Security Fence in the West Bank.[154] In the particular article, it is stated that seizure of property is permitted for military operations.

61. Although the notion of military necessity cannot be easily expanded to include the needs of the military or the needs of the citizens of the occupying power, it has been argued that military necessity should be broadly construed in cases of long-term occupations like the Israeli one. It is interesting to note that, in examining the legality of the erection of the security fence in the West Bank, the Israeli Supreme Court interpreted the notion of "military necessity" as encompassing also the needs of Israeli citizens residing into the occupied territories.[155]

62. Thus, the Israeli Supreme Court, cognizant of the political implications of the project but also of the fact that many of its co-citizens were killed every day, opted to perceive the project first and foremost as a defensive response.[156]

152 Legal Consequences of the Construction of the Wall, above n.12, 180–181, paras.111–113.

153 Ibid., 192, para.135.

154 Ibid.

155 Beit Sourik case, above n.63, para.32. The stance of the Israeli Supreme Court, broadly interpreting the notion of military necessity, can be traced back to the end of the decade of the 1970s. On this, see Ayoub v. Minister of Defense, above n.63, paras.391–392. Yet see also examples of cases where the Court clarified that security needs must be given a narrow interpretation and do not include the national, economic or social interests of the occupying power. HCJ 393/82, Jam'iat Ascan Elma' almoon Eltha'aooniah Elmahduda Elmaolieh v. Commander of IDF Forces, 37(3) PD 794.

156 This is underlined by the fact that while the International Court quickly passed over Israeli arguments on the defensive role of the structure, it focused on the project's violation of jus in bello through the expropriation of land in the West Bank not for the needs of the Israeli army. On the contrary, the Israeli Supreme Court first dealt with the project from a jus ad bellum perspective, clarifying that the fence's motives were related to security and were not political. On these, see paragraphs 122 (speaking of the route of the wall giving expression in loco to the measures taken by Israel regarding East Jerusalem and the West Bank), 135 and 137 of the Advisory Opinion of the International Court and paragraphs 28–31 of the Beit Sourik case. Yet, treatment of the issue through jus ad bellum and jus in bello parameters can be found, respectively, in both cases. In the Advisory Opinion, the International Court accepted subconsciously the applicability of jus ad bellum, through reference to the non-applicability of Article 51 of the UN Charter that relates to the exercise of self-defense, while the Israeli Supreme Court related to the project also through a jus in bello

63. In the *Beit Sourik* case, the Israeli Supreme Court took the defensive character of the fence as a given and from that starting point got involved in the project's essence. Questioning not the legality of its existence but of its route and ultimately annulling almost 40 km of the project, due to their not meeting the standards of necessity and proportionality,[157] the Court engaged in an analysis reminiscent more of *jus ad bellum* and the proportional character of the exercise of the right of self-defense.

64. The Court viewed the terrorist suicide bombings as an attack on Israel and its citizens.[158] If logic, morality and even customary law dictated that Israel had a right to go inside the West Bank and pursue those responsible for the terrorist attacks,[159] this should be the case with simple passive, non-forcible defensive measures, such as the erection of a security fence, the latter even preferred over the former and condoned by international theory.[160] If States have every right to enter a State's sovereign territory in exercise of their right of self-defense, how much more should this be the case when the victim State extends its right of self-defense not to a territory formally belonging to another State, but to a territory considered "occupied" like that of the West Bank, logic refuting contrary views.[161]

spectrum, by interpreting the criterion of military necessity that permits expropriations of occupied territories, as encompassing also the needs of the civilian population of the occupied power. (On these, see paragraph 139 of the Advisory Opinion and paragraph 32 of the Beit Sourik case.)

157 Beit Sourik case, above n.63, para.85.

158 Ibid., paras.1–3.

159 State practice has avidly shown that there exists a right for States acting in self-defense to pursue inside the territory of another State non-State actors which, originating from that State's territory, wage attacks against the first State. Various examples even from the nineteenth century and throughout the twentieth century include the pursuit of armed bandits by the United States in the territory of Mexico, the Thai and Senegalese pursuits of guerrillas into Burma and Guinea Bissau, respectively, and Turkish infiltrations in North Iraq in pursuit of Kurd guerrillas. On these, see G.A. Finch, Mexico and the United States, 11 AJIL (1917), 399–406; L. Oppenheim, International Law (8th edn. Hersch Lauterepacht, 1955), 299–301 (for examples of State practice before 1916); Reisman, above n.108, 47–48, 53; Robert Turner, Symposium: Legal Responses to International Terrorism: Constitutional Constraints on Presidential Power, 22 Houston JIL (1999), 89; Christine Gray, International Law and the Use of Force (2000), 104–105; Robert Jennings, The Caroline and McLeod Cases, 32 AJIL (1938), 82; Franck, above n.13, 63.

160 Leo Damrosch, Symposium: Legal Responses to International Terrorism: Sanctions against Perpetrators of Terrorism, 22 Houston JIL (1999), 68; Pomerance, above n.16, 134, 155. See also the opinion of a prominent publicist such as Ian Brownlie, who even 50 years ago saw favourably the construction of physical obstacles in order to prevent intrusion of terrorists and noted that an electrified wire barrier exists along the Tunisian–Algerian frontier. Brownlie, above n.26, 730.

161 Yet see contra Pieter Bekker, The World Court's Ruling regarding Israel's West Bank Barrier and the Primacy of International Law: An Insider's Perspective, 38 Cornell ILJ (2005), 563 (arguing that a State's right of self-defense does not extend to occupied territory not forming part of a State).

65. Should one argue that other defensive measures, rather than the construction of a fence, should be adopted as expressions of the aforementioned obligation,[162] one is left to wonder if the sending of armed troops in order to arrest terrorists hiding in the civilian population[163] would be more humanitarian in light of the possibility of higher civilian casualties.[164] Under this prism, the erection of a fence or barrier is definitely preferable to any use of force.

IV. Conclusion

66. In modern warfare, the hiding of combatants amidst civilian population often renders military operations not only the *ultimum refugium* but also an undesirable scenario, should the sanctity of life and enemy civilian casualties be taken into consideration. Under these circumstances, recourse to non-forcible defensive measures becomes an imperative need. The Gaza Strip is such a densely populated area, where civilians are prone to be engaged amidst military operations. As such, the Israeli measures following Israel's disengagement from the Strip should be viewed as an attempt to lead to the abandonment of the practice of rocket launching, so that such a military operation will not be rendered necessary.[165]

67. This article tried to demonstrate that although such measures are *per se jus in bello* violations, seen as a response to the use of force by the other side, they can be perceived as non-forcible *jus ad bellum* measures. The cases of targeted killings and the erection of the security fence come to support such a conclusion.

68. In an era when—especially after World War II—the horrors of war have become evident to all humanity, it is humanity's duty to applaud any attempts to diminish, if not uproot, the use of force in international relations. Non-forcible defensive measures are a policy which is in tandem with contemporary developments in international law[166] and which should be sanctioned by all peace-loving nations. No matter the pain—and there is pain—the gain is ultimately huge for world peace and stability.

162 See Legal Consequences of the Construction of the Wall, above n.12, 215, para.34 (sep. op. Higgins). See also Scobbie, above n.51, 1107.

163 Ajuri v. Commander of IDF Forces, above n.63.

164 On this line of thought, see also Pomerance, above n.16, 155 n.97; Friends of the Court Brief, Submitted by the Foundation for the Defense of Democracies (30 January 2004), 10 (http://www.gees.org/documentos/Documen-031.pdf).

165 See Sienho Yee, The Potential Impact of the Possible U.S. Responses to the 9-11 Atrocities on the Law regarding the Use of Force and Self-Defense, 1 Chinese JIL (2002), 287, 291 (noting that "in peacetime, forcible retaliation after an event had already taken place is generally considered illegal, while non-forcible retaliation may be lawful").

166 Damrosch, above n.108, 24.