

Israeli military operations against Gaza: Operation Cast Lead (2008-9), Operation Pillar of Defense (2012) and Operation Protective Edge (2014)

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I. Facts and context

Between 2008 and 2014 Israel launched three major operations inside the Gaza Strip: Operation Cast Lead (2008-9), Operation Pillar of Defense (2012) and Operation Protective Edge (2014). These were all launched in response to rockets launched from Gaza by Hamas and other militia groups operating from within the Gaza Strip. While oversimplification of the complexity of the situation between Israel and Gaza is inevitable, some general background context is necessary in understanding the Israeli military interventions.¹

Israel became the belligerent occupant of Gaza in 1967 after the conclusion of the Six Day War. After negotiations between Israel and the Palestine Liberation Organization at Camp David in July 2000 ended in deadlock, the second *intifada* began on 28 September 2000. In September 2005, Israel implemented a disengagement plan, which was intended to end the occupation, in which it evacuated Israeli settlers within Gaza, withdrew its troops, and ended internal control within the territory, although it retained control over much of Gaza's external existence.² However, the Israeli Defense Forces (IDF) have conducted numerous military operations within Gaza,³ including Operation Summer Rains on 28 June 2006 which followed the capture by Hamas of IDF Corporal Gilad Shalit.⁴ This operation had the aim of both securing the release of Corporal Shalit and the suppression of rockets fired from Gaza into southern Israel. However, rocket fire increased following Hamas' forcible assumption of control of Gaza in June 2007,⁵ and Israel's subsequent declaration that Gaza was to be considered hostile territory.⁶

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¹ Iain Scobbie, 'Gaza' in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 280.

² See Israel Ministry of Foreign Affairs, 'Israel's Disengagement Plan: Selected Documents' available at <<http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/israeli%20disengagement%20plan%2020-jan-2005.aspx>>.

³ 'Israeli military operations against Gaza, 2000-2008' (2009) 38 *Journal of Palestine Studies* 122.

⁴ R. McCarthy, 'Palestinian children pay price of Israel's Summer Rain offensive' *The Guardian* (7 September 2006) available at <<https://www.theguardian.com/world/2006/sep/07/israel>>.

⁵ 'Hamas takes full control of Gaza' *BBC News* (15 June 2007) available at <http://news.bbc.co.uk/1/hi/world/middle_east/6755299.stm>.

⁶ Israel Ministry of Foreign Affairs, 'Behind the headlines: Israel designates Gaza a "hostile territory"' (24 September 2007) available at

On 18 June 2008, an Egyptian brokered ceasefire came into effect, whereby Israel would cease its incursions into and ease its blockade of Gaza, while Hamas would cease the missile and mortar attacks into Israel.⁷ While violations of the ceasefire occurred, it was reasonably well respected during its early stages.⁸ Nonetheless, following a progressive breakdown of the ceasefire, Israel launched an offensive into Gaza on 4 November 2008⁹ and closed the crossings into Gaza the following day.¹⁰ This led to a hostile reaction from those operating within Gaza, which included Hamas' Izz ad-Din al-Qassam Brigades, the al-Aqsa Martyrs' Brigades, the Islamic Jihad, the Abu Ali Mustafa Brigades (the military wing of the Popular Front for the Liberation of Palestine), and al- Naser Salah ad-Din Brigades (the military wing of the Popular Resistance Committees).¹¹ The number of rockets fired into Israeli territory consequently increased.¹² Subsequently, on 27 December 2008, Israel launched a major military offensive in the Gaza Strip codenamed Operation Cast Lead.¹³ This began as a land and sea operation with a ground invasion commencing on 3 January 2009.

Over the course of the operation between 2,300 and 3,000 sorties were flown.¹⁴ Approximately 1,400 Palestinians were killed, the vast majority of whom were civilians,¹⁵ and thirteen Israelis were killed, of whom 10 were soldiers and three were civilians.¹⁶ The aerial bombardment inflicted severe damage on Gaza's infrastructure in that 2,400 homes, 29 Schools, 121 commercial and industrial workshops, 60 police stations, and 30 mosques were reportedly damaged or destroyed.¹⁷

The UN Security Council met in private on 28 December 2008 and issued a press statement in which it 'called for an immediate halt to all violence' and for the opening of border crossings,¹⁸ which was not adhered to. The Council met a further two times, on 31 December 2008 and 6/7 January 2009,¹⁹ before adopting UN Security Council Resolution 1860 on 8 January 2009 which called 'for an immediate, durable and fully respected ceasefire, leading to the full withdrawal of

<[http://www.mfa.gov.il/mfa/foreignpolicy/issues/pages/gaza%20designated%20a%20%20hostile%20territory"%2024-sep-2007.aspx](http://www.mfa.gov.il/mfa/foreignpolicy/issues/pages/gaza%20designated%20a%20%20hostile%20territory)>.

⁷ 'Israel and Hamas Ceasefire Begins' *BBC News* (19 June 2008) available at http://news.bbc.co.uk/1/hi/world/middle_east/8658045.stm.

⁸ For a list of violations that occurred see Human Rights Council, 'Human rights in Palestine and other occupied Arab territories: report of the United Nations Fact Finding Mission on the Gaza conflict' A/HRC/12/48 (15 September 2009), [227]-[266] (the Goldstone Report).

⁹ *Ibid.* [254].

¹⁰ *Ibid.*

¹¹ *Ibid.*[332].

¹² *Ibid.* [255], [257], [259], [263], [264], and [265].

¹³ *Ibid.* [267]; 'Israelis say strikes against Hamas will continue' *The New York Times* (28 December 2008) available at: <http://www.nytimes.com/2008/12/28/world/middleeast/28mideast.html?_r=2&hp>;

¹⁴ Goldstone Report (n 8) [337].

¹⁵ *Ibid.* [352]-[361].

¹⁶ *Ibid.* [364].

¹⁷ Palestine Center for Human Rights, 'IOF Offensive on the Gaza Strip Makes it Like an Earthquake Zone and Claims Civilians and Property' (22 January 2009) available at <<http://pchgaza.org/en/?p=2411>>.

¹⁸ Security Council Press Statement on Situation in Gaza (28 December 2008) UN Doc. SC/9559,.

¹⁹ UNSC Verbatim Record (31 December 2008) UN Doc S/PV.6060.; UNSC Verbatim Record (6 January 2009) UN Doc. S/PV.6061;UNSC Verbatim Record (7 January 2009) UN Doc. S/PV.6061 (Resumption 1)

Israeli forces from Gaza'.²⁰ The UN General Assembly met for an Emergency Special Session on 15 and 16 January 2009²¹ and adopted a resolution which similarly supported an immediate ceasefire in Gaza.²² However, the operation, which lasted a total of twenty-two days, only came to an eventual end on 18 January 2009.²³ After the escalation had come to an end/Thereafter, Hamas and Israel observed an informal cease-fire,²⁴ although rocket fire from Gaza did not completely cease and Israel continued to conduct minor raids into Gaza.

Subsequently, on 14 November 2012, and following further skirmishes between groups within Gaza and the IDF, Israel launched another major operation, this time codenamed Operation Pillar of Defense.²⁵ The operation, which lasted eight days, began with the killing of Ahmed al-Jabari, the chief of the Izz ad-Din al-Qassam Brigades.²⁶ Israel claimed that the operation had been launched following the firing of 100 rockets from Gaza within a 24-hour period,²⁷ and in response to an attack by Gaza militants on an Israeli military patrol jeep within Israeli territory and an explosion near Israeli soldiers who were positioned on the Israeli side of a tunnel passing under the Israeli West Bank barrier.²⁸ During the course of Operation Pillar of Defense, the IDF claimed to have struck 1450 sites within Gaza, including rocket stores and launch pads, suspected Hamas command posts, government facilities, and apartment blocks,²⁹ while over 1,400 rockets were fired into Israeli territory, with Tel-Aviv being hit for the first time since the 1991 Gulf War, and with rockets also being fired at Jerusalem.³⁰ Furthermore, over 400 rockets were intercepted by Israel's Iron Dome anti-missile defense system,³¹ while 142 fell within the Gaza Strip itself.³² By the end of the operation six Israelis had been killed and 239 injured while 174 Palestinians had been killed and hundreds wounded.³³ Following days of negotiation

²⁰ UNSC Res 1860 (8 January 2009) UN Doc S/RES/1860[1].

²¹ . UNGA Emergency Special Session (15 January 2009) UN Doc A/ES-10/PV.32; UNGA Emergency Special Session (16 January 2009) UN Doc A/ES-10/PV.36

²² General Assembly resolution supporting the immediate ceasefire according to Security Council resolution 1860 (2009) UNGA Res ES-10/18 (23 January 2009) UN Doc A/RES/ES-10/18

²³ 'Israel declares ceasefire in Gaza' *BBC News* (18 January 2009) available at <http://news.bbc.co.uk/1/hi/world/middle_east/7835794.stm>.

²⁴ Ibid.

²⁵ 'Israeli air strike kills Hamas military chief Jabari' *BBC News* (14 November 2012) available at <<http://www.bbc.co.uk/news/world-middle-east-20328579>>.

²⁶ Harriet Sherwood, 'Hamas says "gates of hell opened" as Israel kills military leader in Gaza' *The Guardian* (15 November 2012) available at <<https://www.theguardian.com/world/2012/nov/14/israel-assassinates-hamas-military-chief>>.

²⁷ 'Gaza groups pound Israel with over 100 rockets' *The Jerusalem Post* (12 November 2012) available at <<http://www.jpost.com/Defense/Gaza-groups-pound-Israel-with-over-100-rockets>>.

²⁸ Israel Ministry of Foreign Affairs, 'Pillar of Defense – Statement by DM Ehud Barak' (14 November 2012) available at <http://www.mfa.gov.il/MFA/PressRoom/2012/Pages/Pillar_of_Defense-Statement_DM_Barak_14-Nov-2012.aspx>.

²⁹ Verbatim Record (21 November 2012) UN Doc S/PV.6869, 2 (Secretary-General) (Statement by the UN Secretary-General); 'Factbox: Gaza targets bombed by Hamas' *Reuters* (21 November 2012) available at <<http://www.reuters.com/article/us-palestinians-israel-gaza-idUSBRE8AK0H920121121>>.

³⁰ Statement by the UN Secretary-General, *ibid.* See also 'Gaza terrorists fire two rockets at Tel Aviv' *The Jerusalem Post* (16 November 2012) available at <http://www.jpost.com/Defense/Gaza-terrorists-fire-two-rockets-at-Tel-Aviv>.

³¹ Statement by the UN Secretary-General (n 29) 3.

³² Ibid.

³³ Report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolutions S-9/1 and S-12/1(6 March 2013) UN Doc. A/HRC/22/35/Add.1, [6], available at

between Hamas and Israel a ceasefire, again mediated by Egypt, was announced on 21 November 2012.³⁴

After several years of relative quiet, on 12 June 2014 three Israeli teenagers were kidnapped and murdered by two members of Hamas.³⁵ Their bodies were discovered shortly after on 30 June.³⁶ Israel submitted a letter to the UN Security Council claiming that it held ‘Hamas terrorists’ responsible for the deaths of the three teenagers.³⁷ At the same time it made a complaint about the number of rockets that had been fired into Israel during the preceding weeks and asserted that ‘[t]he Israeli government has a right and a duty to protect its citizens’.³⁸ Shortly afterwards the Israeli air force launched a series of air raids on the Gaza Strip, codenamed operation Brother’s Keeper.³⁹

Far from dampening the number of rockets fired from Gaza into Israel they instead increased and, on 8 July 2014, Israel launched a major military air offensive into Gaza codenamed Operation Protective Edge.⁴⁰ On 17 July the operation was expanded by the launching of a ground invasion with the stated aim of degrading the ‘terror organisations’ military infrastructure, and [... neutralize] their network of cross-border assault tunnels’.⁴¹ During this seven-week operation, over 2,200 Palestinians were killed and 11,000 were injured, most of whom were civilians.⁴² Sixty-seven Israeli IDF soldiers and six civilians in Israel were reportedly killed during the course of the operation, while 1,600 soldiers and a few dozen civilians were injured.⁴³ It was said that approximately 16,800 housing units were destroyed or severely damaged.⁴⁴ At the height of the hostilities, the number of internally displaced persons in Gaza reached 500,000, or 28 per cent of the population.⁴⁵ It was reported that Hamas, Islamic Jihad and other militant groups had fired over 4,800 rockets and 1,700 mortars from Gaza into Israel,⁴⁶

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.35.Add.1_AV.pdf>
The Report notes, however, that figures vary according to the source.

³⁴ Peter Beaumont, Harriet Sherwood, and Ian Black, ‘Gaza ceasefire announced in Cairo’ *The Guardian* (21 November 2012) available at <<https://www.theguardian.com/world/2012/nov/21/gaza-ceasefire-announced-cairo>>.

³⁵ Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, (24 June 2015) UN Doc. A/HRC/29/52 [18], available at <<http://www.ohchr.org/EN/HRBodies/HRC/CoIGazaConflict/Pages/ReportCoIGaza.aspx>>.

³⁶ Ibid.

³⁷ Identical letters dated 30 June from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council (30 June 2014) UN Doc S/2014/454.

³⁸ Ibid.

³⁹ ‘Israel Bombs Gaza after Settler Found Killed’ *Al Jazeera* (1 July 2014) available at <<http://www.aljazeera.com/news/middleeast/2014/07/israel-bombs-gaza-after-settler-bodies-found-20147171631852351.html>>.

⁴⁰ Report of the independent commission of inquiry (n 35) [19]; ‘Israel “ready for escalation” of Gaza conflict’ *BBC News* (8 July 2014) available at <<http://www.bbc.co.uk/news/world-middle-east-28206556>>.

⁴¹ Israel Ministry of Foreign Affairs, ‘The 2014 Gaza Conflict: Factual and Legal Aspects’ (14 June 2015) [77], available at <<http://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/2014-Gaza-Conflict-Factual-and-Legal-Aspects.aspx>>; ‘Israel starts Gaza ground offensive’ *BBC News* (18 July 2014) available at <<http://www.bbc.co.uk/news/world-middle-east-28359582>>.

⁴² Report of the independent commission of inquiry (n 35) [20].

⁴³ Ibid.

⁴⁴ Ibid. [23].

⁴⁵ Ibid.

⁴⁶ Ibid. [27].

while the IDF carried out more than 6,000 air strikes in Gaza.⁴⁷

The UN Security Council met three times during the course of the operation, on 10 July, at which only the UN Secretary General and the representatives of Israel and Palestine spoke,⁴⁸ and then again on 18 and 22 July.⁴⁹ On 28 July, the Security Council adopted a Presidential Statement, calling for a de-escalation, restoration of the 2012 ceasefire, respect for international law and a resumption of direct negotiations between both the parties.⁵⁰ A few humanitarian truces were observed to allow in humanitarian aid.⁵¹ Israeli ground forces ultimately withdrew on 5 August 2014,⁵² and on 26 August an open-ended ceasefire was announced,⁵³ which, despite a few isolated incidents involving rockets from Gaza,⁵⁴ held up throughout the final months of 2014.

II. The positions of the main protagonists and the reactions of third States and international organisations

1. Operation Cast Lead

On the morning of the launching of Operation Cast Lead, Gabriela Shalev, Israel's Permanent Representative to the United Nations, sent identical letters to the UN Security Council and UN Secretary-General announcing that 'after a long period of utmost restraint, the Government of Israel has decided to exercise, as of this morning, its right to self-defense'.⁵⁵ In addition, the

⁴⁷ 'The 2014 Gaza Conflict: Factual and Legal Aspects' (n 41) [272]; Report of the independent commission of inquiry (n 35) [35].

⁴⁸ UNSC Verbatim Record (10 July 2014) UN Doc. S/PV.7214.

⁴⁹ UNSC Verbatim Record (18 July 2014) UN Doc S/PV.7220; UNSC Verbatim Record (22 July 2014) UN Doc S/PV.7222

⁵⁰ Statement by the President of the Security Council(28 July 2014) UN Doc S/PRST/2014/13.

⁵¹ 'Israel and Hamas to observe brief Gaza truce' *Al Jazeera* (17 July 2014) <www.aljazeera.com/news/middleeast/2014/07/israel-temporarily-halt-fire-gaza-strip-201471620212427540.html>; 'Shortlived truce broken in Gaza's Shujayea' *Al Jazeera* (20 July 2014) <www.aljazeera.com/news/middleeast/2014/07/ceasefire-under-way-gaza-201472010432898980.html>; '12-hour truce comes into force in Gaza' *Al Jazeera* (26 July 2014) <www.aljazeera.com/news/middleeast/2014/07/reports-hamas-israel-agree-12-hour-truce-201472522159800712.html>; ' Hamas and Israel agree 72-hour Gaza ceasefire' *Al Jazeera* (1 August 2014) <www.aljazeera.com/news/middleeast/2014/07/un-us-announce-72-hour-gaza-ceasefire-2014731214037997737.html>; Nidal Al-Mughrabi, 'Palestinians accuse Israel of violating Gaza truce' *Reuters* (15 August 2014) <www.reuters.com/article/2014/08/15/us-mideast-gaza-shots-idUSKBN0GF1DE20140815>.

⁵² 'Israel pulls troops out of Gaza' *BBC News* (5 August 2014) available at <<http://www.bbc.co.uk/news/world-middle-east-28654229>>.

⁵³ Report of the independent commission of inquiry (n 30) [19]; 'What's in the Gaza peace deal?' *Reuters* (26 August 2014) available at <<http://www.reuters.com/article/us-mideast-gaza-ceasefire-details-idUSKBN0GQ1XQ20140826>> ; Harriet Sherwood and Hazem Balousha, 'Gaza ceasefire: Israel and Palestinians agree to halt weeks of fighting' *The Guardian* (27 August 2014) available at <www.theguardian.com/world/2014/aug/26/gaza-ceasefire-israel-palestinians-halt-fighting>.

⁵⁴ Stuart Winer, 'Mortar shell fired from Gaza at Israel' *Times of Israel* (16 September 2014) <www.timesofisrael.com/rocket-or-mortar-shell-fired-from-gaza-at-israel/>; 'Gaza rocket hits southern Israel causing no damage or injuries: army' *Reuters* (1 November 2014) <www.reuters.com/article/2014/11/01/us-mideast-israel-gaza-idUSKBN0IL2OY20141101>.

⁵⁵ Identical letters dated 27 December 2008 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and to the President of the Security Council (27 December 2008) UN Doc. S/2008/816. The Israeli Foreign Minister, Tzipi Livni, stated in an address to the Israeli Knesset on 29 December

letter stated that Israel had ‘decided to actively fight terrorism and protect its citizens from further terrorist attacks’ by responding to the rockets fired from Hamas in the Gaza Strip into Southern Israel ‘in accordance with the inherent right of every State to self-defense as enshrined in Article 51 of the Charter of the United Nations’.⁵⁶ Israel’s response, the letter stated, was ‘aimed solely against the terrorists and their infrastructure in the Gaza Strip’ and ‘not ... at the civilian population’, and that ‘Israel will continue to provide the people of Gaza with their basic humanitarian needs.’⁵⁷ At a UN Security Council meeting on 31 December 2008, Ambassador Shalev again stated that in light of ‘a steep escalation in Hamas attacks against Israel’ and to ‘send a clear message to the Hamas terrorists’ that ‘enough is enough’⁵⁸ Israel ‘ha[d] exercised its inherent right to self-defence, which is enshrined in Article 51 of the United Nations Charter’.⁵⁹

While not expressly mentioning the right of self-defence at the UN Security Council meeting on 6 January 2009, Ambassador Shalev added some context to Israel’s invocation of this right. In claiming that Israel had ‘sought every way to avoid the current conflict’⁶⁰ and in light of the upsurge in rocket attacks ‘it could not restrain [itself] any longer’.⁶¹ Interestingly, and in justifying some of its targeting decisions during the conflict, it was added that:

The Israel Defense Forces (IDF) have dropped tens of thousands of leaflets and made thousands of phone calls to Palestinian civilians, beseeching them to leave the areas of terrorist operation to avoid harm. But let this be clear: failing to respond to terrorists simply because they are using civilians as cover is not and cannot be an option. To do so would simply broadcast an invitation to every terrorist group in the world to set up shop inside a hospital or a kindergarten.⁶²

In defending the magnitude of the operation the Israeli Ambassador also noted that:

This is not about a “ceasefire” with terrorism or a mutual cessation of hostilities. It is about ensuring the end of terrorism from Gaza and the end of smuggling weapons into Gaza, so that there is no longer a need for Israeli defensive operations.⁶³

Operation Cast Lead, unsurprisingly, was the subject of a significant amount of international controversy. Several States appeared to accept Israel’s claim to be acting in self-defence. Outside of the UN Security Council, US President George W. Bush stated that ‘Israel has a right to

2008 that ‘Israel is entitled to defend itself against any attempt to harm its sovereignty, the well-being of its residents and the security of its citizens. Israel’s actions fulfill its basic right to self-defence.’ See Israel Ministry of Foreign Affairs, ‘Address to the Knesset by FM Livni on Gaza Operation’ (29 December 2008) available at <http://mfa.gov.il/MFA/PressRoom/2008/Pages/Address_Knesset_FM_Livni_Gaza_operation_29-Dec-2008.aspx>.

⁵⁶ Ibid.

⁵⁷ Ibid., and Identical letters dated 6 January 2009 from the Permanent Representative of Israel to the Secretary-General and President of the Security Council (6 January 2009) UN Doc. S/2009/6.

⁵⁸ UN Doc S/PV.6060 (n 19) 6. Although it was also stated that Israel had been ‘subjected to deliberate terrorist attacks carried out by Hamas and other Palestinian terrorist organizations operating from the Gaza Strip’ at 6.

⁵⁹ Ibid. It was also noted that ‘[p]rotecting the lives and well-being of one’s citizens is not only a right, but also a responsibility of every sovereign State’.

⁶⁰ Ibid.

⁶¹ Ibid., 7.

⁶² Ibid.

⁶³ Ibid.

defend herself,⁶⁴ and, on the fourteenth day of the offensive, the US House of Representatives recognized ‘[Israel’s] right to act in self-defense to protect its citizens against Hamas’s unceasing aggression, as enshrined in the United Nations Charter.’⁶⁵ Australia’s Prime Minister, Kevin Rudd, similarly stated that ‘Australia recognizes Israel’s right to self-defence’.⁶⁶

The two UN Security Council meetings on 31 December 2008⁶⁷ and 6 January 2009⁶⁸ were attended by the Permanent Observer to Palestine, Riyad Mansour, and the President of the Palestinian National Authority, Mahmoud Abbas, respectively. During the course of their speeches at these meetings both spoke of Israel’s ‘aggression’ in Gaza,⁶⁹ of Israel as the occupying power,⁷⁰ of the acts constituting collective punishment of the Palestinian people,⁷¹ and of the need for an immediate ceasefire.⁷² Mr Mansour spoke of Israel’s ‘brute force – excessive force – against the population’ of Gaza.⁷³ Much was told of the suffering on the ground by those living within Gaza,⁷⁴ but there was little mention of, let alone justification for, the rockets emanating from Gaza, and no mention of Hamas.⁷⁵ Hamas itself did not appear to issue a justification for the rockets fired.

At the meeting on 31 December 2008, virtually all States expressed concern at the situation and called for a ceasefire,⁷⁶ with some States condemning the inaction of the UN Security Council.⁷⁷ The US was the only State to hold Hamas solely responsible for the violence,⁷⁸ while many other States took a more balanced view in condemning both the rocket attacks and Israel’s response to them.⁷⁹ Several States were fiercely critical of Israel’s actions,⁸⁰ describing them as ‘aggression’⁸¹ by an occupying power.⁸² Others denied that the actions were taken in self-defence,⁸³ with some describing them as ‘collective punishment’ of the people of Gaza.⁸⁴ However, although many States speaking in the Council recognized Israel’s right of self-defence, while urging caution,⁸⁵ most deemed the intervention as disproportionate.⁸⁶

⁶⁴ ‘President Bush’s Final News Conference’ *NY Times* (12 January 2009) available at <<http://www.nytimes.com/2009/01/12/us/politics/12text-bush.html?pagewanted=all>>.

⁶⁵ H.R. Con. Res. 34, 111th Cong. (2009).

⁶⁶ ‘Rudd defends Israel’s Rights’ *The Australian* (6 January 2009) available at <<https://www.pressreader.com>>.

⁶⁷ S/PV.6060 (n 19).

⁶⁸ UN Doc. S/PV.6061 (n 19).

⁶⁹ S/PV.6060 (n 19), 4-5; S/PV.6061, *ibid.*, 4-6.

⁷⁰ S/PV.6060, *ibid.*, 4-5; S/PV.6061, *ibid.*, 4-6.

⁷¹ S/PV.6060, *ibid.*, 4-5; S/PV.6061, *ibid.*, 4-6.

⁷² S/PV.6060, *ibid.*, 4-5; S/PV.6061, *ibid.*, 4-6.

⁷³ S/PV.6060, *ibid.*, 5.

⁷⁴ S/PV.6060, *ibid.*, 4-5; S/PV.6061 *ibid.* 4-6.

⁷⁵ Something noted by the Israeli ambassador: S/PV.6060, *ibid.*, 6.

⁷⁶ S/PV.6060 (n 19).

⁷⁷ *Ibid.* 18 (Egypt), 19 (League of Arab States)

⁷⁸ *Ibid.* 14 (US)

⁷⁹ *Ibid.* 9 (France), 11 (Russia), 15 (Burkina Faso), 17 (Belgium)

⁸⁰ *Ibid.* 8 (Libya), 9 (South Africa), 10 (Indonesia)

⁸¹ *Ibid.* 18 Egypt, 19 (League of Arab States)

⁸² *Ibid.* 18 (Egypt)

⁸³ *Ibid.*

⁸⁴ *Ibid.* 10 (Indonesia), 13 (Vietnam), 19 (League of Arab States)

⁸⁵ *Ibid.* 9 (South Africa), 13 (Italy), 13 (Vietnam), 16 (Costa Rica), 17 (Belgium)

⁸⁶ *Ibid.* 8 (Libya), 9 (South Africa), 9 (France), 10 (Indonesia), 13 (Vietnam), 15 (Burkina Faso), 16 (Costa Rica), 17 (Belgium), 18 (Egypt)

A similar picture emerged at the meeting on 6/7 January 2009 where most States spoke at this meeting, again, expressed concern and called for a ceasefire.⁸⁷ However, many more States spoke and, unsurprisingly, given the time that had passed since the previous meeting of the Council which had discussed the issue, there was noticeably more criticism of Israel,⁸⁸ with claims of disproportionality⁸⁹ being prominent. Again, several States characterized Israel's actions as aggression,⁹⁰ with one State noting that the 'actions clearly demonstrate Israel's complete disregard for international law and its violation of the United Nations Charter'.⁹¹ Claims that Israel was in occupation of Gaza⁹² were made and also that it was acting in collective punishment of the people of Gaza.⁹³ Several States, again, took a balanced approach in condemning both the rocket attacks and Israel's response,⁹⁴ and, again, some, while recognizing Israel's right of self-defence, nonetheless urged caution.⁹⁵ While inaction by the UN Security Council was again condemned,⁹⁶ some States went further in raising the prospect of action by the UN General Assembly under the Uniting for Peace resolution.⁹⁷ A similar range of views was expressed during the parallel debates within the UN General Assembly.⁹⁸

There was also condemnation of Israel outside of the meetings of the UN. On the day the intervention was launched, Jordan's Permanent Representative to the United Nations, Khalid Shawabkah, condemned the action taken by Israel as 'unjustified aggression'.⁹⁹ Similarly, on 14 January 2009, the Malaysian Parliament adopted a resolution in which it called on 'the United Nations General Assembly to immediately? establish an International Criminal Tribunal for Palestine to investigate and prosecute suspected Israeli war criminals involved in the brutal and

⁸⁷ UN Doc. S/PV.6061 (n 19).

⁸⁸, Ibid 10 (Turkey), 12 (Libya) 14 (Austria); UN Doc. S/PV.6061 (Resumption 1) (n 19) 8-9 (Indonesia), 9 (Pakistan), 14 (Nicaragua), 15 (Venezuela), 17 (Bolivia).

⁸⁹ UN Doc S/PV.6061 (n 19) 10 (Turkey), 14 (Austria), 15 (Vietnam), 19 (Mexico); UN Doc S/PV.6061 (Resumption 1) 2 (Malaysia), 5 (Brazil), 8 (Argentina), 9 (Pakistan), 15 (Iceland), 16 (Ecuador), 17 (Bolivia), 17 (Paraguay, on behalf of the States members of the Common Market of the South)

⁹⁰ UN Doc S/PV.6061 (n 19) 12 (Libya), 22 (Saudi Arabia), 24 (League of Arab States), 28 (Egypt), 29 (Jordan), 31 (Lebanon), 31 (Morocco), 33 (Qatar); UN Doc S/PV.6061 (Resumption 1) (n 19) 2 (Malaysia), 4 (Cuba, on behalf of the Non-Aligned Movement), 10 (Pakistan), 12 (Iran), 14 (Nicaragua), 17 (Bolivia)

⁹¹ UN Doc S/PV.6061 (Resumption 1) (n 19) 2 Malaysia

⁹² UN Doc S/PV.6061 (n 19) 13 (Libya), 24 (League of Arab States), 28 (Egypt), 31 (Lebanon), 33 (Qatar); UN Doc S/PV.6061 (Resumption 1) (n 19) 10 (Pakistan), 12 (Iran), 13 (Nicaragua), 16 (Ecuador)

⁹³(4 (resumption 1)), UN Doc S/PV.6061 (n 19) 23 (Saudi Arabia), 29 (Jordan), 31 (Lebanon); UN Doc S/PV.6061 (Resumption 1) (n 19) 4 (Cuba, on behalf of the Non-Aligned Movement)

⁹⁴ UN Doc S/PV.6061 (n 19) 14 (Austria), 19 (Mexico); UN Doc S/PV.6061 (Resumption 1) (n 19) 5 (Brazil), 8 (Argentina), 15 (Iceland), 17 (Paraguay, on behalf of the States members of the Common Market of the South).

⁹⁵) UN Doc S/PV.6061 (n 19) 14 (Austria), 18 (Croatia), 19 (Japan) 21 (Uganda)

⁹⁶ UN Doc S/PV.6061 (n 19) 34 (Qatar); UN Doc S/PV.6061 (Resumption 1) (n 19) 2 (Malaysia), 10 (Pakistan), 13 (Iran), 14 (Nicaragua), 17 (Ecuador), 18 (Paraguay, on behalf of the States members of the Common Market of the South)

⁹⁷ UN Doc S/PV.6061 (Resumption 1) (n 19) 9 (Indonesia), 13 (Iran), 17 (Ecuador).

⁹⁸ See Tenth Emergency Special Session of the United Nations General Assembly, 32nd, 33rd, 34th and 35th meetings UN Doc A/ES-10/PV.32 to UN Doc A/ES-10/PV.36 (n 21)

⁹⁹ Identical letters dated 27 December 2008 from the Chargé d'affaires a.i. of the Permanent Mission of Jordan to the United Nations addressed to the Secretary-General and to the President of the Security Council (27 December 2008) UN Doc. S/2008/818.

aggressive acts on the Palestinian people.’¹⁰⁰

The Human Rights Council condemned Israel’s actions in Gaza as an act of aggression in calling upon ‘the international community to support the current initiative aiming at putting an immediate end to the current military aggression in Gaza’,¹⁰¹ and strongly condemned ‘the ongoing Israeli military operation carried out in the Occupied Palestinian Territory, in particular in the Occupied Gaza Strip.’¹⁰² It decided to dispatch an urgent independent fact-finding mission to Gaza,¹⁰³ led by Richard Goldstone, which issued a report on Operation Cast Lead on 3 April 2009,¹⁰⁴ although it omitted to cover the *jus ad bellum* aspects of the operation.¹⁰⁵

2. Operation Pillar of Defense

Neither at the outset or during Operation Pillar of Defense did Israel submit a letter to the UN Security Council informing it that it had invoked its right of self-defence. Nonetheless, in a statement published on the Israeli Ministry of Foreign Affairs website, it was asserted that Israel ‘ha[d] the right under international law, and a moral obligation, to act in self-defense, to defend its population and to protect its territory when under attack, as well as to take military action against the terrorist attacks from the Gaza Strip’.¹⁰⁶ However, it also noted that ‘ Hamas and other terrorist organizations in the Gaza Strip have been waging an ongoing armed conflict against Israel’ and that Hamas had violated ‘the principle of distinction’ and that ‘Israel and the IDF are fully committed to international law in general, and to the Laws of Armed Conflict in particular’.¹⁰⁷ A statement by the Israeli Defense Minister, Ehud Barak, stated that the aims of the operation were to strengthen Israel’s deterrence, inflict serious damage on the rocket launching network, deliver a painful blow for Hamas and the other terrorist organizations, and minimize damage to Israel’s home front.¹⁰⁸

The European Union denounced the rocket attacks from Gaza and claimed that Israel ‘has the

¹⁰⁰ Letter dated 14 January 2009 from the Permanent Representative of Malaysia to the United Nations addressed to the President of the General Assembly and the Annexed to the Letter dated 14 January 2009 from the Permanent Representative of Malaysia to the United Nations addressed to the President of the General Assembly (16 January 2009) UN Doc. A/ES-10/444.

¹⁰¹ UN Human Rights Council Resolution (12 January 2009) UN Doc A/HRC/S-9/L.1/Rev.2 [7].

¹⁰² Ibid.,[1].

¹⁰³ Ibid.[14].

¹⁰⁴ For the report of this mission see Goldstone Report (n 7). See, in general, Zera Yihdego, ‘The Gaza Mission: Implications for International Humanitarian Law and UN Fact-Finding’ (2012) 13 Melbourne Journal of International Law 1.

¹⁰⁵ This was considered by some as constituting a ‘blind spot’ of the Report. See John Reynolds, ‘The Use of Force in a Colonial Present, and the Goldstone Report’s Blind Spot’ (2010) 16 Palestine Yearbook of International Law 55.

¹⁰⁶ Israel Ministry of Foreign Affairs, ‘Operation Pillar of Defense: Legal Points’ (19 November 2012) available at <http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Operation_Pillar_of_Defense_Legal_points.aspx>.

¹⁰⁷ Ibid.

¹⁰⁸ Israel Ministry of Foreign Affairs, ‘Pillar of Defense: Statement by DM Ehud Barak’ (14 November 2012) available at <http://www.mfa.gov.il/MFA/PressRoom/2012/Pages/Pillar_of_Defense-Statement_DM_Barak_14-Nov-2012.aspx>.

right to protect itself from these kinds of attacks’ but also that it ‘must act proportionately and ensure the protection of civilians at all times’.¹⁰⁹ The President Obama condemned the rocket attacks from Gaza and stated that the United States was ‘fully supportive of Israel’s right to defend itself’.¹¹⁰ The United Kingdom Foreign Secretary asserted that ‘ Hamas bears principal responsibility for the current crisis’ and ‘utterly condemn[ed] [the] rocket attacks from Gaza into southern Israel by Hamas and other armed groups’.¹¹¹ Similar support for what was deemed Israel’s right of self-defence and/or condemnation of Hamas came from several other Western States, including Australia¹¹² and the Netherlands.¹¹³ France, Germany and Belgium, expressed concern over the escalating violence between Israel and Hamas in Gaza.¹¹⁴ While acknowledging Israel’s right to defend itself, a measured response was called for and all parties were urged to act wisely. Caution by both sides was also urged by many other States, including Russia,¹¹⁵ China,¹¹⁶ and Ireland.¹¹⁷

On the other hand, Fawzi Barhoum, a spokesman for Hamas, characterized the assassination of Ahmed Jabari as a declaration of war,¹¹⁸ while the Palestinian Authority, President Mahmoud Abbas, condemned the Israeli military operation and asked for an emergency meeting of the Arab League to discuss the Israeli ‘aggression’.¹¹⁹ At an emergency meeting, the Arab League denounced Israel’s operation in Gaza and issued a call to prosecute Israel for war crimes.¹²⁰ The Non-Aligned Movement, of which Iran held the Presidency at the time, also issued a statement claiming that: ‘Israel, the occupying power, is, once more, escalating its military campaign against the Palestinian people, particularly in the Gaza Strip’ and condemned ‘this act of aggression by the Israelis and their resort to force against the defenseless people’ and demanded

¹⁰⁹ Tovah Lazaroff, ‘EU: Israel has the right to proportional self-defense’ *The Jerusalem Post* (19 November 2012) available at <<http://www.jpost.com/Diplomacy-and-Politics/EU-Israel-has-right-to-proportional-self-defense>>.

¹¹⁰ The White House, Remarks by President Obama and Prime Minister Shinawatra in a Joint Press Conference (18 November 2012) available at <<https://www.whitehouse.gov/the-press-office/2012/11/18/remarks-president-obama-and-prime-minister-shinawatra-joint-press-confer>>. See also US Department of State, ‘Gaza Rocket Attacks’ (14 November 2012) available at <<http://www.state.gov/r/pa/prs/ps/2012/11/200551.htm>>.

¹¹¹ UK Foreign and Commonwealth Office, ‘Foreign Secretary Statement on Gaza and southern Israel’ (15 November 2012) available at <<https://www.gov.uk/government/news/foreign-secretary-statement-on-gaza-and-southern-israel>>. See also ‘Israel-Gaza crisis: Cameron speaks to Netanyahu’ *BBC News* (15 November 2012) available at <<http://www.bbc.co.uk/news/uk-politics-20338088>>.

¹¹² Bianca Hall, ‘Gillard condemns attacks on Israel’ *The Age* (16 November 2012) available at <<http://www.theage.com.au/federal-politics/political-news/gillard-condemns-attacks-on-israel-20121115-29fx8>>.

¹¹³ Government of the Netherlands, ‘Timmermans condemns rockets attacks on Israel from Gaza’ (13 November 2012) available at <<https://www.government.nl/latest/news/2012/11/13/timmermans-condemns-rocket-attacks-on-israel-from-gaza>>.

¹¹⁴ ‘EU ministers caution Israel over escalation in Gaza’ *EurActiv.com* (16 November 2012) available at <<http://www.euractiv.com/section/global-europe/news/eu-ministers-caution-israel-over-escalation-in-gaza/>>.

¹¹⁵ ‘Russian FM calls for Israel-Hamas ceasefire following attacks on Gaza media center’ *RT* (19 November 2012) available at <<https://www.rt.com/politics/gaza-rt-office-ministry-statement-037/>>.

¹¹⁶ ‘Ministry of Foreign Affairs: China is gravely concerned about Israel’s military action against Gaza’ *China Daily* (16 November 2012) available at <http://www.chinadaily.com.cn/hqzx/2012-11/16/content_15934878.htm>.

¹¹⁷ Department of Foreign Affairs and Trade (Ireland), ‘Tánaiste calls for end to Gaza violence’ (15 November 2012) available at <<https://web.archive.org/web/20121117173749/http://www.dfa.ie/home/index.aspx?id=88779>>.

¹¹⁸ ‘Hamas: Assassination is a Declaration of War’ *The Jerusalem Post* (14 November 2012)- available at <<http://www.jpost.com/Middle-East/Hamas-Assassination-is-a-declaration-of-war>>.

¹¹⁹ *Ibid.*

¹²⁰ Elad Benari, ‘Arab Foreign Ministers Blame Israel for Gaza Violence’ *Arutz Sheva* (18 November 2012) available at <<http://www.israelnationalnews.com/News/News.aspx/162181#.UKsISofO0gM>>.

‘decisive action by the UN Security Council.’¹²¹ Many States specifically condemned Israel’s actions in Gaza, with assertions that they were aggressive and disproportionate, including Bahrain,¹²² Egypt,¹²³ Jordan,¹²⁴ Turkey,¹²⁵ Russia,¹²⁶ Pakistan,¹²⁷ Saudi Arabia,¹²⁸ and Yemen.¹²⁹ Amnesty International and Human Rights Watch urged both sides to cease violent acts.¹³⁰

The UN Security Council held a private emergency meeting on 14 November 2012 without reaching a decision.¹³¹ The UN Secretary-General, Ban Ki-moon, went on a three-day visit to Egypt, Israel, the occupied Palestinian territories and Jordan and issued a statement to the UN Security Council on the day the ceasefire was announced,¹³² whereby he urged adherence to the ceasefire and expressed regret at the numbers of casualties.¹³³ Furthermore, the Secretary-General ‘consistently condemn[ed] indiscriminate rocket fire from Gaza into Israel’ while at the same time believing ‘that the excessive and disproportionate use of force that endangers civilian lives is intolerable.’¹³⁴

3. Operation Protective Edge

With regard to Operation Protective Edge, Israel did not immediately inform the Security Council of its actions, but waited until the Council met on 10 July 2014.¹³⁵ At this meeting,

¹²¹ Isabel Kershner and Rick Gladstone, ‘Israel and Hamas Step Up Air Attacks in Gaza Clash’ *The New York Times* (15 November 2012) available at <http://www.nytimes.com/2012/11/16/world/middleeast/israel-gaza-assault.html?pagewanted=all&_r=0>.

¹²² Ministry of Foreign Affairs (Kingdom of Bahrain), ‘Minister of State for Foreign Affairs affirms Bahrain’s position in supporting the Palestinian case’ (17 November 2012) available at <<http://www.mofa.gov.bh/Default.aspx?tabid=7824&ItemId=2102>> (which talked of ‘Israeli aggression’).

¹²³ Harriet Sherwood and Luke Harding, ‘Egyptian president condemns Israel’s “aggression” in Gaza’ *The Guardian* (15 November 2012) available at <<https://www.theguardian.com/world/2012/nov/15/egyptian-president-condemns-israel-gaza>> (which talked of Israel’s ‘aggression’).

¹²⁴ ‘Egypt, Jordan, Turkey and Russia chorus condemnation of Israel’s resort to force, US leads Western supporters’, *The Times of Israel* (15 November 2012), available at <<http://www.timesofisrael.com/egypt-jordan-turkey-and-russia-chorus-condemnation-of-israels-resort-to-force-us-leads-western-supporters/>>.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ ‘PM Raja Ashraf condemns Israeli air strikes’ *PakTribune* (17 November 2012) available at <<http://paktribune.com/news/PM-Raja-Ashraf-condemns-Israeli-air-strikes-255019.html>> (‘grave violation of international law’).

¹²⁸ ‘Saudi Arabia Condemns the Israeli Assaults on Gaza Strip’ *Alriyadh* (18 November 2012) available at <<http://sites.alriyadh.com/en/article/785392/Saudi-Arabia-Condemns-the-Israeli-Assaults-on-Gaza-Strip>> (talks of the ‘new aggression’ committed by Israel).

¹²⁹ ‘Yemen strongly condemns brutal Israeli aggression on Gaza’ *Yemen News Agency (SABA)* (16 November 2012) available at <<http://www.sabanews.net/en/news287944.htm>> (talks of ‘aggression’).

¹³⁰ Amnesty International, ‘Israel/Gaza: All sides must step back from the brink to protect civilians’ (14 November 2012) available at <<https://www.amnesty.org/en/press-releases/2012/11/israelgaza-all-sides-must-step-back-brink-protect-civilians/>>; Human Rights Watch, ‘Israel/Gaza: Avoid harm to civilians’ (15 November 2012) available at <<https://www.hrw.org/news/2012/11/15/israel/gaza-avoid-harm-civilians>>.

¹³¹ UNSC Verbatim Record (14 November 2012) UN Doc. S/PV.6863.

¹³² UNSC Verbatim Record (21 November 2012) UN Doc. S/PV.6869.

¹³³ Ibid, 2.

¹³⁴ Ibid., 3.

¹³⁵ UN Doc. S/PV.7214 (n 48).

Israel, while not specifically mentioning Article 51, or that it had been the subject of an ‘armed attack’, nevertheless stated:

This week, Israel launched a self-defence operation, called Protective Edge, to counter the attacks, to defend our citizens and to secure for them a life without a constant threat. The goal of our operation is to remove the threat posed by Hamas by dismantling its military infrastructure and to restore calm in Israel. We are not looking for a band-aid solution that will allow Hamas to rest and regroup. We are not going to give them so-called time out so that they can replenish their rocket supplies and hit us again in a few weeks.¹³⁶

Israel furthermore argued that the use of force was justified by the fact that Israel ‘had no choice’ but to defend itself against what it called the ‘Hamas terrorist organization in Gaza’ that ‘is intentionally and indiscriminately threatening the lives of 3.5 million innocent men, women and children’ by its rockets and that ‘no nation, no people and no Government could tolerate it’.¹³⁷ At a subsequent meeting of the Security Council, on 18 July 2014, Israel’s Ambassador Prossor stated that his country was ‘acting solely to defend Israelis from constant terror attacks.’¹³⁸

At the meeting of 10 July 2014, the Palestinian representative, Riyad Mansour, described the operation as Israeli ‘military aggression’.¹³⁹ Furthermore, Mr Mansour stated that:

We also reject the claims of self-defence by Israel, while, despite the prohibition under international law, it deliberately carries out reprisals and collective punishment against the Palestinian people in declared retaliation and revenge, directly called for by the Israeli Prime Minister himself, for the killing of three Israeli settlers, which the Palestinian leadership has clearly condemned.¹⁴⁰

Indeed, ‘[n]o act in self-defence can justify the killing of children or the oppression of the Palestinian people in the occupied territories.’¹⁴¹ Poignantly, the Palestinian representative also talked of Israel clearly violating its responsibility as an occupying Power to ensure the safety and well-being of the civilian population under its occupation.¹⁴²

During the meeting of 18 July 2014, Mr Mansour reiterated the view that the ‘savage Israeli aggression [could not] be justified by any means. It is not self-defence but a vengeful military aggression, intentionally planned and perpetrated by the occupying Power against the civilian population under its occupation.’¹⁴³ It went on to stress that Israel had ‘cynically used the killing of three Israeli settlers to launch the aggression’ and called upon the Security Council to condemn Israel’s action/unlawful conduct?.¹⁴⁴

During the initial phases of Operation Protective Edge, the United States, perhaps unsurprisingly, came out in support of Israel, and was critical of Hamas. In particular, it stressed that ‘no country can accept rocket fire aimed at civilians’ and it supported ‘Israel’s right to defend itself against

¹³⁶ Ibid., 6-7.

¹³⁷ Ibid., 6.

¹³⁸ UNSC Verbatim Record (18 July 2014) UN Doc. S/PV.7220.

¹³⁹ UN Doc. S/PV.7214 (n 48135) at 4.

¹⁴⁰ Ibid., 5.

¹⁴¹ Ibid., 5.

¹⁴² UN Doc. S/PV. 7220 (n 138) 6.

¹⁴³ Ibid, 5.

¹⁴⁴ Ibid., 5-6.

these vicious attacks.’¹⁴⁵ Israel’s ‘right to defend itself’ was also accepted by several European states.¹⁴⁶ The EU, in urging restraint by both sides and displaying concern for the mounting civilian casualties, ‘recogniz[ed] Israel’s legitimate right to defend itself against any attacks’ and ‘underline[d] that the Israeli military operation must be proportionate and in line with international humanitarian law’.¹⁴⁷ Ireland condemned the violence.¹⁴⁸ A number of countries, including Venezuela, Egypt, Iran and Pakistan denounced the Israeli operation from both states.¹⁴⁹ In a Communiqué, the Joint Coordination Committee of the Non- Aligned Movement and the Group of 77 and China, representing 135 states, ‘strongly condemn[ed] the ongoing military aggression by Israel’ and ‘demand[ed] an immediate end’.¹⁵⁰ The Arab League Secretary-General, Nabil al Arabi, called for an emergency meeting of the Security Council to ‘adopt measures to stop Israeli aggression against the Gaza Strip’.¹⁵¹ Secretary-General Ban Ki-Moon urged restraint on both sides and expressed concern over the civilian casualties.¹⁵² On 23 July 2014, the UN Human Rights Council established a commission of inquiry to investigate all violations of international humanitarian law and international human rights law during Operation Protective Edge which published its report on 24 June 2015.¹⁵³ As with the Goldstone Report, published in the aftermath of Operation Cast Lead, the report on Operation Protective Edge similarly excluded analysis of the *jus ad bellum* issues that arose.

During the meeting of the UNSC on 18 July, Jordan strongly condemned ‘the repeated

¹⁴⁵ Josh Earnest, White House Press Secretary, Daily Briefing (8 July 2014) available at <<http://www.presidency.ucsb.edu/ws/index.php?pid=105420>>

¹⁴⁶ See, for example, the UK: UK Prime Minister’s Office, ‘PM Call with Israeli Prime Minister’ (9 July 2014) available at <<https://www.gov.uk/government/news/pm-call-with-israeli-prime-minister>>; Germany: Frank-Walter Steinmeier, Foreign Minister of Germany, Statement on the Situation in the Middle East (8 July 2014) available at <www.auswaertiges-amt.de/EN/Infoservice/Presse/Meldungen/2014/140708-BM_Nahost.html?nn=582300>.

¹⁴⁷ European Union External Action Service, Statement by the Spokesperson on Rocket Fire from Gaza and On-Going Retaliation Operations of the Israeli Defence Force (Brussels, 8 July 2014) Doc 140708/02 available at <http://eu-un.europa.eu/articles/en/article_15236_en.htm>.

¹⁴⁸ Irish Department of Foreign Affairs and Trade, ‘Minister Gilmore condemns violence in Gaza and Israel’ (9 July 2014) available at <www.dfa.ie/news-and-media/press-releases/press-release-archive/2014/july/minister-gilmore-condemns-violence-gaza-israel/>.

¹⁴⁹ See, for example, Nicolas Maduro Moros, President of the Bolivarian Republic of Venezuela, Communiqué, ‘Venezuela condemns new aggression against Palestine’ (Caracas, 9 July 2014) available at <www.embavenez.by/en/news/1467-venezuela-condena-nueva-agresion-contra-palestina>; Egyptian Ministry of Foreign Affairs, ‘Egypt condemns Israeli hostilities against the Gaza Strip’ (9 July 2014) available at <www.mfa.gov.eg/English/Ministry/News/Pages/NewsDetails.aspx?Source=6781921f-3993-444a-859e-ee26ce851de8&newsID=45b91d39-d1bd-438a-934d-a6d036fb94b8>; ‘Iran urges firm action on brutal Israel attacks’, *Presstv* (9 July 2014,) available at <www.presstv.ir/detail/2014/07/09/370533/iran-urges-firm-action-on-israel-raids/>; Pakistan Ministry of Foreign Affairs, ‘Pakistan condemns Israeli military attacks on Gaza’ (9 July 2014) available at <www.mofa.gov.pk/pr-details.php?prID=2083>.

¹⁵⁰ Communiqué of the Joint Coordination Committee (JCC) of the Non- Aligned Movement and the Group of 77 and China calling for an end to the Israeli military Aggression against the Palestinian people, particularly in the Gaza Strip, 28 July 2014, 29 July 2014, available at <<http://english.wafa.ps/page.aspx?id=frrm4qa24792213897afrrm4q>>.

¹⁵¹ See ‘World reacts to the conflict in Gaza’ *Al Jazeera* (10 July 2014) <www.aljazeera.com/news/middleeast/2014/07/world-reacts-conflict-gaza-201471073217736666.html>.

¹⁵² UN Secretary-General Ban Ki-Moon, ‘Press Conference by Secretary-General Ban Ki-Moon at United Nations Headquarters’ (9 July 2014) UN Doc SG/SM/16011.

¹⁵³ See Report of the independent commission of inquiry (n 35).

aggressions waged by Israel on the Gaza Strip'.¹⁵⁴ However, several Council members, including the United States, Nigeria, Lithuania, the United Kingdom, Luxembourg and Rwanda, explicitly recognized the right of Israel 'to defend itself' or 'to protect its population' from rocket fire, although did not refer to Article 51 UN Charter.¹⁵⁵ In addition, many members of the Council stressed that Israel should act proportionately and ensure the protection of civilians at all times,¹⁵⁶ while a number of countries, such as Chile and Argentina, argued that Israel had escalated the conflict and/or had engaged in disproportionate and excessive use of force.¹⁵⁷ In a similar vein, several Members explicitly held the civilian toll on the Palestinian side to be unjustifiable.¹⁵⁸ Other States, such as China and the Republic of Korea, expressed concern over the high number of civilian casualties.¹⁵⁹

The debate within the Security Council on 22 July 2014 was generally more negative towards Israel. Several States, for example the United States, the United Kingdom, Australia, Nigeria, Chad, as well as the European Union,¹⁶⁰ still supported, as a matter of principle, Israel's right to act in self-defence, although without referring to Article 51 UN Charter.¹⁶¹ At the other end of the spectrum, many countries, for example Pakistan, Morocco, Algeria, Turkey, Indonesia and Bangladesh, described the Israeli operation as an act of 'aggression',¹⁶² a sentiment shared by the Movement of Non-Aligned Countries.¹⁶³ A recurring criticism of the operation by Members of the Council was that it represented a form of 'collective punishment' against the people of Gaza.¹⁶⁴ However, numerous States took the opportunity to again stress that Israel must act in a proportionate manner in exercising its right of self-defence and in line with international humanitarian law, as well as taking all the necessary measures to prevent or minimize civilian casualties.¹⁶⁵ Indeed, while many States clearly condemned Hamas' indiscriminate firing of rockets into Israel, it was also apparent within the meeting that most States were critical of Israel's disproportionate and excessive use of force against the civilian population of Gaza.¹⁶⁶ Some States expressly denied the legality of Israel's self-defence claim upon the basis of considerations of proportionality.¹⁶⁷ For example, El Salvador stressed that 'the exercise of

¹⁵⁴ Ibid., 10.

¹⁵⁵ Ibid., 10 (United States), 12 (Nigeria), 14 (Lithuania), 15 (UK), 17 (Luxembourg), 20 (Rwanda).

¹⁵⁶ Ibid., 12 (Nigeria), 14 (Lithuania), 15 (United Kingdom), 17 (Luxembourg), 20 (Rwanda).

¹⁵⁷ Ibid., 14 (Chile), 18 (Argentina).

¹⁵⁸ See, for example, *ibid.* 12 (Nigeria), 15 (Chad).

¹⁵⁹ Ibid., 11, 19.

¹⁶⁰ UNSC Verbatim Record (22 July 2014) UN Doc S/PV.7222, 9 (Israel, Luxembourg), 12 (United States), 17 (United Kingdom), 20 (Nigeria), 24 (Australia), 26 (Chad), 27 (Lithuania), 28 (Rwanda), 37 (European Union), 51 (Norway), 60 (Canada), 61 (Bangladesh), 68 (Jamaica).

¹⁶¹ For an exception, see, for example, *ibid.* 59 (El Salvador).

¹⁶² Ibid., 4-5 (Palestine), 34 (Pakistan), 35 (Morocco, Malaysia), 42 (Algeria), 43 (Namibia), 45 (Nicaragua), 47 (Turkey), 50 (Indonesia, Maldives), 52 (Qatar), 53 (Syria), 58 (Tunisia), 59 (Venezuela), 61 (Bangladesh), 62 (Cuba), 66 (Kuwait).

¹⁶³ Ibid., 55.

¹⁶⁴ Ibid., 11 (Jordan), 32 (Saudi Arabia), 34 (Pakistan), 43 (Namibia), 47 (Turkey), 52 (Qatar), 55 (Movement of Non-Aligned Countries), 59 (Venezuela), 62 (Cuba), 66 (Kuwait).

¹⁶⁵ *ibid.*, 17 (United Kingdom), 20 (Australia), 26 (Chad), 27 (Lithuania), 37 (European Union), 51 (Norway).

¹⁶⁶ *ibid.*, 9 (Luxembourg), 11 (Jordan), 18 (Russia), 20 (Nigeria), 25 (Chile), 26 (Chad), 35 (Malaysia), 43 (Namibia), 44 (Ecuador), 49 (Democratic People's Republic of Korea), 61 (Bangladesh), 62 (Cuba), 68 (Peru, Jamaica).

¹⁶⁷ Ibid., 11 (Jordan), 26 (Chad), 29 (Lebanon), 36 (Malaysia), 44 (Ecuador), 50 (Indonesia), 59 (El Salvador), 61 (Bangladesh), 63 (Zimbabwe), 65 (Kazakhstan).

States' right to legitimate self-defence, as set out in the Charter of the United Nations, does not justify the disproportionate use of military force against another State, and even less against its civilian population'.¹⁶⁸

Following on from the tone of the meeting of 22 July, it was clear that the international condemnation of Israel grew, especially in light of a number of Israeli attacks which resulted in large numbers of civilian casualties, as well as several attacks against UN facilities, such as a UN school in Rafa.¹⁶⁹

III. Legality of the operations

Despite their controversy and devastating consequences, the three Israeli interventions into Gaza attracted relatively little attention in legal doctrine.¹⁷⁰ In a letter published in *The Sunday Times* over two dozen international lawyers rejected Israel's justification of self-defence. Instead, it was argued, Israel's actions amounted to 'aggression':

ISRAEL has sought to justify its military attacks on Gaza by stating that it amounts to an act of "self-defence" as recognised by Article 51, United Nations Charter. We categorically reject this contention ... The rocket attacks on Israel by Hamas deplorable as they are, do not, in terms of scale and effect amount to an armed attack, entitling Israel to rely on self-defence. Under international law self-defence is an act of last resort and is subject to the customary rules of proportionality and necessity ... Israel's actions amount to aggression, not self-defence, not least because its assault on Gaza was unnecessary ... We condemn the firing of rockets by Hamas into Israel and suicide bombings which are also contrary to international humanitarian law and are war crimes. Israel has a right to take reasonable and proportionate means to protect its civilian population from such attacks. However, the manner and scale of its operations in Gaza amount to an act of aggression and is contrary to international law, notwithstanding the rocket attacks by Hamas.¹⁷¹

It is worth recalling that Article 51 of the UN Charter provides that:

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

¹⁶⁸ Ibid., 59 (El Salvador).

¹⁶⁹ See, for example, 'US appalled by disgraceful Israeli shelling of Gaza UN school' *The Guardian* (3 August 2014) <<https://www.theguardian.com/world/2014/aug/03/us-appalled-disgraceful-israeli-shelling-gaza-un-school>>; Rowena Mason, 'David Cameron warns Israel over Gaza after pressure from Ed Miliband' *The Guardian* (4 August 2014) <www.theguardian.com/politics/2014/aug/04/david-cameron-israel-gaza-hamas-ed-miliband-labour>; UNHCHR, 'Pillay alarmed at mounting civilian toll in Gaza, appeals to all sides to abide by international law' (Geneva, 11 July 2014) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14849&>; 'UN chief condemns 'atrocious' Gaza killings' *Al Jazeera* (21 July 2014) <www.aljazeera.com/news/middleeast/2014/07/un-chief-condemns-atrocious-gaza-killings-2014720222714271433.html>; UNSG, 'Statement attributable to the spokesman for the Secretary-General on attack outside UNRWA shelter' (New York, 3 August 2014) <www.un.org/sg/statements/?nid=7904>.

¹⁷⁰ See, for example, Victor Kattan, 'Operation Cast Lead: Use of Force Discourse and Jus ad Bellum Controversies, (2009) 15 *The Palestine Yearbook of International Law* 95; Noura Erakat, 'Operation Cast Lead: The Elusive Quest for Self-Defense under International Law', (2009) 36 *Rutgers Law Record* 164; Amos Guiora, 'Legal Aspects of 'Operation Cast Lead' in Gaza' *Jurist* (11 January 2009) <<http://www.jurist.org/forum/2009/01/legal-aspects-of-operation-cast-lead-in.php>>; Guglielmo Verdirame, 'Gaza Crisis: The Legal Position of Israel and Hamas' *BBC News* (20 November 2012) <<http://www.bbc.co.uk/news/world-middle-east-20415886>>.

¹⁷¹ 'Israel's bombardment of Gaza is not self-defence – it's a war crime' *The Sunday Times* (11 January 2009), 20. Signatories included Sir Ian Brownlie QC, Professor Richard Falk, and Professor Christine Chinkin.

necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The right of self-defence as contained in Article 51 comprises both procedural and substantive elements. On a procedural level, it is clear from the accounts elaborated within the above section that Israel generally satisfied the requirement of reporting its actions to the UN Security Council.¹⁷² This section, however, will focus more on the substantive requirements of self-defence contained within Article 51 and in customary international law. While the letter above appeared to focus to a large degree on the necessity and proportionality of Israel's response – two requirements for self-defence found within customary international law and addressed below – it also argued that the rockets fired from Hamas did not constitute an armed attack, the *sina qua non* for the invocation of the right of self-defence under Article 51. As eluded to by the International Court of Justice (ICJ) in the *Wall* advisory opinion, for the purposes of the right of self-defence an armed attack must be directed from outside of a State's own territory or territory occupied or controlled by it:

The Court ... 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 ... Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.¹⁷³

The general point was reaffirmed in the Chatham House Principles, stating that 'unless an attack is directed from outside territory under the control of the defending State, the question of self-defence in the sense of Article 51 does not normally arise'.¹⁷⁴ Consequently, if Gaza was 'under the control' of Israel and the IDF at the time of the interventions then self-defence is excluded *ab initio*.

Although occupied by Israel since 1967, Israel, as noted above, went through a so-called 'unilateral disengagement' from Gaza in 2005, raising the prospect of the territory being seen as sufficiently separate from Israel to enable it be the instigator of an armed attack. For example, the UN Secretary General's Palmer Report on the Israeli flotilla raid in 2010 found that the international law of blockade was applicable based upon the fact that 'Gaza and Israel are both distinct territorial and political areas'.¹⁷⁵ Yet, it is also widely believed that Israel was continuing to occupy the Gaza Strip during all three of the interventions. Indeed, despite the 2005 proclaimed disengagement, whereby Israeli civilians and IDF troops were removed from the Gaza Strip, the consensus appears to be that Gaza remained occupied territory under

¹⁷² Although the ICJ has suggested that a failure to meet this requirement does not preclude a State from relying upon the right of self-defence, but is an indicator in assessing the legality of measures justified as self-defence and whether the State in question was itself convinced of its claims. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 1986 14, [200], [235].

¹⁷³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004], ICJ Reports 2004 136, [139].

¹⁷⁴ Elizabeth Wilmshurst, 'The Chatham House Principles of International Law on the Use of Force in Self-Defence', (2006) 55 *International and Comparative Law Quarterly* 963, 966.

¹⁷⁵ UN Secretary-General, 'Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident' (2 September 2011) [73], <http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf>.

international law.¹⁷⁶ Indeed, this view is shared, *inter alia*, by many States speaking within the UN Security Council during the discussions on the interventions,¹⁷⁷ the UN Secretary General,¹⁷⁸ and the Goldstone Report.¹⁷⁹ This is based upon the fact that Gaza was subjected to a comprehensive economic and political blockade, and Israel controlled all of the territory's entry and exit points, its airspace, its territorial waters, its local monetary market, and population registry. It would, in this sense, be seen to have effective control of Gaza; therefore as Gaza was 'under the control of the defending State' at the time of the interventions,¹⁸⁰ the international right of self-defence was arguably not applicable.

Nonetheless, while Israel exerted a large degree of control over the external aspects of Gaza's existence it was not, however, permanently present on the ground within Gaza and did not exercise control over the actions of the political actors within Gaza or over the other groups operating there. While Israel exerted a large degree of control over Gaza, the two could legitimately be seen to be 'distinct territorial and political areas'.¹⁸¹ Furthermore, during the debates over the three interventions very few States denied that Israel's right of self-defence existed in principle. As such, the possibility of Israel invoking its right of self-defence should not be dismissed too readily.

The first issue, then, and going back to the textual provision of Article 51, is whether Hamas and the other non-State groups operating within Gaza are able to perpetrate an armed attack. On the one hand, given that it can be seen to exist as an independent territorial and political unit it might be seen to constitute, or form part of, a 'contested State' of Palestine.¹⁸² According to this view, there is arguably no problem with the notion of it being responsible for an armed attack, although while Hamas would be seen as the governmental authorities within this contested State, or the relevant part thereof, questions remain in regards to the other non-State groups operating within Gaza, and in particular the responsibility of Hamas for the actions of these groups.

However, another opinion is that Hamas and the other groups operating from Gaza are simply non-State actors, which raises potential question marks over their ability to be the perpetrators of an armed attack. Academic opinion is to an extent divided on this issue. Some scholars have maintained the view that the right of self-defence only exists in light of an attack by a State actor.¹⁸³ Furthermore, while different interpretations have been put to it, the ICJ nonetheless stated in the *Wall* advisory opinion that 'Article 51 of the Charter ... recognizes the existence of

¹⁷⁶ Scobbie (n 1) 293. This raises the prospect of the laws of belligerent occupation, as a section of the law of armed conflict, becoming applicable, an issue that was prominent within the debates at the UN. See section 2 above.

¹⁷⁷ See, in general, section 2 above.

¹⁷⁸ S/PV.6060 (n 19) 4.

¹⁷⁹ The Goldstone Report (n 7) paras [276]-[277].

¹⁸⁰ Wilmshurst (n 174)

¹⁸¹ Palmer Report (n.152). Report of the independent commission of inquiry? (n 153)

¹⁸² See Christian Henderson, 'Contested States and the Rights and Obligations of the *Jus ad Bellum*' (2013) 21 *Cardozo Journal of International and Comparative Law* 367.

¹⁸³ See, for example, Alexander Orakhelashvili, 'Changing *Jus Cogens* through State Practice? The Case of the Prohibition of the Use of Force and its Exceptions' in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 157, 171-3.

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.*¹⁸⁴

In this respect, pages have been written on whether attribution to a State is required, as might be seen in the *Nicaragua* case.¹⁸⁵ However, it is perhaps fair to say that many of States and scholars, today, perceive non-State actors as being qualified in their own right to perpetrate an armed attack under international law.¹⁸⁶ Indeed, there is nothing in Article 51 restricting invocation of the right to attacks by State actors only,¹⁸⁷ and the infamous *Caroline* case, which has been described as the ‘locus classicus’ of self-defence,¹⁸⁸ was itself an example of an action in self-defence against the activities of non-State actors. Today, the view that non-State actors are able to perpetrate an armed attack for the purposes of the right of self-defence arguably stems from the invocation of the right of self-defence by the United States following the attacks of 11 September 2001.¹⁸⁹ Not only was the right consciously invoked in the face of attacks by the non-State terrorist group al-Qaida, but this appeared to be not only tolerated but widely accepted within the international community, with very few dissenting voices.¹⁹⁰ One interpretation of this reaction is that it entailed recognition that, due to the scale of the 9/11 attacks, non-State actors were able and willing to use force that appeared to be akin to the scale of that used by States, employing weapons with similar destructive capability, and being able to perpetrate attacks with similarly dire effects in terms of death and destruction. If a State is subjected to such a horrific attack, why should it make any difference, in principle, if it was perpetrated by a State or a non-State actor, as the State in question still needs to defend itself, which is the *raison d’être* of the right encompassed in UN Charter Article 51?

It was the ICJ in the *Nicaragua* judgment that first raised the notion of armed attacks being of a particular ‘scale and effects’ and of a certain gravity.¹⁹¹ While some have dismissed this so-called gravity threshold in the case of attacks by States,¹⁹² it is something that appears to have been maintained in the case of attacks by non-State actors.¹⁹³ Furthermore, the ICJ made the

¹⁸⁴ *Wall* Advisory Opinion (n 173), para. 194 (emphasis added).

¹⁸⁵ *Nicaragua* case (n 172 -) [195].

¹⁸⁶ See, for example, Thomas M Franck, ‘Terrorism and the Right of Self-Defense’ (2001) 95 *American Journal of International Law* 839, 840; Kimberley N Trapp, ‘Back to Basics: Necessity, Proportionality, And The Right Of Self-Defence Against Non-State Terrorist Actors’ (2007) 56 *International and Comparative Law Quarterly* 141, 147–55; Ruth Wedgwood, ‘Responding to terrorism: the strikes against Bin Laden’ (1999) 24 *Yale Journal of International Law* 559, 564; and Ruth Wedgwood, ‘The ICJ Advisory Opinion on the Israeli Security Fence and the limits of self-defense’ (2005) 99 *American Journal of International Law* 52, 57–59; Wilsnhurst (n 174) 970; Sean D Murphy, ‘Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?’ (2005) 99 *American Journal of International Law* 62, 67–70.

¹⁸⁷ Judge Higgins was correct in pointing out in her separate opinion in the *Wall* advisory opinion that ‘[t]here is, with respect, nothing in the text of Article 51 that ... stipulates that self-defence is available only when an armed attack is made by a State.’ See *Wall* advisory opinion (n 173), separate opinion of Judge Higgins < www.icj-cij.org/docket/files/131/1681.pdf >, 33.

¹⁸⁸ Robert Y. Jennings, ‘The *Caroline* and *McLeod* Cases’ (1938) 32 *American Journal of International Law* 82, 92.

¹⁸⁹ Letter from the US to the President of the Security Council (7 October 2001) UN Doc S/2001/946,.

¹⁹⁰ *Cf* Orakhelashvili (n 183).

¹⁹¹ *Nicaragua* case (n 172), para. 195.

¹⁹² See, for example, Yoram Dinstein, *War, Aggression and Self-Defence* (5th ed., Cambridge University Press 2011) 210-212.

¹⁹³ As observed in Tom Ruys, ‘*Armed Attack*’ and *Article 51 of the UN Charter* (Cambridge University Press 2010) 147.

distinction between armed attacks and ‘mere frontier incidents’,¹⁹⁴ which is perhaps what the rocket attacks from Gaza could be perceived as. The Eritrea-Ethiopia Claims Commission also excluded ‘border encounters’ from the purview of armed attack when it stated that ‘[I]ocalized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for the purposes of the Charter.’¹⁹⁵ The Commission, as such, concluded that the clashes were ‘relatively minor incidents ... not of a magnitude to constitute an armed attack by either State against the other within the meaning of Article 51 of the UN Charter’,¹⁹⁶ although this was, of course, in the context of a conflict between two States. In this light, it is difficult to conclude that the rocket attacks constituted an armed attack, thus permitting Israel to invoke its right of self-defence.

However, others have dismissed such a gravity threshold. Indeed, an alternative view is that rather than seeing armed attacks that give rise to the right of self-defence as quantitatively/qualitatively different from mere uses of force, which do not give rise to this right, the legality of the action in self-defence could be judged upon the basis of the proportionality of the response and not on the basis of not the magnitude of the forcible act provoking it.¹⁹⁷ If we apply this test to the operations studied in this chapter it is difficult to reach a positive verdict. Indeed, the proportionality of the response of Israel seemed to be the main sticking point even for those States that supported the State’s right of self-defence in principle.¹⁹⁸

Yet, Israel appears to have implicitly argued that the rocket attacks should not be seen in isolation but should, instead, be assessed cumulatively. Indeed, in quantifying the stream of rocket attacks for the purposes of determining whether an armed attack has occurred or is occurring, the ‘accumulation of events’ theory might provide some support to Israel’s invocation of the right of self-defence.¹⁹⁹ It is true that this theory has been given some implicit support by, for example, the ICJ²⁰⁰ as well as in the writing of scholars.²⁰¹ Nevertheless, even if we could envisage the threshold of an armed attack as one that could be crossed through an accumulation of smaller, more minor, attacks it is difficult to see the rocket attacks as doing so. Indeed, even taken cumulatively, the scale of the effects of the rocket attacks arguably did not reach that threshold, as appears to be asserted in the letter to the *Sunday Times* above. Perhaps it would depend upon whether we judge the ‘scale and effects’ of the rockets by their *actual* effects or *potential* effects. The actual effects of the rockets landing in Israel was, as the letter above indicates and as was asserted by many during the debates within the Security Council, relatively minimal. On the other hand, the *potential* effects of such rocket attacks, and the constant fear of attack, is far greater, and the effects would have been greater if it were not for Israel’s Iron Dome missile defence system.

It is possible to argue that Israel was entitled to rely on a more prospective interpretation of the

¹⁹⁴ *Nicaragua case* (n 172) [195].

¹⁹⁵ Eritrea Ethiopia Claims Commission, Partial Award, *Jus Ad Bellum*, Ethiopia’s Claims 1–8, between The Federal Democratic Republic of Ethiopia and The State of Eritrea, The Hague, Dec. 19, 2005, [11].

¹⁹⁶ *Ibid.*, [12].

¹⁹⁷ Rosalyn Higgins, *Problems and Process: International Law And How We Use It* (Clarendon Press 1994) 251.

¹⁹⁸ See the debates above in section 2.

¹⁹⁹ Dinstein (n 192) 206-7.

²⁰⁰ *Case Concerning Oil Platforms (Islamic Republic of Iran v US)* (Merits) [2003] ICJ Rep 161, [64].

²⁰¹ See, for example, Dinstein (n 192).

right of self-defence, in the form of the right of anticipatory self-defence. This might seem to be evident in its stated aims of actively fighting terrorists and protecting Israeli citizens from further attacks. This right, which is normally based upon demonstrating that a threat of ‘imminent’ attack exists, would be easier to demonstrate given the cycle of constant attacks and constant threat of attack. Yet, it can be argued that given this context and having already suffered an attack, either singularly or cumulatively, there is no need to rely on anticipatory self-defence as the action falls squarely within the concept of self-defence as found within Article 51, regardless of the prospective defensive aim of the operations.

In addition to the question as to whether it is possible to view the rocket attacks as an armed attack, there are, as noted above, two further associated elements in the legal assessment of the operations: the necessity and proportionality of any action taken in self-defence. While in the legal assessment of actions in self-defence the ICJ has perceived these criterion as somewhat secondary considerations to that of whether an armed attack has occurred,²⁰² they play a more central role in the assessments undertaken by States.²⁰³ Indeed, throughout the course of the debates not a single State mentioned the phrase ‘armed attack’ but States constantly discussed whether the Israeli operations were necessary and proportionate. As such, even if we are to conclude that Israel was not the victim of an ‘armed attack’ on one or all of the occasions, the question of whether the interventions were necessary and proportionate cannot be simply dismissed. Indeed, given the disagreement that exists within legal doctrine as to what constitutes an ‘armed attack’ it would be remiss to do so.

Necessity is often referenced back to the *Caroline* case correspondence of 1841 between the British and the Americans in which a ‘necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation’ was required.²⁰⁴ This has been interpreted in more recent times to mean that, in the absence of an immediate necessity to respond, all *reasonable* alternatives of defending the State must have been exhausted and/or that there is a demonstrable futility in invoking available non-forcible measures.²⁰⁵ In this respect, it might be argued that prior to invoking its right of self-defence, Israel should have brought the rocket attacks to the attention of the UN Security Council. However, it did just that on numerous occasions,²⁰⁶ meaning that Israel may have been justified in claiming that the Council did not take the ‘necessary measures’ (*per* Article 51 of the UN Charter) which would have precluded, in principle, Israel invoking its right of self-defence. As such, given that the UN Security Council did not take action, and given the constant threat that Israel claimed it was under, it might be argued that Israel’s action in self-defence was necessary.

However, a further alternative to military action was presented in the form of the various ceasefires that had been agreed upon, that not only were in existence but had been shown to be successful for both parties to the dispute. Indeed, it has been argued, in connection with

²⁰² See *Nicaragua* case (n 172) [237].

²⁰³ James A. Green, *The International Court of Justice and Self-Defence in International Law* (Hart 2009) 127.

²⁰⁴ Letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington, 24 April 1841, reprinted in *British and Foreign State Papers 1840–1841*, (1857) Vol. XXIX 1138.

²⁰⁵ Ruys (n 193) 95.

²⁰⁶ For a list of those in 2012 alone, see ‘The 20 Israeli appeals ignored by the U.N. this year’ *UN Watch* (20 November 2012) <<http://blog.unwatch.org/index.php/2012/11/20/israel-sent-19-letters-to-u-n-on-hamas-rockets-in-2012-before-responding-militarily/>>.

Operation Cast Lead, that:

The figures strongly demonstrate that Israel diminished rocket attacks and mortar shellings in a matter of weeks through diplomatic means. Israel was able to bring more protection to its citizens during the four months when it agreed to a ceasefire than it was able to provide in all the months preceding and in the month following the ceasefire when it had used force ... In addition to diminishing the rocket and mortar attacks, Israel was also able to forge a mutual interest with Hamas. Despite the ceasefire, Hamas not only ceased its attacks on Israel but it worked to prohibit other groups from launching attacks as well.²⁰⁷

Based on this account it might be argued that Israel itself had created the necessity for the action in self-defence. Indeed 'Israel justified its attack on Gaza as a response to Hamas rocket fire into Israel in violation of the ceasefire. While Hamas indeed renewed its cross-border attacks leading up to Operation Cast Lead, it did so in response to an Israeli raid into Gaza that killed six Hamas militants on November 4, 2008, four months into the tenuous ceasefire.'²⁰⁸ Furthermore, in feeding into the discussion on necessity, and in light of Israel's stated aims in regards/with regard to the operations of putting an end to the rocket attacks once and for all, the repeated nature of the interventions arguably leads one to conclude that they were clearly ineffective and therefore unnecessary. For example, during Operation Cast Lead Israeli Ambassador Shalev clearly stated that the aim of the operation was 'ensuring the end of terrorism from Gaza'.²⁰⁹ Yet, five years later in the third of the major operations discussed here, Operation Protective Edge, Ambassador Shalev, in somewhat similar tones, stated that '[t]he goal of our operation is to remove the threat posed by Hamas' and that Israel was not looking for a 'band-aid' solution.²¹⁰ In this sense, given that Cast Lead had failed in its key objective there was no reason to believe that a similar military operation with similar objectives in the future would succeed.

In this respect, one might claim that despite the stated aims of the operations, their real aim was not of a defensive nature, but instead of a punitive nature, to punish Hamas and the other groups involved in the rocket attacks. Many will claim that the operations were simply armed reprisals, which are outlawed under international law.²¹¹ Of course, Israel was careful not to justify its actions in this way, and States generally did not characterize Israel's actions in this way, with most either accepting the right of self-defence in principle or claiming that the Israel's interventions were aggression.²¹²

However, if the rocket attacks emanating from Gaza had not crossed the 'legal rubicon',²¹³ individually or cumulatively, and if Israel's interventions did not satisfy the necessity criterion and/or were seen as acts of reprisal, the question arises as to whether Israel was responsible for an act of aggression,²¹⁴ which was, as noted above, a prominent accusation amongst States who

²⁰⁷ Erakat (n 170) 173.

²⁰⁸ Erakat (n 170) 171.

²⁰⁹ UN Doc. S/PV.6060 (n 19) 7.

²¹⁰ UN Doc. S/PV.7214 (n 48) 6-7.

²¹¹ See, for example, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625, principle 1;].UNSC Res 188 (9 April 1964) UN Doc S/RES/188 [1]

²¹² See the debates above in section 2.

²¹³ Dinstein (n 192) 204.

²¹⁴ Kattan (n 170) 105. Erakat also notes that 'Israel's November 4th raid into Gaza marked the first significant breach of the ceasefire, which was then met by renewed Hamas cross-border attacks and ultimately Israel's 22-day

condemned the Israeli interventions.²¹⁵ Aggression is stated in the 1974 Definition of Aggression as ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations’.²¹⁶ Given what was said above in regards to Israel being perceived as the occupying State, the question arises as to whether aggression can take place by an occupier against a territory that is subject to belligerent occupation. The Definition of Aggression arguably applies in these contexts. Indeed, if Article 1 is read in conjunction with its explanatory note which states that ‘In this Definition the term “State”’: (a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations’ it would seem to apply.²¹⁷ Indeed, ‘[t]he reason why the word “state” was retained in Article 1 of the Definition was to ensure conformity with the language used in the UN Charter’,²¹⁸ and allegations of aggression have been similarly made in the context of attacks against entities whose statehood was questionable or contested, for example South Korea, Goa, East Timor, and the Falkland Islands. As such, ‘the legal status of the territory subjected to an act of aggression is not a significant factor in making a determination as to whether such an act in fact occurred’.²¹⁹

However, States accusing Israel of aggression did not often appear to do so upon the basis that Israel had no right to use force in the first place, either because of a lack of an armed attack or necessity for an armed response, but more because of the disproportionate nature of its eventual response.²²⁰ While proportionality might arguably require a defending State to scale its forcible response to the attack preceding it,²²¹ the more generally accepted interpretation of this customary requirement is that the response in self-defence must be proportionate in relation to the aim of the defensive action.²²² In this respect, proportionality might be seen as possessing two inter-related limbs; whether a use of force was a proportionate response given the nature of the preceding attack (which is closely related to necessity) and then whether the operation as a whole was proportionate in halting the attack or imminent threat of one. In respect to the first of these, given the persistent and cumulative nature of the rocket attacks we might view proportionality in light of Israel’s stated aims of putting an end once and for all to the rocket attacks. Yet, given the failure of the past interventions, it is arguable that it was a disproportionate response. This failure and the amount of civilian deaths and destruction leads to the conclusion that the operations were disproportionate. Indeed, whether we gauge the legality of the operations upon the basis of responding to the preceding rockets taken singly or cumulatively, or upon Israel’s stated aim of ending terrorism from Gaza, it is difficult to perceive them as either necessary or proportionate.

offensive against Gaza.’ Erakat (n 170) 172.

²¹⁵ See the debates above in section 2.

²¹⁶ Definition of Aggression UNGA Res3314 (XXIX), (14 December 1974) UN Doc. A/RES/29/3314, Article 1 (emphasis added).

²¹⁷ Henderson (n 182) 393.

²¹⁸ Kattan (n 170) 112.

²¹⁹ Ibid, 117.

²²⁰ See the debates above in section 2.

²²¹ See, for example, B. Levenfeld, ‘Israeli counter-fedayeen tactics in Lebanon: self-defence and reprisal under modern international law’ (1982-3) 21 Columbia Journal of Transnational Law 1, 41.

²²² See, for example, Tarcisio Gazzini, *The Changing Rules on the Use of Force in International Law* (Manchester University Press 2005) 148; Ruys (n 193) 112.

IV. Conclusion: precedential value

The unfortunate reality is that the three Israeli interventions will be perceived by many as ‘business as usual’. In this respect, there is a sense that with every intervention Israel fails to learn the lessons of the past, perhaps including that they will not put an end to rocket attacks emanating from Gaza. Given that this was the stated aim of Israel on each occasion, it is difficult to see them as necessary. Nonetheless, concessions on either side are not something that have been witnessed too frequently in the Middle East crisis, and without them it is difficult to see an alternative future to the circular pattern of rocket attacks and interventions. When both claim, with regular support, that the other is responsible for aggression, or the instigator of violence, the law on the use of force can seem either irrelevant or, at best, trapped.

This notwithstanding, it is more in connection with the related questions of whether the rocket attacks constituted an armed attack and whether Israel’s response was proportionate that are perhaps of most interest to the international lawyer, and where we may find its most relevant precedential value. While some supported Israel’s claim of self-defence, and against what many will see as non-State actors, there was little express renunciation of it in principle. In this respect, the reaction to the interventions arguably provide further support for the argument that armed attacks may be perpetrated by non-State actors. Furthermore, given that the right was invoked in the face of numerous rocket attacks, which arguably taken individually would not amount to an armed attack, there is perhaps some implicit support in principle from these interventions for the ‘accumulation of events’ theory. Lastly, it is unclear whether the States who charged Israel with aggression were doing so in the context of the legal form of the phrase, but there is also support to be taken from these interventions for the proposition that aggression can occur against non-State actors, and even within territory under the control of the defending State.