The Gaza Flotilla and International Law

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Further politicization of the global legal system

Monday, August 1, 2011 27 min read By: Peter Berkowitz

On may 31, 2010, in defense of a naval blockade imposed on the Gaza Strip, Israel seized control of the Mavi Marmara in international waters, detained the passengers, and towed the ship to the Israeli port city of Ashdod. During the previous three days and without incident, Israel had boarded, inspected, and brought to Ashdod the other five ships that had set sail from Turkey as part of the "Gaza Freedom Flotilla." But on the Mavi Marmara, passengers wielding pipes, knives, and axes attacked Israeli commandos as they rappelled from helicopters down to the ship's deck. Nine passengers were killed in the operation and several dozen were injured. Seven commandos were injured as well.

The flotilla's ostensible purpose was to bring humanitarian goods to the Palestinian population of Gaza. In fact, humanitarian goods had been arriving in Gaza over land through Israel, and Israel had repeatedly volunteered to deliver the flotilla's humanitarian cargo through the established land crossings. The flotilla's real and obvious goal was, as one of the organizers put it, "breaking Israel's siege."

The international outcry in response to Israel's raid on the Mavi Marmara was immediate. Little attention was given to the Turkish flotilla's deliberate provocation or to the possibility that Israel had acted ineptly or unwisely. The focus rather was on the accusation, often couched as a conclusion, that Israel had acted unlawfully.

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On May 31, almost as soon as the news broke, un Secretary General Ban Ki Moon insisted that it was incumbent upon Israel to explain its actions to the world: "I condemn this violence . . . it is vital that there is a full investigation to determine exactly how this bloodshed took place . . . I believe Israel must urgently provide a full explanation."

Also on May 31, Richard Falk, un special rapporteur on the Situation of Human Rights in the Occupied Palestinian Territory, immediately pronounced Israel in egregious violation of international law: "Israel is guilty of shocking behavior by using deadly weapons against unarmed civilians on ships that were situated in the high seas where freedom of navigation exists, according to the law of the seas." Falk called for an investigation on the grounds that "It is essential that those Israelis responsible for this lawless and murderous behavior, including political leaders who issued the orders, be held criminally accountable for their wrongful acts." He characterized the Gaza blockade as "a massive form of collective

punishment" constituting "a crime against humanity, as well as a gross violation of the prohibition on collective punishment in Article 33 of the Fourth Geneva Convention." He insisted that failure to punish Israel's lawlessness would itself be criminal: "As special rapporteur for the Occupied Palestinian Territories, familiar with the suffering of the people of Gaza, I find this latest instance of Israeli military lawlessness to create a situation of regional and global emergency. Unless prompt and decisive action is taken to challenge the Israeli approach to Gaza all of us will be complicit in criminal policies that are challenging the survival of an entire beleaguered community." Such was Israel's "flagrant flouting of international law" that, to end its blockade of Gaza, Falk concluded, "the worldwide campaign of boycott, divestment, and sanctions against Israel is now a moral and political imperative, and needs to be supported and strengthened everywhere."

Many nations promptly condemned Israel and some presumed its guilt that day. According to the bbc, within hours of the boarding of the Mavi Marmara French Foreign Minister Bernard Kouchner announced he was "deeply shocked" by Israel's action and called for an inquiry, and French President Nicolas Sarkozy accused Israel of a "disproportionate use of force." Sweden summoned the Israeli ambassador to discuss the "unacceptable action." The Turkish foreign ministry issued a statement declaring the incident a "flagrant breach of international law" while Turkish Prime Minister Recep Tayyip Erdogan proclaimed Israel's raid "totally contrary to the principles of international law" and an act of "inhumane state terrorism." And the Arab League called for an emergency meeting the next day to discuss Israel's "terrorist act."[1]

On June 1, the un Security Council issued a presidential statement. By condemning Israel's raid and by demanding a "prompt, impartial, credible, and transparent investigation conforming to international standards," the Security Council indicated that there was sufficient evidence to be concerned that serious breaches of international law had occurred.

Not to be outdone, the notorious un Human Rights Council on June 2 issued resolution 14/1 on "The Grave Attacks by Israeli Forces against the Humanitarian Boat Convoy."[2] The hrc resolution "condemns in the strongest terms the outrageous attack by the Israeli forces against the humanitarian flotilla of ships which resulted in the killing and injuring of many innocent civilians from different countries." And it authorized "an independent, international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance."

The widespread accusations of unlawful conduct directed at Israel — coming, it should be said, not from some abstract international community, but from officers and official bodies of the un, European states, Turkey, and Arab states — were high on outrage and low on legal analysis. This is in keeping with the growing tendency in international affairs to transform hard political questions into conclusive legal judgments. The transformation increasingly yields gross abuses of law fraught with substantial political implications. The denunciations

of Israel's response to the Gaza Flotilla provide a case in point. To counteract the harm they can cause to a state's interests when they gain international currency and exert worldwide influence, even far-fetched and perverse legal arguments must be addressed and refuted in legal terms.

In fact, the legality of Israel's stopping and seizing of the Mavi Marmara and the other five ships of the Gaza Freedom Flotilla turned on the legality under international humanitarian law (a part of the international law of war governing the conduct of war, also known as ihl, the law of armed conflict, or the laws of war) of the naval blockade. If the blockade was legal, then Israel was perfectly within its rights to stop on international waters ships whose announced intention was to break it, and Israeli commandos were within their rights to defend themselves against the potentially lethal attacks to which they were subject as they boarded the Mavi Marmara. Israel's blockade was legal given the state of armed conflict between Israel and Hamas, the de facto ruler of Gaza; the widely accepted use of naval blockades in war; and the conformity of Israel's blockade to the requirements of maritime law — it was duly declared, effective, nondiscriminatory, and allowed the passage of humanitarian assistance to the civilian population of Gaza.

Israel neither has troops stationed in Gaza nor exercises the functions of government there.

Many, however, continue to contend the blockade is illegal. According to the standard argument, the blockade violates international law because — notwithstanding its disengagement from Gaza in the summer of 2005, in which Israel withdrew every soldier and every civilian, and despite the absence of any Israeli soldiers or citizens in Gaza on May 31, 2010, when the Mavi Marmara was seized — Israel continues to be an occupying power of Gaza, and as such is barred from undertaking acts of war, such as a naval blockade, against the Palestinian people of Gaza.

The standard argument, however, is at best weak and generally groundless and incoherent. It twists well-settled concepts, distorts basic categories, overlooks or obscures crucial facts, misreads critical cases, and ignores fundamental legal principles. To put the matter succinctly, since it neither has troops stationed in Gaza nor exercises the functions of government there, Israel does not exercise "effective control" of Gaza, and therefore does not meet the test that international humanitarian law establishes to determine whether a territory is occupied by a hostile power.

More importantly, the argument over whether Israel occupies Gaza is ultimately irrelevant to determining the legality of its naval blockade. Even if Israel were deemed the occupying power, it would not lose its inherent right of self-defense, recognized by the un charter and international law, to repel acts of aggression. By virtue of its public declarations, its bombardment of civilian populations in Israel, its unremitting efforts to conduct terrorist operations against Israel, and, after Israel's December 2008-January 2009 Gaza operation, its rearmament in preparation for the renewal of rocket and missile attacks, Hamas has been

in a condition of persistent, widespread, and organized war with Israel since it seized control of Gaza by force in June 2007. Accordingly, Israel is entitled under international law to impose a naval blockade to prevent Hamas from acquiring additional weapons of war. Of course Israel remains obliged to permit civilians' humanitarian requirements to be met.

The acceptance of poor arguments on behalf of the widespread opinion that the Israeli blockade of Gaza is illegal threatens the integrity of the international law of war. As in the case of the Goldstone Report before it, in the case of the Gaza Flotilla again, influential international public opinion has coalesced around a view of the law of armed conflict that substitutes propaganda for credible legal analysis. As with the Goldstone Report controversy, so too with the Gaza Flotilla controversy: Exposing the abuses to which the international law of war has been subject and setting forth a sounder view is critical to conserving it, and is a task in which all nations devoted to the rule of law have a stake — liberal democracies in particular, and especially liberal democracies such as the United States that are actively engaged in armed struggle against transnational terrorists. And as with the Goldstone Report, so too with the Gaza Flotilla controversy, that task requires a critique of the majority view; a restatement of longstanding principles of the law of armed conflict; and, above all, a recovery of the imperative to strike a reasonable balance between military necessity and humanitarian responsibility, the imperative out of which the international law of war emerged and which must remain its governing goal.[3]

The occupation argument

To vindicate the standard argument that Israel is prohibited from maintaining a naval blockade of Gaza because it is an occupying power, proponents must overcome the well-settled definition of occupation and the established test for determining whether an occupation has come into existence.

The law of occupation is rooted in two principal sources. According to Article 42 of the 1907 Hague Regulations, "territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."[4] And Article 6 of the Fourth Geneva Convention indicates that a state achieves established authority and becomes an occupying power in a territory "to the extent that such Power exercises the functions of government in such territory."[5]

The legal test is whether the hostile army has placed territory and its population under "effective control." As Elizabeth Sampson, on the basis of an extensive review of the legal materials, observes, "In the context of international occupation law, 'effective control' is a term of art with no definite source, but it has developed as the standard that combines the conditions for occupation outlined in the Hague Regulations and the Fourth Geneva

Convention."[6] Case law and state practice, moreover, indicate general agreement that to exercise effective control in the legally relevant sense is to perform the functions of government, which typically requires troops in the territory.

During Operation Cast Lead, Israel imposed a naval blockade to prevent the arrival into Gaza of weapons.

Israel in Gaza obviously does not meet the test as commonly understood. Israel has not had troops stationed in Gaza, or indeed any permanent presence there, military or civilian, since September 2005, when it completed the disengagement process it began the month before. When Israel left Gaza, the Palestinian Authority took over the functions of government, which it exercised until June 2007, when Hamas violently overthrew it and took control. Since then, Hamas has exercised the functions of government in Gaza. In late December 2008, Israel launched Operation Cast Lead, the aim of which was to stop Hamas's firing of shells, rockets, and missiles at civilian populations in the southern part of the country. Early on in the three-week operation, Israel imposed a naval blockade to prevent the arrival into Gaza of weapons and other military supplies. At the conclusion of the operation, Israel brought home all troops, but maintained the blockade.

Nevertheless, influential segments of international public opinion and international legal opinion insist that Israel occupies Gaza. The routine characterization of Gaza as occupied — in, among other places, the un Human Rights Council, General Assembly, and Security Council resolutions[7] — is backed by a set of oft-repeated legal arguments. Among the leading advocates of the standard argument is Noura Erakat, adjunct professor of international human rights law in the Middle East at Georgetown University and the U.S.-based legal advocacy coordinator for Badil Resource Center for Palestinian Residency and Refugee Rights.

To maintain that since its complete withdrawal from Gaza in 2005 Israel has occupied Gaza, Erakat must reinterpret the meaning of "effective control." Crucial to her position is rejection of the view that a hostile military presence throughout the territory is required by the "effective control" test. Rather, she points to decisions by the Nuremberg Tribunal and the International Criminal Tribunal for the former Yugoslavia that, according to her, consider an occupation ongoing provided there remains "the capacity to send troops within a reasonable time to make the authority of the occupying power felt."[8] Israel retains this capacity, Erakat contends, and, through repeated military operations since the Gaza disengagement, has demonstrated its willingness to use it.

In practice, according to Erakat, Israel exercises control over the Palestinians of Gaza in a variety of ways. Because it controls entrance into and exit from Gaza, including control of land crossings and all air and sea access to Gaza, Israel determines the flow of people and goods in and out of Gaza. Israel controls Gaza's electricity supply, giving it the power to turn the lights on and off. Israel's restrictions on the entry into Gaza of "dual-use" goods — that is,

goods that can be used for military as well as civilian purposes — has created a shortage of spare parts to maintain wastewater treatment plants. Furthermore, Israel retains control over some of Gaza's telecommunications networks, its electromagnetic sphere, its fuel supply, and its population registry, as well as the collection and distribution of a substantial amount of Palestinian tax revenue.

Among proponents of the standard argument, some of whom are Israeli, it is commonly asserted that the primary purpose of the closure policy is not to maintain security but to exert pressure.[9] Even Israel's Turkel Commission Report, authorized by the government to investigate the Gaza Flotilla controversy, grants that "it would be a mistake to examine the circumstances of imposing the naval blockade from a narrow security perspective only" because the blockade is also intended as "indirect economic warfare" to put political pressure on Hamas.[10] Many opponents of the blockade allege that Israel has used disproportionate force by depriving an entire civilian population of sufficient quantities of basic goods because a few militants have been firing relatively ineffectual rockets.[11] Furthermore, Erakat argues, Israeli troops might as well be stationed in Gaza inasmuch as in its disengagement plan, "Israel reserved the right to use force against Palestinians living in Gaza in the name of preventive and reactive self-defense."[12]

What the various forms of control Israel exercises over Gaza add up to, concludes Erakat, is clear: "The confluence of its ongoing control, its continuous military operations, as well as its capacity to redeploy its troops within a reasonable time demonstrate that Israel remains in effective control of the Gaza Strip."[13] Therefore, despite lacking troops on the ground and the absence of any involvement in the governing of Gaza, Israel should be seen under international humanitarian law as occupying Gaza.

Accordingly, the standard argument continues, Israel is barred by international law from taking military action — attacks, blockades, or otherwise — against it. In particular, Article 43 of the Hague Regulations imposes significantly greater limits on the force that can be legally used by an occupier than by belligerents at war, requiring that the occupier "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[14] Accordingly, as occupier, Israel shoulders responsibility for enforcing the rule of law in Gaza. Some go so far as to suggest that any terrorist activity originating there, such as the launching of mortars and rockets, is Israel's fault for failing to fulfill its obligations to maintain law and order.[15]

Moreover, the standard argument holds that as occupier Israel is restricted by international humanitarian law to the use of law enforcement measures to respond to violence originating within Gaza. A military response would be inherently disproportionate. Indeed, Erakat hints that even the use of firearms by Israel in the discharge of its obligation to police Gaza might be considered an "extreme measure."[16] If Israel were allowed under international law to use its military might rather than rely on law enforcement, it would put the Palestinian residents

of Gaza in the impossible position of defending themselves against one of the world's most powerful armies "without the benefit either of its own military, or of any realistic means to defend itself."[17] Israel's claim that it is compelled to use military force in Gaza is, according to Erakat, nothing less than a "deliberate effort to shift [international humanitarian law] by insisting that it can simultaneously be at war with the entity that it occupies."[18]

The critique of the occupation argument

In reality, it is proponents of the standard argument such as Noura Erakat who seek to shift international law, indeed to fundamentally rewrite it. Their view that Israel occupies Gaza cannot withstand scrutiny. It lacks foundations in the principles of international law and is at odds with common sense understandings of war and peace.

The challenge for Erakat and the standard argument that she champions is to show that despite lacking boots on the ground and not performing the functions of government, Israel nevertheless exercises effective control over and therefore occupies Gaza. Such success as Erakat's legal arguments have enjoyed as legal arguments depends on sophistry. Erakat treats a single potential indicator of occupation — the ability to deploy troops at will — as if it were a conclusive determinant, and she substitutes the colloquial meaning of "effective control," namely, the ability to exercise significant influence, for the legal meaning under international law, which is to govern by force.

The first part of Erakat's argument for occupation — that Israel can deploy troops at will in Gaza — is exposed to an immediate objection: "Military superiority over a neighbor does not itself constitute occupation. If it did, the U.S. would have to be considered the occupier of Mexico and Canada, Egypt the occupier of Libya, Iran the occupier of Afghanistan, and Russia the occupier of Latvia."[19] In fact, Erakat suppresses the restricted circumstances under which international law regards the ability to deploy troops at will as an indicator of occupation.

The icty case she cites as the leading authority, The Prosecutor v. Naletilic & Martinovic — Case No. IT-98-34-T (2003), states that "to determine whether the authority of the occupying power has been actually established," several "guidelines provide some assistance." The court provided a list:

- The occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly.
- The enemy's forces have surrendered, been defeated, or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation.
- The occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt.

- A temporary administration has been established over the territory; the occupying power has issued and enforced directions to the civilian population.[20]

No one of these guidelines is conclusive, none can be applied mechanically, and taken together they show that the core meaning of occupation under international law coincides with the common sense meaning and consists in subduing a civilian population by force and governing it by force.

The guidelines elaborated in the ICTY case clearly indicate that Israel's relationship to Gaza is not that of occupier.

Taken together, the guidelines elaborated in the icty case that Erakat takes as authoritative clearly indicate that Israel's relationship to Gaza falls well outside the legal definition of occupier. Despite the readiness of Israeli troops to defend against terrorist incursions and mortar, rocket, and missile attacks from Gaza, Hamas continues to govern Gaza; it has not been rendered incapable of functioning publicly; it has not surrendered or been defeated or withdrawn; and Israel does not administer Gaza or issue and enforce directives to the civilian population.

The circumstances, according to the icty Trial Chamber, under which the laws of occupation apply absent physical occupation shed additional light on the erroneousness of Erakat's view that Israel's ability to send troops into Gaza is legally decisive evidence that it is an occupying power. The court explained that the forced transfer of people and forced labor are prohibited from the moment civilians fall into the hands of the opposing power, regardless of the stage of hostilities and irrespective of whether the hostile power has established an actual state of occupation as defined in Article 42 of the Hague Regulations. If a state has a degree of effective control that falls short of actual control, it will only be considered an occupier for the purposes of international law if that control is used to compel people to migrate or perform work involuntarily. In such circumstances, Geneva protections for occupied populations take effect, regardless of whether the hostile army has boots on the ground or exercises the functions of government.

Such circumstances, however, are not present in Israel's relation to Gaza. Israel is neither forcing anyone to leave Gaza nor compelling anyone to labor against his or her will. Once again, the very icty opinion that Erakat cites as authority for the legal judgment that Israel, despite the absence of troops and the fact of Hamas's control of the government, occupies Gaza, explains why, under international law, Israel cannot properly be considered Gaza's occupier.

The second part of Erakat's argument for occupation — that Israel exercises extensive forms of control over Gaza — appeals, like the first part, to certain observable facts but depends on disregarding the clear application of the law to them. To be sure, as Erakat stresses, Israel

does strictly limit the movement of people and goods in and out of Gaza, thus creating conditions that make it difficult for all Gazans to travel and for many to work. But extensive control is not, under the law of armed conflict, synonymous with effective control.

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To begin with, Erakat wrongly asserts that Israel exercises complete control over Gaza's borders.[21] In fact, Egypt has controlled the Rafah crossing from Gaza into the Sinai Peninsula since Israel's disengagement in the summer of 2005 and maintained severe restrictions on the movement of goods and people through Rafah up until May 2011, when it relaxed restrictions. In addition, the effects on movement and labor stemming from the forms of control Israel does exercise over Gaza are exactly the opposite of those that the icty specifies as necessary, in the absence of boots on the ground and operation of the government, to trigger application of the laws of occupation. Instead of suffering forced migration, Israeli policy causes Palestinians in Gaza to stay put; and rather than being subject to forced labor, Palestinians in Gaza find themselves, as a result of Israel's response to Hamas, underemployed or unemployed.

Such hardships, however, do not define occupation. In fact, they are among the consequences one would expect of war, even where the law of armed conflict is scrupulously observed. And Hamas not only believes that it is at war with Israel. It undertakes acts — launching mortars, rockets, and missiles at Israeli civilian populations; continued mobilization for armed conflict; and constant planning and undertaking of terrorist incursions — that meet the settled definition of aggression, namely acts that threaten a state's territorial integrity or political independence.[22]

Although Hamas's precise legal status is open to question — Gaza is not a state, and Hamas came to power by overthrowing the Palestinian Authority — Hamas is the de facto ruler of Gaza and has exercised the functions of government there since it seized control in June 2007. Notwithstanding its designation as a terrorist organization by the U.S. State Department and the European Union, Hamas operates in Gaza a full range of ministries, a police force, and a military, and makes and enforces the law. Consequently, Israel cannot be said to exercise effective control over Gaza in the legally relevant sense. Any attempt by Israel to exert the "effective control" Erakat insists it still retains by imposing law and order on Gaza would quickly clarify that Israel lacks effective control in Gaza, in both the legal and the colloquial sense. To have prevented Hamas from launching rockets in the first place, as Erakat and others suggest it should have, would have required Israel to mount a full-scale invasion in 2007 when Hamas overthrew the Palestinian Authority. Such an action would have made Operation Cast Lead look like a minor border skirmish.[23]

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At the same time, Hamas's launching of mortars, rockets, and missiles against Israel does not reflect a failure on its part to maintain law and order. Rather, it displays Hamas's determination to wage war against Israel, indeed a kind of war that is strictly forbidden by international law.

Hamas reaffirmed its criminal intentions in the wake of Justice Richard Goldstone's stunning reconsideration, appearing April 1, 2011, in the Washington Post, in which, among other things, he withdrew the gravest charge the Goldstone Report leveled against Israel — that in Operation Cast Lead Israel had, as a deliberate policy, sought to terrorize the civilian population of Gaza.[24] Goldstone also applauded Israel for launching more than 400 investigations of allegations of criminal wrongdoing arising from the Gaza operation and expressed disappointment that Hamas had not undertaken a single one. When asked by the New York Times to respond to Goldstone's disappointment, Hamas Justice Minister Mohammad al-Ghoul said that "there was nothing to investigate because shooting rockets was 'a right of self-defense of the Palestinian people in the face of the Israeli invasion and mass killing of Palestinians.'"[25]

Justice Minister al-Ghoul's statement is factually erroneous and legally wrong, but it gives clear expression to Hamas's criminal military strategy and objectives. Contrary to Minister al-Ghoul, there is no right under international law, in self-defense or otherwise, to deliberately target civilians. At the same time, the shooting of rockets at civilians for which Minister al-Ghoul matter-of-factly takes responsibility, and which the Goldstone Report properly characterized as war crimes, did not take place in response to Israel's Gaza operation. Indeed, Hamas launched thousands of projectiles at Israeli civilians after Israel's withdrawal from Gaza in September 2005 and before Operation Cast Lead began in December 2008. Israel's Gaza operation was a response to Hamas attacks on civilians, not the other way around.

Given Hamas's officially declared intentions, its sustained aerial assault on Israeli civilians should not be surprising. Hamas's principal aim in waging war against Israel is not to end a supposed occupation of Gaza or to break a naval blockade, but rather to annihilate Israel. Hamas's Charter makes this abundantly clear: "Israel will exist and will continue to exist until Islam will obliterate it" (Preamble). "Hamas strives to raise the banner of Allah over every inch of Palestine" (Article 6). "There is no solution for the Palestinian question except through Jihad" (Article 13).[26]

The emptiness of the standard argument that Israel occupies Gaza was further confirmed in March of this year by an authoritative source — the un Security Council.[27]un Security Council Resolution 1973 — adopted by a vote of ten in favor, none against, and five abstentions — authorized the use of military force to protect civilians against Muammar Gadaffi's fighters, imposed a no-fly zone across the entire country, and tightened the asset freeze and arms embargo established by un Security Council Resolution 1970, while at the same time declaring that Libya was not and would not be occupied.[28] If, despite the extensive forms of

control that nato forces and the Arab League exercise over Libya under Resolution 1973, they could not be considered occupying powers, then it follows that Israel, which exercises lesser forms of control over Gaza cannot, consistent with international law, be deemed an occupying power of Gaza.

The inherent right of self-defense

The ultimate ground of Israel's naval blockade of Gaza — as well as of Operation Cast Lead and of the various measures that it continues to take to protect itself against Hamas mortar, rocket, and missile attacks and more — is its inherent right of self-defense. In exercising this right, Israel is obliged to honor the cornerstones of international humanitarian law: The principle of distinction requires fighters to distinguish civilians and civilian objects and prohibits attacking them;[29] and the principle of proportionality bars attacks on legitimate military targets that knowingly produce harm to civilians and civilian objects that is excessive in relation to the military advantage gained.[30] The proper legal question to ask in regard to any exercise of force is whether it conforms to the principles of distinction and proportionality. That would be true even if Israel were regarded as an occupying power.

A state's inherent right of self-defense stems from the right of the individuals in the state to defend themselves.

The un Charter, Article 51, declares, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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."[31] The tendency among international lawyers is to adopt a narrow reading, contending that the right of self-defense can only be exercised in response to an attack, and that once the Security Council is seized of a matter states are barred from exercising their right even if the attack continues. Yet as Abraham Sofaer points out, "Advocates of a narrow interpretation of Article 51 disregard the substantial authority that exists among scholars and in state practice for a more flexible approach."[32] That more flexible approach is more consistent with the un Charter's language, which recognizes that states' inherent right of self-defense is not conferred upon them by the un or by international law. Instead, as Michael Walzer argues in his classic study, Just and Unjust Wars, nations' inherent right to defend themselves stems from the inherent right of the individuals who compose states to defend themselves and provides the foundation of the modern state system and the international law of war.[33]

Proponents of a narrow reading of Article 51, moreover, argue from the mistaken assumption that the more flexible interpretation of the inherent right of self-defense undermines international peace and security by inviting states to take the law into their own hands. But, as Sofaer stresses, "Self-defense is a key element in any sensible program to supplement the inadequate, collective efforts of the Security Council."[34] History provides ample evidence that the Security Council cannot be counted upon to counter aggression swiftly and decisively.

Consequently, exercise of the inherent right of self-defense is critical to upholding international order and vindicating the principle that aggression is criminal and will not be tolerated. At the same time, "Actions in self-defense," as Sofaer observes, "should be judged by their reasonableness, as are issues of force in any other contests of law enforcement and national law."[35] In international humanitarian law, the decisive measures of reasonableness are the principles of distinction and proportionality.

Israel is barred from invoking a right of selfdefense against Hamas fighters, Erakat argues, because they are nonstate actors.

In the last analysis, the question of the legality of Israel's blockade should be whether it distinguishes civilians and civilian objects and represents a proportionate response to Hamas's declared jihad against it. As the Turkel Commission Report argues, Israel's naval blockade conforms to the requirements of international maritime law, including allowing for the passage of humanitarian relief to the Gazan civilian population, and so does meet the requirements of proportionality.[36] Moreover, as an exercise of force aimed at preventing armed attacks by Hamas, Israel's naval blockade is considerably more protective of Gaza's civilians than the obvious alternative, a land invasion that would inevitably cause substantial civilian death and destruction because of Hamas's criminal military strategy of operating in civilian areas while disguised as civilians.

Erakat displays the argumentative extremes to which she is willing to go by contending that Israel's inherent right of self-defense does not apply to Palestinian aggression. Israel is barred from invoking a right of self-defense against Hamas fighters, she argues, because they are nonstate actors. Her authority for this remarkable notion is the International Court of Justice. On this occasion, Erakat, alas, accurately reports the court's opinion. She fails to note, however, that this aspect of the opinion is widely regarded as bizarre, and is inconsistent with state practice, for example that of the United States for nearly a decade in its use of armed force against the Taliban in Afghanistan and Pakistan.

In her most comprehensive article on the blockade, Erakat maintains that the International Court of Justice's "Advisory Opinion on the Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory" (2004)[37] stands for two crucial propositions: first, "that a non-state entity cannot trigger Article 51 self-defense"; and second, that attacks that originate within occupied territory where the law of occupation applies distinguish the case of Gaza attacks on Israel from al Qaeda's September 11 attack on the U.S. and therefore "[un Security Council] Resolutions 1368 and 1373, which authorize the invocation of Article 51 self-defense against al-Qaeda, are distinct from, and nonapplicable to, the Occupied Palestinian Territories."[38]

There have always been nonstate entities that present threats to states' territorial integrity or political independence.

In regard to Erakat's first proposition, in providing that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations," Article 51 does not require the attacker to be a state. Nor is that surprising: Even as the rise of terrorists armed with weapons of mass destruction has confronted international law with novel and difficult questions, there have always been nonstate entities, within states as well as in border regions of questionable territorial allegiance, that present threats to states' territorial integrity or political independence. And it is this criterion — whether an act presents a threat to state's territorial integrity or political independence — that determines whether the crime of aggression has been committed and states' inherent right of self-defense has been triggered. Subjecting one million citizens to the daily danger, and heavy civic and commercial dislocations, of mortar, rocket, and missile attacks as well as the ever present threat of terrorist incursion — as Hamas has done for many years to the civilians of southern Israel — threatens Israel's territorial integrity and political independence and so constitutes under the international law of war criminal aggression by Hamas.

Oddly, Erakat herself provides substantial and compelling scholarly authority to establish that she and the icj ruling on which she relies are in error to argue that "a non-state entity cannot trigger Article 51 self-defense." As it happens, several sources in support of the conclusion that a nonstate entity can trigger Article 51 self-defense are contained in her footnote 100, which she offers in defense of the proposition that it can't:

> See e.g., Ruth Wedgwood, "The icj Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense" . . . ("The Charter's language does not link the right of self-defense to the particular legal personality of the attacker. In a different age, one might not have imagined that nonstate actors could mimic the force available to nation states, but the events of September 11 have retired that assumption."); See also Geoffrey Watson, Self-Defense and the Israeli Wall Advisory Opinion: The "Wall" Decisions in Legal and Political Context . . . (Watson argues that the icj's decision is "expansive and sweeping" and fails to conduct a proper analysis of law and fact.); See also Sean D. Murphy, Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit From the icj . . . ("First, nothing in the language of Article <<span class="smallcaps">51 of the Charter requires the exercise of self-defense to turn on whether an armed attack was committed directly by, or can be imputed to, another state. Article 51 speaks of the right of self-defense by a 'Member of the United Nations' against an armed attack, without any qualification as to who or what is conducting the armed attack. The 'ordinary meaning' of the terms of Article 51 provides no basis for reading into the text a restriction on who the attacker must be.")[39]

Contrary to her apparent intention, Erakat highlights international law's convergence with the common-sense idea that states may exercise their right of self-defense against any actors, including nonstate actors, that threaten their territorial integrity or political independence.

Even though Israel clearly does not occupy Gaza, it is worth noting that Erakat's second proposition, that attacks coming from occupied territory can never trigger a state's inherent right of self-defense, is also in error. Many articles in the Geneva Conventions that deal with the protection of civilians nevertheless recognize that in cases of military necessity humanitarian responsibilities do not cancel the right of self-defense. For example, the Geneva Conventions, Additional Protocol 1 (1977), Article 54, Sect. 5, concerns the obligation of occupying powers to prevent starvation and provide foodstuffs. It provides that

> In recognition of the vital requirements of any Party to the conflict in the defense of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.[40]

Thus, notwithstanding the responsibilities owed by occupiers to civilians under their control, a state that is an occupying power may, in a situation of military necessity, exercise its inherent right of self-defense, which means using military force to defeat threats to its territorial integrity or political independence. And to repeat, a state's exercise of its inherent right of self-defense does not suspend international law, because it remains obliged to exercise its right reasonably, that is, in conformity with the principles of distinction and proportion.

In sum, one may plausibly argue that Israel's handling of the seizure of the Mavi Marmara was inept or unwise, and one may plausibly contend that it involved the application of disproportionate force. But one cannot — as Noura Erakat, the un Human Rights Council, Turkey, Arab states, and European states try to — argue coherently and in keeping with well-established principles of international humanitarian law that Israel's blockade is inherently illegal. In imposing a maritime blockade on Gaza that allows for the passage into it of goods that satisfy the basic requirements of the civilian population, Israel is exercising its inherent right of self-defense against Hamas, the ruling power in Gaza, which is waging against it a religious war that aims at Israel's total destruction.

Conserving the international law of war

The standard arguments for viewing Israel's blockade of Gaza as unlawful are unsound and insubstantial. Their popularity reflects the determination to subordinate the international law of war to partisan political goals. Since the international law of war stands or falls with its claim to transcend partisan controversies and rise above the political fray, and since the international law of war is a vital component of a freer, more peaceful, and more prosperous world order, most nations and certainly all liberal democracies have a vital interest in defending its integrity. That defense must devote considerable attention to the controversies in which Israel has become embroiled, because the sustained campaigns to criminalize Israel's exercise of its inherent right of self-defense are among the gravest abuses to which the international law of war has been subject.

When it comes to Israel's exercise of military force, critics — lawyers and non-lawyers alike — exhibit a tendency to infer criminal conduct from civilian harm. This is certainly true of the Gaza Flotilla controversy and the Goldstone Report. The inference, however, which involves an elevation of humanitarian responsibility and a disregard of military necessity, is invalid under the law of armed conflict. The main tests of criminality in war are distinction and proportionality. They require fighters to strike a reasonable balance between humanitarian responsibility and military necessity, which sometimes are mutually reinforcing but also can be in tragic tension. Proper application of the laws of war necessitates an inquiry not only into the identity and suffering of civilians but also into tactics and strategy, battlefields and weapons, what troops and commanders knew and what they reasonably could have known. And thus their proper application depends not only on an understanding of fighters' responsibilities toward noncombatants but also on expertise in the intricacies of battle and the requirements of victory. The inherent difficulties of applying distinction and proportionality are compounded when, as is the case with Hamas, one side unlawfully abandons the use of uniforms, refuses to carry its arms openly, hides amidst civilian populations, stores arms in ostensibly civilian facilities, and fires mortars, rockets, and missiles from civilian areas. Such blatantly unlawful conduct inevitably increases civilian casualties. But the international law of war is clear: Fighting forces that operate among civilians remain legitimate military targets, and fighters who use civilian areas and structures for military purposes cause them to lose their immunity.

The great revolution in military affairs over the last 60 years by means of which the conduct of war has come under vastly greater legal supervision continues apace. In many respects it has made war more humane. At the same time, it has been accompanied by a politicization of the international law of war that threatens to reward terrorism and impair the right of liberal democracies to defend themselves. No cure or corrective will succeed that does not give close attention to the education of the next generation of lawyers, scholars, soldiers, and statesman. The young men and women who will assume responsibility for the preservation and elaboration of the international law of war need to be trained to appreciate both humanitarian responsibility and military necessity, and to respect the distinction between politics and law. Consequently, conserving the international law of war awaits a major reform of educational affairs.

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[1] The bbc timeline of events "As it happened: Israeli raid on Gaza flotilla" is available at http://www.bbc.co.uk/news/10196585.

[2] Available at http://domino.un.org/unispal.nsf /0/4d2f5b28bb470a8e8525773d0051f543?. In favor (32): Angola, Argentina, Bahrain, Bangladesh, Bolivia, Bosnia and Herzegovina, Brazil, Chile, China, Cuba, Djibouti, Egypt, Gabon, Ghana, India, Indonesia, Jordan, Kyrgyzstan, Mauritius, Mexico, Nicaragua, Nigeria, Norway, Pakistan, Philippines, Qatar,

Russian Federation, Saudi Arabia, Senegal, Slovenia, South Africa, and Uruguay. Against (3): Italy, Netherlands, and United States of America. Abstentions (9): Belgium, Burkina Faso, France, Hungary, Japan, Republic of Korea, Slovakia, Ukraine, and United Kingdom. Vote count and discussion available at http://unispal.un.org/UNISPAL.NSF/0/64C49CB9EFCA5BAB852577360055ADE6

[3] See also "The Goldstone Report and International Law," Policy Review 162 (August & September 2010), available at http://www.hoover.org/publications/ policy-review/article/43281.

[4] Available at http://www.icrc.org /ihl.nsf/full/195

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[6] Elizabeth Sampson, "Is Gaza Occupied? Redefining the Legal Status of Gaza," Mideast Security and Policy Studies 83 available at http://www.biu.ac.il/Besa/MSPS83.pdf.

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[8] Noura Erakat, "It's Not Wrong, It's Illegal: Situating the Gaza Blockade Between International Law and the un Response" (2010), 11, available at http://www.law.utoronto.ca/documents/ihrp/NouraErakatarticle.pdf.

[9] "Gaza Closure Defined: Collective Punishment" is available at http://gisha.org/UserFiles/File/ publications/GazaClosureDefinedEng.pdf.

[10] The Turkel Commission Report is available at http://www.turkel-committee.gov.il/index.html.

[11] Victor Kattan, "Operation Cast Lead: Use of Force Discourses and Jus Ad Bellum Controversies," The Palestine Handbook of International Law (2009), available at http://www.victorkattan.com/ cmsAdmin/uploads/Victor_Kattan_BRILL.pdf

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[13] Erakat, "It's Not Wrong, It's Illegal," 13, available at http://www.law.utoronto.ca/documents/ihrp/NouraErakatarticle.pdf.

[14] Available at http://www.icrc.org/ihl.nsf/WebART/195-200053?OpenDocument.

[15] Kattan, “Operation Cast Lead,” 109–110; “The occupation of the Gaza Strip and the continued renouncement of responsibility,” International Law Observer (2008), available at http://internationallawobserver.eu/2008/10/ 24/the-occupation-of-the-gaza-strip-and-the-continued-renouncement-of-responsibility/.

[16] Erakat, “It’s Not Wrong, It’s Illegal,” 15. (Erakat quotes from Marco Sassoli’s paper “Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century.”) See also Kattan, “Operation Cast Lead.”

[17] Erakat, “It’s Not Wrong, It’s Illegal,” 20. Erakat references George E. Bisharat et al, “Israel’s Invasion of Gaza in International Law,” Denver Journal of International Law and Policy, 38:1 (2009), available at http://law.du.edu/documents/ djilp/38No1/Bisharat-Final.pdf.

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[19] Avraham Bell and Justus Reid Weiner, “International Law and the Fighting in Gaza” (2008), 18, available at http://www.jcpa.org/text/puzzle1.pdf.

[20] The icty’s Prosecutor v. Naletillic is available at http://www.icty.org/x/file/Legal%20Library/ jud_supplement/supp42-e/naletilic.htm.

[21] Erakat, “It’s Not Wrong, It’s Illegal,” 12.

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[30] "Customary ihl," Rule 14, is available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14.

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[33] Michael Walzer, Just and Unjust Wars (Basic, 2000), 51–73 (in particular 51–64).

[34] Sofaer, "International Security and the Use of Force," 561.

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[37] Available at http://www.icj-cij.org/docket/ index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4.

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[39] Erakat, "It's not Wrong, It's Illegal," 19–20.

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