The assault on Gaza marks the end of an era for Israel. For the second time in two years its colonial ambition has fountained in the face of determined resistance. It may persist for some time; but the trajectory is clear — it is losing both legitimacy and power. Support for it is dwindling in Washington; its friends are alarmed. Citizens are acting where government has failed. The momentum for boycott, divestment and sanctions is snowballing. Apologists are finding it more difficult to justify its persistent criminality. Riots have emerged in the transatlantic alliance over its recent actions; EU leaders have broken with Israel and the US, questioning the wisdom of continuing to isolate Hamas, on the pliant Tony Blair will no longer toe the line.

This debate may yet be tamed, accountability restored; but that path, if any, will international law have played in this?

At one point in Errol Morris’s 2004 documentary ‘Fog of War’, former US Secretary of Defence Donald Rumsfeld recounts a conversation he had had with General Curtis LeMay of the United States Air Force in a pre-emptive bombing of Japanese cities. LeMay, according to McNamara, said that if the US ended up losing the war “we would be hanged for this.” As it transpired, the US did lose; and far from being hanged, the allied command got to play hangman.7 The trials that led to the execution of German and Japanese high command assumed a broader significance; they became the founding documents of international law. The conclusions from these trials served as the basis for the Genocide Convention (1948), the Universal Declaration of Human Rights (1948), the Nuremberg Principles (1950), The Convention on the Abolition of the Statute of Limitations on War Crimes and Crimes against Humanity (1968), the Geneva Convention on the Laws and Customs of War (1949), its supplementary protocols (1977), and the International Criminal Court (2002).

As Kirsten Sellars details in her book ‘The Rise and Rise of Human Rights’, the Nuremberg trials and the subsequent Tokyo trials which would later provide the basis for international law were not themselves free of controversy. At the end of the war, Western powers saw Germany and Japan as potential allies in the looming conflict against the Soviet Union. However, the passions that had been mobilized against the Axis powers demanded blood sacrifice before Japan and Germany could be brought back into the Free World. It was to satisfy this purpose that the tribunals were reluctantly instituted. While Justice Robert Jackson’s eloquent pronouncements on the rule of law in international affairs have become de rigueur in discourses on the subject, his contemporaries took a less generous view. US chief justice Harlan Stone called the whole Nuremberg exercise a “sanctimonious...fraud” accusing Jackson of conducting a “high-grade lynching party”. Justice William Douglas of the US Supreme Court accused the allies of “substituting power for principle” and creating laws “ex post facto to suit the passion and clamour of the time”. In his famous dissent at the Tokyo trials, Indian Justice Radhabinod Pal indicted the tribunal for its exclusion of European colonialism and the American use of the atomic bomb. The trials were, he said, “nothing more than an opportunity for the victors to retaliate”. Antiwar US senator Robert Taft called it “victors’ justice”.

Power asymmetry has defined the application of International Law since. Gaza is a case in point.

**Jus ad Bellum**

Israel and its apologists have sought to justify its military assault on Gaza as an act of “self-defence” against Hamas rockets invoking Article 51 of the United Nations Charter:8 So pervasive was this view that even putatively antiwar voices frequently worked the word “disproportionate” into their discussions. Israel, according to this view, has a right to defend itself but used more force than was necessary. However, this argument relies on the inversion of cause and effect and a defective legal premise.

Israel’s assault was not meant to protect its citizens against the Hamas rockets, but to protect its colonial project and right to continue the strangulation of Gaza. Israel broke the truce on 4th November 2008 when under the cover of the US elections it launched an attack inside Gaza killing six Palestinians. The attack, writes Middle East scholar Sara Roy, was “no doubt designed finally to undermine the truce”,9 as even according to Israel’s own intelligence agencies Hamas had implemented the ceasefire with remarkable effectiveness. Though Hamas retaliated with rockets, it still offered to renew the truce provided Gaza was restored; but what part, if any, will international law have played in this?

Israel faces regular shortages of diesel, petrol and cooking gas. On 13th November, Gaza’s only power station was attacked; it could have had to rely on diesel and gas smuggled from Egypt via the tunnels. In an attempt to undermine Hamas, Israel’s surrogates in the Palestinian Authority (PA) witheld water supplies from Gaza’s Coastal Municipalities Water Utility (CMWU) to pay for fuel to run Gaza’s sewage system. Israel has also provided a large quantity of chlorine – 200,000 tons of chlorine requested by CMWU for water purification. While medical supplies in Gaza have been running dangerously low, the collaborationist PA has been turning supply shipments away rather than send them to Gaza.9

It was within this context that on 19th December Hamas officially ended the truce. All of this is significant, as in 1967 Israel used Nasser’s blockade of the Gulf of Tiran as the casus belli for its pre-emptive attacks on Egypt, Syria and Jordan – the fate we witnessed in the late war and Bank Gaza Strip. Unlike Gaza, however, Israel faced no shortages of food, fuel or medicine — indeed, trade continued as normal with its main air- and sea ports (all of which are located on the Mediterranean coast). Yet, in spite of the facts,7 it has already mainstayed discourse as a legitimate case of pre-emptive self-defence under Article 51 of the Geneva Conventions. The precedent was even invoked by Colin Powell when on 5th February 2003 he made his case for invading Iraq at the UN Security Council. If Israel was within its rights to launch a pre-emptive war in ‘67 – a highly tendentious proposition – then the Palestinians most definitely had a similar right. It is not only enthroned in the Fourth Geneva Convention, it is also accorded them by virtue of Israel’s denial of basic necessities.

But what of international law?

The use of force is an act of last resort under international law subject to the customary rules of proportionality and necessity. As a signatory to the Geneva Conventions, Israel has a right to defend itself against attacks; but it has no right to do so by force. In order to use force, it will have to show that other options were not available. This was clearly not the case. It had the option to end the occupation, withdraw, cease fire and accept the international consensus on the two-state solution. It also had more immediate options: it could have agreed to renew the truce and end the crippling siege of Gaza. The Hamas government had made three separate peace offers over a period of two years through veteran Israeli peace activist Rabbi Gilad aton. Even if the offer was once more rejected, it would have required only one a mere two weeks before the assault. Relayed through a family member of Israeli Prime
As the occupying power Israel has no rights under the Fourth Geneva Convention, it has only obligations including a responsibility to protect Palestinian civilians and infrastructure.

Hamas and hence a legitimate target. In the very first hour of its assault Israel bomed the Palestinian Legislative Council, the Ministries of Education and Health, the Islamic University of Gaza, mosques, ambulances and many homes. Palestinian civilian infrastructure was subjected as a whole to Israeli terror. By the end, Israel had destroyed 4,700 homes completely or partially, leaving tens of thousands of people homeless. Sara Roy implored the world in the name of International law – and “human decency” – to protect the people of Gaza. Perhaps the appeal to human decency is a tacit acknowledgment of the irrelevance of international law were it doesn’t align with the interests of major powers. As Conor Gearty notes, the assault on Gaza “has laid bare the relative impotence of international law in the face of friends and rivals whose sovereign actions”.

Like Roy and Gearty, Falk also places little faith in the impotence of the mechanisms for enforcing international humanitarian and human rights law. In addition, the blockade of humanitarian relief, the destruction of civilian infrastructure, and preventing access to basic necessities such as food and fuel, are prima facie war crimes.”

That the Palestinians also have a right to self-defence and to legitimate self-defence in the Occupied Territory, according Israel the right to ‘defend civilians’ – for instance, in Gaza constituted war crimes and crimes against humanity, writes Omar Barghouti, “this UN discourse not only reduces close to half a million Palestinian men in that wretched, tormented and occupied coastal strip to ‘militants’, radical ‘fighters’, or whatever other nouns in currency nowadays in the astounding, but characteristically, biased western media coverage...it also treats them as already contented with a system that deserves the capital punishment Israel has meted out on them.”

VARIANT 34 | SPRING 2009 | 37

As the occupying power Israel has no rights under the Fourth Geneva Convention, it has only obligations including a responsibility to protect Palestinian civilians and infrastructure.

Hamas and hence a legitimate target. In the very first hour of its assault Israel bomed the Palestinian Legislative Council, the Ministries of Education and Health, the Islamic University of Gaza, mosques, ambulances and many homes. Palestinian civilian infrastructure was subjected as a whole to Israeli terror. By the end, Israel had destroyed 4,700 homes completely or partially, leaving tens of thousands of people homeless. Sara Roy implored the world in the name of International law – and “human decency” – to protect the people of Gaza. Perhaps the appeal to human decency is a tacit acknowledgment of the irrelevance of international law were it doesn’t align with the interests of major powers. As Conor Gearty notes, the assault on Gaza “has laid bare the relative impotence of international law in the face of friends and rivals whose sovereign actions”.

Like Roy and Gearty, Falk also places little faith in the impotence of the mechanisms for enforcing international humanitarian and human rights law. In addition, the blockade of humanitarian relief, the destruction of civilian infrastructure, and preventing access to basic necessities such as food and fuel, are prima facie war crimes.”

That the Palestinians also have a right to self-defence and to legitimate self-defence in the Occupied Territory, according Israel the right to ‘defend civilians’ – for instance, in Gaza constituted war crimes and crimes against humanity, writes Omar Barghouti, “this UN discourse not only reduces close to half a million Palestinian men in that wretched, tormented and occupied coastal strip to ‘militants’, radical ‘fighters’, or whatever other nouns in currency nowadays in the astounding, but characteristically, biased western media coverage...it also treats them as already contented with a system that deserves the capital punishment Israel has meted out on them.”

Jus in Bello
Israel made no bones about its attacks on civilian targets: one army spokeswoman declared that “[a]nything affiliated with Hamas is a legitimate target”; another added that “we are trying to hit the terror infrastructure, because everything is connected and everything supports terrorism against Israel”. The government which had only a year before boasted the results of a election which had seen Hamas take the majority of the vote, was suddenly willing to acknowledge the party’s popularity so it could hold against it the charge of violation of Gaza as evidence of their support for “terrorism against Israel”. As the democratically elected government of the Palestinian people all of Gaza’s civilian infrastructure was thus “affiliated with breaching international humanitarian law when it refused access for four days to a Zeitoun neighbourhood where four small children were later found starving among twelve corpses, including those of their mothers. The incident also occasioned one of the most extraordinary moments in the history of British journalism when Alex Thomson of Channel 4 subjected the Israeli spokesperson Mark Regey to an unrelenting interrogation ending with the plea, “In the name of humanity what is Israel doing?”

While Israel may have taken a hit in terms of its image – already the worst brand in the world, according to a 2006 poll – a wave of boycotts and the sweeping Europe also adds economic pressure. “But in the absence of any kind of enforcement mechanism,” writes Gearty, “the legal effect of all this international noise has been for all practical purposes zero”. There being no international adjudicative body to which Israel is required to defer “might not be able to survive a few hours in a court of law”, Gearty avers, but with a mostly pliant media already hummimg with a chorus of friendly ‘academic terrorism experts’ and ‘defence analysts’ Israel is all but immune from accountability.

It was Israel’s 1987 pre-emptive attacks on neighboring Arab states and Reagan’s March 1986 bombing of Libya – both invoking Article 51 of the UN charter – that demonstrated that unilateral action was possible without eliciting any legal repercussions. The US refused to join the International Criminal Court, and Israel’s repeated rejection of its jurisdiction, is transforming the whole concept of international law into a farce. The only people brought to trial in the Hague have all belonged to countries either on the rough end of the unipolar world’s stick, or to countries in which major powers have no vested interests. The irony of the US supporting the ICC’s prosecution of Sudanese president Omar al-Bashir while itself refusing to ratify its charter is lost on few in the outside world. Under these circumstances, warnings about criminal responsibility are seen as little more than a farcical threat. International law has hitherto served no purpose other than to lull the aggrieved into believing that verbal indictments are somehow a substitute for justice.

The End of Impunity?
Concerns about prosecutions at the Hague led the Bush administration to repeal the US signature from the treaty enabling the ICC and in 2002 to pass the American Service Members Protection Act (ASMPA), more commonly known as the Invasion of The Hague Act which permits the United States to unilaterally invade the Netherlands to liberate any military personnel and other elected and appointed officials held for war crimes. The US also pressured weaker states around the world to sign ‘bilateral immunity’ policies that require them to sign a waiver stating that they will contravene the ICC in the case of Americans being arrested. Those who do not comply risk losing US military assistance: Kenya and Trinidad-Tobago, for example, learned this the hard way. According to the Ottawa Centre for ICC prosecutor Luis Moreno-Ocampo is already pursuing seriously the legal instruments that would allow him to put Israel on trial for war crimes. Fear of prosecution has already caused the Israeli government to launch an international campaign to defend its legal posistion while and at the same time redacting names written in reports and masking photographs of military personnel involved. Director of the Israeli Law Center, Nitsana Darshan-Leitner, has opted for bluff, urging the Knesset to legislate a law prohibiting cooperation with any war crimes tribunal and to pass an ASMPA-style invasion of the Hague law. “Foreign countries should be made to understand we mean business”, she added.

Obstacles remain, however, and precedents of the actual implementation of international law
demand one to attenuate expectations. It is this recognition that has led some to consider using the universal jurisdiction laws enshrined in the legal systems of several European countries to bring US and Israeli war criminals to the dock. Several Israelis have already had close brushes with the law in Europe. In 2001 prosecutors in Belgium filed a war crimes indictment against Ariel Sharon and General Amos Yaron over their responsibility for the massacre of Palestinians in Lebanon. The case was later dismissed by an appeals court on a technicality. On 10th September 2005, General Doron Almog escaped arrest on arrival in London only through the last minute warning from someone at the Foreign Office. Had he disembarked, he would have faced arrest for violations of the Geneva Convention in carrying out house demolitions in Gaza.

Using the same laws that led to the 1998 arrest of the former Chilean dictator Augusto Pinochet, Spanish Foreign Minister, José Antonio Alonso has launched an investigation of Israeli officials over a 2002 bombing where a one-ton bomb dropped on a densely populated Gaza neighbourhood killed fifteen, including nine children. Those charged include former defense minister, Binyamin Ben-Eliezer; former chief-of-staff, Moshe Ya’alon; former defense chief, Dan Halutz; head of Southern command, Doron Almog; head of the National Security Council, Giora Eiland; the defense minister’s military secretary, Mike Herzog; and head of Shin Bet, Avi Dichter. The Israeli lobby flexed its muscle, and foreign minister Tzipi Livni was soon claiming that she had been assured by her Spanish counterpart, Miguel Maroto, that his government would amend its laws to diminish the possibility of investigating torture and war crimes committed outside Spain. This assurance was immediately contradicted by Deputy Prime Minister Maria Teresa Fernández de la Vega who stated defiantly that “Spain is a country, ruled by law whose justice system enjoys ‘absolute independence’; this fact was ‘made clear to Israel and we are sure they understand this’.

The ground is also shrinking around leading US war criminals. Henry Kissinger already can’t set foot in many European countries without risking arrest. Donald Rumsfeld likewise had to be spirited out of Paris a few years back in order to save him the embarrassment of being served a French subpoena. Recently the renowned prosecutor of the Nuremberg trials, Sir Benjamin Skeffington has shown how criminal law can be used to prosecute George W. Bush for murder in any of the districts where a soldier stationed in the US has been killed as a result of such a soldier’s lies.21 Until international law evolves a mechanism for enforcement that does not allow any state exemption from its purview, the potential of domestic laws to keep war criminals on their toes if not behind bars will remain indispensable.

In the wake of the 11th September 2001 attacks, Dick Cheney and the cabal of neoconservatives had already occasioned tension between the Obama administration and the Israeli lobby. The growing unease over the ascension of Benjamin Netanyahu as Prime Minister has only intensified the sense that US policy makers are letting Israel’s foreign policy dictate US relations with the world. This fear has been exacerbated by the bellicose statements made by US defense secretary, Robert Gates. In most cases, Gates has made statements that are at variance with public statements by Secretary of State Hillary Clinton and National Security advisor, Samantha Power. Gates’ comments include: “I think the United States needs to be very clear that unless there is a political process that keeps the states that exist today from going to war, then the United States would be left with the only option of preventing something similar to the Lebanon War of 2006 from happening. This would be a situation which would be very difficult for us. If that happens, then the UN Security Council will have a responsibility to respond.”

The rocket attacks had not killed a single individual before Israel began its assault; had they done so, they would still not entitle Israel to kill 1,300 Palestinians, mostly civilians to one-up Senator Patrick Leahy who has proposed a Truth and Reconciliation Commission. But for the first time talk of prosecutions has entered mainstream discourse. What was dismissed as unreasonable only months ago appears now almost attainable. Since Pelosi controls the assignment of hearings to relevant committees in the Congress, writes the veteran journalist, Alexander Cockburn, “this means that she could give the green light to House Justice Committee chairman John Conyers to organize hearings...equipped with a capable director and subpoena power to compel testimony and documents under the threat of criminal sanction.”

Pelosi may or may not be serious but for the left there is a rich opportunity in all this, writes Cockburn. “Obama’s pledges in the campaign to run a lawful government were very explicit”. He clearly seeks a big change in the image if not necessarily the policies of the Bush administration. The closing of Guantanamo and the categorical ban on torture is part of this new trajectory (even though unlawful detention and subcontracted torture will likely continue). This attempt to re-engage with the world will not be effective until Obama affirms US commitment to international law, including a re-signing of the ICC charter. This would also have the effect of empowering the UN rapporteurs, special representatives, tribunals and so on, Gearty argues.

“Since its application would be general, Obama could do all this without any mention of Israel, leaving the consequences of the working of the international system to be decided by his bureaucracies...Were pressure from the lobbies to reach dangerous levels, the president might choose to take the issue to the American people, to discuss openly whether Israel should have an exemption from the system of values to which...the US itself will by our law in Europe. In 2001 prosecutors in Belgium filed a war crimes indictment against Ariel Sharon and General Amos Yaron over their responsibility for the massacre of Palestinians in Lebanon. The case was later dismissed by an appeals court on a technicality. On 10th September 2005, General Doron Almog escaped arrest on arrival in London only through the last minute warning from someone at the Foreign Office. Had he disembarked, he would have faced arrest for violations of the Geneva Convention in carrying out house demolitions in Gaza.

Using the same laws that led to the 1998 arrest of the former Chilean dictator Augusto Pinochet, Spanish Foreign Minister, José Antonio Alonso has launched an investigation of Israeli officials over a 2002 bombing where a one-ton bomb dropped on a densely populated Gaza neighbourhood killed fifteen, including nine children. Those charged include former defense minister, Binyamin Ben-Eliezer; former chief-of-staff, Moshe Ya’alon; former defense chief, Dan Halutz; head of Southern command, Doron Almog; head of the National Security Council, Giora Eiland; the defense minister’s military secretary, Mike Herzog; and head of Shin Bet, Avi Dichter. The Israeli lobby flexed its muscle, and foreign minister Tzipi Livni was soon claiming that she had been assured by her Spanish counterpart, Miguel Maroto, that his government would amend its laws to diminish the possibility of investigating torture and war crimes committed outside Spain. This assurance was immediately contradicted by Deputy Prime Minister Maria Teresa Fernández de la Vega who stated defiantly that “Spain is a country, ruled by law whose justice system enjoys ‘absolute independence’; this fact was ‘made clear to Israel and we are sure they understand this’.

The ground is also shrinking around leading US war criminals. Henry Kissinger already can’t set foot in many European countries without risking arrest. Donald Rumsfeld likewise had to be spirited out of Paris a few years back in order to save him the embarrassment of being served a French subpoena. Recently the renowned prosecutor of the Nuremberg trials, Sir Benjamin Skeffington has shown how criminal law can be used to prosecute George W. Bush for murder in any of the districts where a soldier stationed in the US has been killed as a result of such a soldier’s lies.21 Until international law evolves a mechanism for enforcement that does not allow any state exemption from its purview, the potential of domestic laws to keep war criminals on their toes if not behind bars will remain indispensable.

In the wake of the 11th September 2001 attacks, Dick Cheney and the cabal of neoconservatives had already occasioned tension between the Obama administration and the Israeli lobby. The growing unease over the ascension of Benjamin Netanyahu as Prime Minister has only intensified the sense that US policy makers are letting Israel’s foreign policy dictate US relations with the world. This fear has been exacerbated by the bellicose statements made by US defense secretary, Robert Gates. In most cases, Gates has made statements that are at variance with public statements by Secretary of State Hillary Clinton and National Security advisor, Samantha Power. Gates’ comments include: “I think the United States needs to be very clear that unless there is a political process that keeps the states that exist today from going to war, then the United States would be left with the only option of preventing something similar to the Lebanon War of 2006 from happening. This would be a situation which would be very difficult for us. If that happens, then the UN Security Council will have a responsibility to respond.”

The rocket attacks had not killed a single individual before Israel began its assault; had they done so, they would still not entitle Israel to kill 1,300 Palestinians, mostly civilians to one-up Senator Patrick Leahy who has proposed a Truth and Reconciliation Commission. But for the first time talk of prosecutions has entered mainstream discourse. What was dismissed as unreasonable only months ago appears now almost attainable. Since Pelosi controls the assignment of hearings to relevant committees in the Congress, writes the veteran journalist, Alexander Cockburn, “this means that she could give the green light to House Justice Committee chairman John Conyers to organize hearings...equipped with a capable director and subpoena power to compel testimony and documents under the threat of criminal sanction.”

Pelosi may or may not be serious but for the left there is a rich opportunity in all this, writes Cockburn. “Obama’s pledges in the campaign to run a lawful government were very explicit”. He clearly seeks a big change in the image if not necessarily the policies of the Bush administration. The closing of Guantanamo and the categorical ban on torture is part of this new trajectory (even though unlawful detention and subcontracted torture will likely continue). This attempt to re-engage with the world will not be effective until Obama affirms US commitment to international law, including a re-signing of the ICC charter. This would also have the effect of empowering the UN rapporteurs, special representatives, tribunals and so on, Gearty argues.

“Since its application would be general, Obama could do all this without any mention of Israel, leaving the consequences of the working of the international system to be decided by his bureaucracies...Were pressure from the lobbies to reach dangerous levels, the president might choose to take the issue to the American people, to discuss openly whether Israel should have an exemption from the system of values to which...the US itself will by
Jus ad bellum is a set of criteria that are to be consulted before engaging in war in order to determine whether entering into war is permissible, that is, whether it is a just war. Jus ad bellum is sometimes considered a part of the laws of war, but the term "laws of war" can also be considered to refer to jus in bello, which concerns whether a war is conducted justly (regardless of whether the initiation of hostilities was just). "Jus ad bellum refers to the conditions under which States may resort to war. The final guide of jus ad bellum is that the desired end should be proportional to the means used. This principle overlaps into the moral guidelines of how a war should be fought, namely the principles of jus in bello. With regards to just cause, a policy of war requires a goal, and that goal must be proportional to the other principles of just cause. Whilst this commonly entails the minimizing of war's destruction, it can also invoke general balance of power considerations. The distinction between jus ad bellum and jus in bello has a long tradition in the theory of warfare (Vitoria, 16). Wolff, 17 Vattel 18). However, it found its place in positive law only at the time of the League of Nations, when the Kellogg-Briand Pact outlawed the absolute power to resort to war by its prohibition of aggressive war.19. The recognition of jus ad bellum and jus in bello as legal concepts has brought important conceptual innovations vis-à-vis the legal thinking of the 19th century. It has not only Jus (or ius) ad bellum is the title given to the branch of law that defines the legitimate reasons a state may engage in war and focuses on certain criteria that render a war just. The principal modern legal source of jus ad bellum derives from the Charter of the United Nations, which declares in Article 2: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." The Principles of Jus ad Bellum. There are six criteria that must be satisfied before entering war can be considered just: 1. Just Cause: There must be a just and proper reason for going to war. Some of the justifiable reasons include self-defense, protecting the innocent (e.g., preventing genocide), restoring human rights wrongly denied, and assisting an ally in their self-defense. 2. Proportionate Cause: The good of going to war must outweigh the destruction and death that will be caused by warfare.