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The Failure of International Law in Palestine

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ARTICLE

THE FAILURE OF INTERNATIONAL LAW IN PALESTINE

SVETLANA SUMINA & STEVEN GILMORE*

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I. INTRODUCTION TO RESISTANCE IN PALESTINE

Nabi Saleh is a small village not far from Jerusalem in the West Bank of what is known as Israel.¹ Nabi Saleh is also a radical enclave in occupied Palestine—a place where protests and demonstrations against the occupying Israeli military are common.² Though acts of rebellion are not infrequent in many of the West Bank villages, Nabi Saleh is somewhat unique in the villagers' commitment to “unarmed resistance.”³ The Tamimi family, who reside in Nabi Saleh, has grown accustomed to conflict and confrontation in the village.⁴ In December 2011, Mustafa Tamimi was killed by an Israeli soldier when he was shot in the head at close range with a tear gas canister.⁵ Nearly a year later, in November 2012, Rushdie Tamimi was killed when Israeli soldiers fired close to eighty rounds of live ammunition without justification at Rushdie and other protestors.⁶ An Israeli military inquiry into the incident referred to it as a “failure of values” on the part of the soldiers.⁷ Two years later,

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1. Ben Ehrenreich, *Is This Where the Third Intifada Will Start?*, N.Y. TIMES MAG. (Mar. 15, 2013), <http://www.nytimes.com/2013/03/17/magazine/is-this-where-the-third-intifada-will-start.html> [<https://nyti.ms/2kvBZQA>].

2. Ben Rawlance, *Ben Ehrenreich Writes a Love Letter to Palestine*, N.Y. TIMES (July 14, 2016), <https://www.nytimes.com/2016/07/17/books/review/ben-ehrenreich-the-way-to-the-spring-palestine.html> [<https://nyti.ms/2lejwti>].

3. Yasmeen Serhan, *A Symbol of the Palestinian Resistance for the Internet Age*, ATLANTIC (Jan. 5, 2018), <https://www.theatlantic.com/international/archive/2018/01/internet-famous-in-the-west-bank/549557> [<https://perma.cc/Z4DZ-C5W7>].

4. Abdul Hakim Salah, *A Family Affair: The Tamimis' History of Resistance*, ARAB NEWS (Jan. 8, 2018), <http://www.arabnews.com/node/1219941/middle-east> [<https://perma.cc/7NJB-MGNY>]; Serhan, *supra* note 3.

5. Haggai Matar, *Mustafa Tamimi: A Murder Captured on Camera*, +972 MAG. (Dec. 11, 2011), <https://972mag.com/mustafa-tamimi-a-murder-captured-on-camera/29459> [<https://perma.cc/2GSS-YUK2>].

6. Chaim Levinson & Jack Khoury, *IDF Probe: 80 Bullets Fired Without Justification in Death of West Bank Palestinian*, HAARETZ (Jan. 16, 2013), <https://www.haaretz.com/premium-army-palestinian-shot-80-times-1.5224816> [<https://perma.cc/JG8M-MVV3>].

7. *Id.*

Nariman Tamimi, the family's matriarch, was shot in the leg by an Israeli soldier for filming the military's dispersal of a demonstration in the village.⁸ In August of the following year, still confined to crutches, Nariman hobbled to the defense of her twelve-year-old son, Mohammad, whose neck was in the grip of an Israeli soldier.⁹ Mohammad had recently broken his arm when he tripped while fleeing tear gas fired near a store by the Israeli Defense Force (IDF).¹⁰ Slowed by her injury, Nariman could not aid Mohammad soon enough.¹¹ The first to make the scene was Mohammad's older sister, Ahed Tamimi.¹² Ahed, then fourteen years old, heard her brother screaming and ran to his rescue, whereupon she tried to pry the soldier away from him.¹³ When that tactic failed, Ahed bit the soldier's hand.¹⁴ "When things are happening," Ahed recalled, "you don't feel fear."¹⁵

This was not Ahed's first brush with notoriety, nor would it be her last.¹⁶ In 2012, eleven-year-old Ahed received widespread recognition when she was filmed raising her fist back in anger, threatening to strike a fully armed soldier who had arrested her older brother moments before.¹⁷ The video of the incident now has more than half a million views—a number that continues to increase.¹⁸ Ahed escaped those encounters largely unscathed, but her latest run-in with the IDF has landed her in deeper water.¹⁹ On December 15, 2017, hot on the heels of U.S. President Donald Trump's proclamation that the U.S. would now recognize Jerusalem as the capital of Israel, Ahed's cousin, Mohammed, was shot in the head by an IDF soldier with a "rubber-coated metal bullet" while peering over a wall to see whether any soldiers were in the

8. Amira Hass, *The Palestinian Family That Fought a Soldier to Save Their Son*, HAARETZ (Sept. 03, 2015), <https://www.haaretz.com/israel-news/.premium-1.674254> [<https://perma.cc/DZ5T-AXY8>].

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Serhan, *supra* note 3.

17. *Id.*

18. Nokta Grup, *Brave Palestinian Girl Ahed Tamimi vs Soldier: Where is my brother ?????*, YOUTUBE (Dec. 24, 2012), <https://www.youtube.com/watch?v=E4FM9WGRWdQ>.

19. Serhan, *supra* note 3.

vicinity.²⁰ The gunshot caused intracranial bleeding that required removing portions of Mohammed's skull.²¹ He would spend the next 72 hours in a medically-induced coma.²² When news reached Ahed and her family an hour later, she was understandably incensed.²³ With tears in her eyes, it was then that Ahed went outside and attempted to oust a group of IDF soldiers standing in her family's yard.²⁴ Inadvisable under the best of circumstances, Ahed confronted the IDF soldiers and, in a fit of rage, pushed and slapped one of the soldiers.²⁵ Sixteen-year-old Ahed was subsequently arrested along with her mother and older female cousin.²⁶ They were charged with multiple offenses, including: "threatening a soldier, attacking a soldier under aggravated circumstances, interfering with a soldier in carrying out his duties, incitement, and throwing objects at individuals or property."²⁷

This is life under occupation in Palestine.²⁸ This is life in conflict with Israel, an occupying force that is the premier U.S. ally and the only purported "liberal democracy" in the Middle East.²⁹ This is life in the absence of legal recourse or meaningful oversight by the international community.³⁰ Palestine exists in a void—a place where people who

20. Gideon Levy & Alex Levac, *The Story Behind Ahed Tamimi's Slap: Her Cousin's Head Shattered by Israeli Soldier's Bullet*, HAARETZ (Jan. 5, 2018), <https://www.haaretz.com/israel-news/premium-1.833157> [<https://perma.cc/W4YR-RG8N>].

21. *Id.*

22. Jaclynn Ashly, *Israel Indicts Palestinian Teen Activist Ahed Tamimi*, AL JAZEERA (Jan. 2, 2018), <http://www.aljazeera.com/news/2018/01/israel-indicts-palestinian-teen-activist-ahed-tamimi-180101183249057.html> [<https://perma.cc/5STT-M3T4>].

23. Levy & Levac, *supra* note 20.

24. *Id.*

25. Serhan, *supra* note 3.

26. Yotam Berger & Yaniv Kubovich, *Ahed Tamimi, Palestinian Teen Who Slapped Israeli Soldier in Video, Charged With Assault*, HAARETZ (Jan. 1, 2018), <https://www.haaretz.com/israel-news/1.832424> [<https://perma.cc/7VLW-PAWD>].

27. *Id.*

28. *See generally* Ehrenreich, *supra* note 1 (describing the daily conflicts in occupied Palestine).

29. *See* Alex Lockie, *Here's Why the US and Israel Are Such Close Allies*, BUS. INSIDER (Feb. 18, 2017), <http://www.businessinsider.com/us-israel-allies-2017-2> [<https://perma.cc/8S2X-YSXB>] (citing Middle East analyst, Michael Koplow, at the Israel Policy Forum asserting that Israel, which holds "regular and open elections," is "an important ideological ally" for the United States in the Middle East). *See generally* Ehrenreich, *supra* note 1.

30. *See* Jeremy R. Hammond, *Rogue State: Israeli Violations of U.N. Security Council Resolutions*, FOREIGN POLICY J. (Jan. 27, 2010), <https://www.foreignpolicyjournal.com/2010/01/27/rogue-state-israeli-violations-of-u-n-security-council-resolutions> [<https://perma.cc/XW9E->

control it deny its very existence.³¹ And yet Palestine and its people are real, with families, hopes, and fears as much as any of us. Ahed and her family are only one example of thousands, and each has their own, though not uncommon, experience under occupation.³² To more fully understand this dire situation, we must examine the ways in which international law has failed the people of Palestine. For many countries, international law is the only external mechanism for justice when internal means via national governmental and legal functions have become corrupt or otherwise complicit in the oppression of the nation's citizens. In articulating the nature of this unique crisis, we must first take a brief overview of certain concepts germane to international law. Then, more specifically, we will examine the legal status of Palestine under international law, the Gaza Strip conflict, and the Israeli blockade that prevents the receipt of foreign humanitarian aid in Palestine. The potential effects of President Trump's announcement declaring Jerusalem the future home of the U.S. Embassy will be discussed and finally, we will propose solutions achievable through application of international legal principles to the ongoing struggle for self-determination in Palestine.

II. KEY PRINCIPLES OF INTERNATIONAL LAW

The humanitarian legal order is meant to protect civilians during times of war by minimizing their suffering.³³ International humanitarian law

NPLS] (listing U.N. Security Council resolutions from 1948 through 2010 that “directly criti[cize] Israel for violations of U.N. Security Council resolutions, the U.N. Charter, the Geneva Conventions, international terrorism, or other violations of international law”).

31. Jonathan Lis, *Israeli Lawmaker Says Palestinian Nation Doesn't Exist, Because Arabic Doesn't Have 'P'*, HAARETZ (Feb. 10, 2016), <https://www.haaretz.com/israel-news/1.702630> [<https://perma.cc/3PPT-4G4V>].

32. See generally Ehrenreich, *supra* note 1 (detailing Ahed and her family's experience living in Palestine under the Israeli occupation).

33. Noura Erakat, *It's Not Wrong, It's Illegal: Situating The Gaza Blockade Between International Law and the UN Response*, 11 UCLA J. ISLAMIC & NEAR E. L. 37, 62 (2012). See M. Cherif Bassouni, *Redefining International Criminal Law: New Interpretations and New Solution: Criminal Law: The New Wars and the Crisis Of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 719, 806–809 (2008) (arguing that “individual and collective compliance” with International Humanitarian Law would reduce “harmful human consequences” in times of war).

is influenced by the principles of humanity and human rights.³⁴ It is the body of law that regulates the conduct of states involved in armed conflicts.³⁵ The modern “humanitarian rights system directly addresses the responsibility of governments vis-à-vis populations over which they exercise power, authority, or jurisdiction, largely regardless of nationality.”³⁶ The purpose of an international humanitarian law is to prevent nations from only pursuing their own national interests, hold them accountable when they do,³⁷ and prevent acts which “shock the moral conscience of mankind.”³⁸ Indeed, the purpose of “human rights laws is to protect physical integrity and human dignity in all circumstances. They apply to relationships between unequal parties.”³⁹ When it comes to fully or partially occupied States, the unequal parties include the occupying power and the occupied State and its citizens.⁴⁰ The law of belligerent occupation governs such unequal relationships.⁴¹

Belligerent occupation standards are derived from law that regulates the behavior of occupying forces during wartimes.⁴² Belligerent occupation was temporary until the opponents came to a peace agreement.⁴³ The law of belligerent occupation imposes two types of duties on the seizing power.⁴⁴ The first is to protect the life and property of the inhabitants, and the second is to respect the sovereign rights of the expelled government.⁴⁵ In conjunction with the law of belligerent occupation, international humanitarian law prohibits certain forms of

34. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L. L. 239, 249 (2000) (explaining the human elements of humanitarian law).

35. See Bassouni, *supra* note 33, at 718 n.15 (2008) (defining International Humanitarian Law (IHL)); George Bisharat et al., *Israel's Invasion of Gaza in International Law*, 38, 43 DENV. J. INT'L L. & POL'Y 41, 43 (2009) (examining whether Israel violated international humanitarian law during Operation Cast Lead, a 2009 military operation in the Gaza Strip).

36. Meron, *supra* note 34, at 256.

37. Erakat, *supra* note 33, at 52–53.

38. T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in the Light of Robust Peacekeeping*, 25 B.C. INT'L & COMP. L. REV. 1, 8 (2002).

39. See Meron, *supra* note 34, at 240 (discussing belligerent occupation).

40. *Id.*

41. *Id.*

42. See Eyal Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26 LAW & HIST. REV. 621, 621 (2008) (explaining what belligerent occupation entails).

43. See *id.* (noting belligerent occupation is usually temporary).

44. *Id.* at 622.

45. *Id.*

warfare and exempts specific persons and categories of property from being damaged.⁴⁶ Unfortunately, due to the “absence of effective conflict resolution mechanisms,”⁴⁷ international law lacks effective enforcement despite the presence of NATO, the United Nations, the International Criminal Court, the International Court of Justice, and other organizations.⁴⁸

The doctrine of humanitarian intervention has developed from the growth of international law by virtue of individual states, groups of states, or the United Nations implementing it.⁴⁹ Providing humanitarian intervention has become a highly controversial matter due to the volatile nature of conflicts and issues of sovereignty.⁵⁰ Humanitarian intervention is a form of imposition into a state’s domestic affairs by other states who believe that unforgivable international law violations have taken place.⁵¹ In light of the litany of disastrous and warlike campaigns waged under this principle,⁵² though not without controversy, humanitarian intervention has achieved some measure of legitimacy via the writing of scholars and political theorists seeking answers to rampant human rights abuse in oppressive and impoverished nations.⁵³ Humanitarian intervention opponents argue there are no established guidelines for intervention and that intervention is ruled by the political

46. See Bassouni, *supra* note 33, at 719 (clarifying property should not be damaged by the belligerent occupier).

47. *Id.*

48. See generally *International Humanitarian Law Answers To Your Questions*, INT’L COMM. OF THE RED CROSS 88–92 (Dec. 2014), <https://www.icrc.org/eng/assets/files/other/icrc-002-0703.pdf> [<https://perma.cc/E48E-GM68>] (discussing the role of the ICRC in international humanitarian law).

49. See Ocran, *supra* note 38, at 2–3 (describing the purpose of humanitarian intervention).

50. See *id.* (clarifying humanitarian intervention is a form of imposition by states).

51. See Maxine Marcus, *Humanitarian Intervention Without Borders: Belligerent Occupation or Colonization?*, 25 HOUS. J. INT’L L. 99, 102 (2002) (exemplifying instances of humanitarian intervention).

52. See Freddie deBoer, *Good Wars, Real or Imagined*, JACOBIN (Sept. 1, 2013), <https://jacobinmag.com/2013/09/good-wars-real-or-imagined> [<https://perma.cc/ZX96-YFF2>] (discussing the support of conflict resolution via war and describing the effects of intervention or lack thereof).

53. See Marcus, *supra* note 51, at 106 (explaining the history of humanitarian intervention); see also CHRISTOPHER HITCHENS, *The Case for Humanitarian Intervention*, in ARGUABLY 573–75 (1st ed. 2013) (justifying the use of military as a form of humanitarian intervention because without the influence from the United States the United Nations would not exist). The author views this as a strong case for U.S. military engagement in Iraq as a form of humanitarian intervention. *Id.*

interests of powerful nations on the U.N. Security Council.⁵⁴ Others view humanitarian intervention as little more than a cover for the expanding reach of western American influence and interests—imperialism with a human face.⁵⁵

Acts that may constitute implementation of humanitarian assistance are those preventing genocide, ethnic cleansing, war crimes, crimes against humanity, and the large scale loss of life.⁵⁶ Humanitarian intervention can be provided by means of “material assistance through relief, aid, or sanctions which consists of coercive, but non[-]military pressure to end abusive practices; and the dispatch of military forces to remedy massive human atrocities.”⁵⁷ However, the legality of humanitarian intervention has been questioned within the framework of international law,⁵⁸ particularly as the actors engaged in humanitarian intervention have stretched the concept to embrace military activity as an acceptable method of intervention.⁵⁹ Political, social, and economic roadblocks are erected when trying to implement humanitarian aid packages to states in crisis or existing in grave human rights violations.⁶⁰

54. See Marcus, *supra* note 51, at 106 (illustrating specific acts that constitute humanitarian intervention).

55. See, e.g., Gregory Afinogenov, *When Humanitarianism Became Imperialism*, JACOBIN (Sept. 17, 2016), <https://jacobinmag.com/2016/09/when-humanitarianism-became-imperialism> [<https://perma.cc/AF3M-W67S>] (describing how the Afghan War became the recipe for modern humanitarian intervention and stating “. . . the United States and its NATO allies routinely instrumentalize human rights in the service of empire.”); Noam Chomsky, *Humanitarian Imperialism: The New Doctrine of Imperial Right*, MONTHLY REVIEW (Sept. 2008), <https://monthlyreview.org/2008/09/01/humanitarian-imperialism-the-new-doctrine-of-imperial-right> [<https://perma.cc/2X8B-SHY6>] (describing events during several presidential administrations where interventions into certain conflicts had ulterior interests associated with them); Tim Shorrock, *Making COIN: The Modern History of an Unstoppable Bad Idea*, BAFFLER (Dec. 2016), <https://thebaffler.com/salvos/making-coin-shorrock> [<https://perma.cc/YM6R-TE2P>] (detailing how counterinsurgency has allegedly been used in the past to win over the “hearts and minds” of the locals in the war-torn regions of various U.S. wars). Counterinsurgency has instead led to mass killings, torture, and force relocation. *Id.*

56. Ocran, *supra* note 38, at 8.

57. *Id.*

58. *Id.* at 18.

59. See Anne Ryniker, *The ICRC's Position on "Humanitarian Intervention"*, 83 INT'L. REV. OF THE RED CROSS 527, 529 (June 2001) https://www.icrc.org/eng/assets/files/other/527-532_ryniker-ang.pdf [<https://perma.cc/SWL2-2ZMX>] (denouncing humanitarian aid in the form of military activity as a contradiction of terms).

60. See Ocran, *supra* note 38, at 11–13 (identifying the inherent difficulty in utilizing humanitarian strategies).

In states where some form of humanitarian intervention is required, such intervention may be impeded due to the constraints on enforcing international law or regional geopolitical and economic concerns.⁶¹ Currently, humanitarian aid is being extended to nations such as Afghanistan, Libya, Haiti, Nepal, South Sudan, Somalia, and Yemen.⁶²

III. THE CURRENT STATUS OF PALESTINE

Indigenous Palestinians were settled in the geographic region for over two millennia; by the late nineteenth century, Palestine had over 500,000 indigenous Palestinians.⁶³ The region, as administered by the Ottoman Empire, was an agrarian society comprised of various religious demographics: 80% were Muslim, approximately 10% were Christian, and 5–7% were Jewish.⁶⁴ During World War I, an agreement was created between the Allied Associated Powers on the future of the Ottoman Empire—more specifically, Palestine.⁶⁵ At the time of declaration, 92% of the people living in the region were Palestinian Arabs.⁶⁶ After World War II, Jewish immigration into the region along with calls for a Jewish state led the global political and economic leaders of the time to declare Palestine the new nation of Israel.⁶⁷ On May 14, 1947, the state of Israel was officially proclaimed.⁶⁸ Not long thereafter, hostilities broke out between Israel and its surrounding neighbors in the 1948 Arab–Israeli War.⁶⁹ Consequently, Israel established a military

61. See *id.* at 25–26 (demonstrating constraints of enforcing intervention as international law).

62. *The ICRC Worldwide*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/en/where-we-work> [<https://perma.cc/D26A-RHFG>] (last visited Feb. 25, 2018).

63. See Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT’L L.J. 65, 72 (2003) (discussing the population patterns in Palestine in the 19th century).

64. See *id.* (listing the different religions of the region in 19th century Palestine).

65. See MUSA MAZZAWI, *PALESTINE AND THE LAW* 15–16 (1997) (outlining guidelines for resolution of the Arab–Israeli conflict); see also JOHN QUIGLEY, *THE STATEHOOD OF PALESTINE: INTERNATIONAL LAW IN THE MIDDLE EAST CONFLICT* 11 (2010) (explaining the identity of Palestine and indicating it does indeed hold statehood).

66. Imseis, *supra* note 63, at 73.

67. See *id.* at 75 (detailing the creation of Israel by the U.N. General Assembly).

68. MAZZAWI, *supra* note 65, at 130; QUIGLEY, *supra* note 65, at 101.

69. MAZZAWI, *supra* note 65, at 141; QUIGLEY, *supra* note 65, at 122–23; Bisharat et al., *supra* note 35, at 47. Palestinians continue commemorating Al Nakba, or “the catastrophe” on May 15th, recognizing the Israeli invasion and subsequent cleansing and expulsion of Palestinians from their homeland that began on May 15, 1948. *The Nakba Did Not Start or End in 1948*, ALJAZEERA

administration in 1967 tasked with governing the Gaza Strip, the West Bank, Golan Heights, and Sinai Peninsula.⁷⁰ By 1989, about one hundred states had recognized Palestine as a state.⁷¹ While unsuccessful, the support was due to negotiation efforts concerning territorial settlements with Israel.⁷² Amidst efforts for Palestinian statehood,⁷³ or in an attempt to appease critics of Israeli occupation,⁷⁴ Israel only disengaged its troops and dismantled settlements from the Gaza Strip in 2005.⁷⁵ It did not completely cease occupying Palestine.⁷⁶ In its “Disengagement Plan,” Israel announced it will “supervise and guard the external envelope on land, will maintain exclusive control in the air space of Gaza, and will continue to conduct military activities in the sea space of the Gaza Strip.”⁷⁷

(May 23, 2017), <https://www.aljazeera.com/indepth/features/2017/05/nakba-start-1948-170522073908625.html> [<https://perma.cc/W9WU-JUNW>].

70. QUIGLEY, *supra* note 65, at 134–35; Bisharat et al., *supra* note 35, at 47.

71. QUIGLEY, *supra* note 65, at 158.

72. *Id.* at 172–73.

73. *See id.* at 190–91 (discussing the efforts of the United Nations, United States, and Russia in 2003 to establish a roadmap for a permanent two-state solution to the Israel–Palestine Conflict).

74. *See Annan Pleased at Israeli Withdrawal From Gaza; Praises Sharon, Commends Abbas*, U.N. NEWS CENTRE (Sept. 12, 2005), <http://www.un.org/apps/news/story.asp?NewsID=15767> [<https://perma.cc/AC5V-WJ2N>] (quoting then Secretary-General of the U.N., Kofi Annan, lauding “cooperation and coordination between Israelis and Palestinians” and bestowing similar adulations upon Israeli Prime Minister Sharon and Palestinian President Abbas).

75. *See, e.g.*, Kelly Wallace, *Sharon: ‘Occupation’ Terrible for Israel, Palestinians*, CNN (May 27, 2003), <http://www.cnn.com/2003/WORLD/meast/05/26/Mideast> [<https://perma.cc/YM9H-LXBE>] (quoting Israeli Prime Minister Ariel Sharon calling Israeli actions in Gaza an “occupation . . . a terrible thing for Israel and for the Palestinians”). Prime Minister Mahmoud Abbas called for a cessation of Israel’s military operations in Gaza. *Id.*; *World Bank Criticises Israel*, BBC NEWS, <http://news.bbc.co.uk/2/hi/business/2820933.stm> [<https://perma.cc/QXJ8-464W>] (last updated Mar. 5, 2003) (illustrating the devastating effect of Israel occupation on Gaza and the West Bank).

76. Wallace, *supra* note 75.

77. *See* GREGORY HARMS & TODD M. FERRY, *THE PALESTINE-ISRAEL CONFLICT: A BASIC INTRODUCTION* 182 (3rd ed. 2012) (quoting The Disengagement Plan stating Israel “will evacuate the Gaza Strip” but retain supervisory control of the boundaries); *see also* QUIGLEY, *supra* note 65, at 216 (explaining that in 2005 Israel controlled the exterior of Gaza while Palestinian officials controlled its interior); Bisharat et al., *supra* note 35, at 46, 48 (“Though Israel maintains that its ‘withdrawal’ from Gaza ended its occupation of the Strip and that, accordingly, it no longer has any obligations to the population of Gaza, it is still widely accepted that Israel continues to occupy the Gaza Strip as a matter of international law.”). Emphasis added to “disengaged” because this does not mean that Israel is not still belligerently occupying Palestinian territories.

Following the death of longtime Palestinian leader and founder of the Fatah political faction, Yasser Arafat, rival political faction Hamas gained governmental control over Gaza.⁷⁸ In 2006, Hamas entered the Palestinian elections, winning an overwhelming seventy-six of the legislature's one hundred thirty-two seats.⁷⁹ Following the election, a power struggle arose between Hamas and Fatah over control of Gaza and the West Bank, causing the two-state solution to largely vanish from the Israeli–Palestinian discourse.⁸⁰

Beyond the geographical differences, Fatah and Hamas are ideologically and religiously different.⁸¹ Fatah has been the main representative group of the Palestine Liberation Organization in the United Nations since 1969.⁸² Calling for a “democratic secular state” in the Palestinian territories, Fatah co-exists with Israel to some extent.⁸³ On the other hand, Hamas has been deemed a terrorist organization by various western nations.⁸⁴ The origins of Hamas can be traced to the

78. QUIGLEY, *supra* note 65, at 216; *Gaza E.R. Fatah v. Hamas*, PBS (Aug. 14, 2007), <http://www.pbs.org/wnet/wideangle/episodes/gaza-e-r/fatah-vs-hamas/?p=1227> [<https://perma.cc/4YXZ-AKTH>] [hereinafter *Fatah v. Hamas*].

79. HARMS & FERRY, *supra* note 77, at 184; *See* QUIGLEY, *supra* note 65, at 216; *see also* Bisharat et al., *supra* note 35, at 57.

80. *See* QUIGLEY, *supra* note 65, at 216–17 (detailing the fragmenting of power in Gaza and the West Bank); Nathan J. Brown, *The Hamas-Fatah Conflict: Shallow but Wide*, 34 FLETCHER F. WORLD AFF. 35, 35, 40, 46 (2010) (believing a two-state solution to be fruitless).

81. *See* Brown, *supra* note 80, at 44–46.

The deepest divisions between Hamas and Fatah lie as much in political questions as religious ones . . . [t]he structural problem is that Fatah and Hamas do not fight in the genteel settings of seminar rooms or the established channels of constitutional democracy. Instead, their contest unfolds on the street of Gaza and the West Bank, where both sides simply impose their will whenever they can.

E.g., *Fatah v. Hamas*, *supra* note 78 (“[N]early all Palestinian Muslims are from the Sunni branch of Islam.”).

82. QUIGLEY, *supra* note 65, at 137–38.

83. *Id.*

84. *See Foreign Terrorist Organizations*, U.S. DEPT. ST., <http://www.state.gov/j/ct/rls/other/des/123085.htm> [<https://perma.cc/N3BB-Z7HJ>] (last visited Feb. 25, 2018) (identifying Hamas as a terrorist organization in the United States); *see also Proscribed Terrorist Organisations*, GOV.UK, (Dec. 22, 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/670599/20171222_Proscription.pdf [<https://perma.cc/84CV-JSM6>] (labeling Hamas a terrorist organization in the United Kingdom); *Current Listed Entities*, PUB. SAFETY CAN., <https://www.publicsafety.gc.ca/cnt/ntnl-scrf/cntr-trrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx> [<https://perma.cc/6UW2-4AVK>] (last updated Feb. 15, 2018) (listing Hamas as a terrorist organization in Canada); *Listed Terrorist Organizations*, AUSTR. NAT'L SECURITY, <https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default>.

Muslim Brotherhood, as it was previously the branch of the organization in Palestine.⁸⁵ Hamas came into prominence after opposing the Oslo Peace accords between Israel and Palestine by arranging the suicide bombings in February and March of 1996 that killed 60 Israelis.⁸⁶ Both organizations diverge on a multitude of topics—principally in that Hamas seeks to maintain a theocratic authoritarian control and claim that they will never accept Israel, whereas Fatah prefers secular democratic control.⁸⁷ As a result of this stance, the tensions between Israel and the Hamas-controlled Gaza Strip have risen sharply since June 2007.⁸⁸ Once internal divisions boiled over, Fatah was ousted from the Gaza Strip by Hamas in September 2007.⁸⁹ After Hamas took control, Israel and Egypt

aspx [<https://perma.cc/3RB5-DBWB>] (last visited Feb. 25, 2018) (deeming Hamas a terrorist organization in Australia). *But see* Bisharat et al., *supra* note 35, at 75.

While Israel and a handful of other nations have designated Hamas a “terrorist organization,” this designation has only domestic legal implications in the countries adopting it. The designation bears no international legal import, and does nothing to relieve Israel of its obligation to respect the civilian-combatant and civilian objects-military objectives distinctions.

Id. at 52.

85. *See* Brown, *supra* note 80, at 44–46 (stating Hamas is “unquestionably Islamist . . . formed by Islamists who were frustrated by their camp’s absence from the national struggle.”). Hamas, in concert with a current trend in the Muslim Brotherhood, regularly emphasizes the religious struggle with Israel over politics. *Id.*; *see also* Robert S. Leiken & Steven Brooke, *The Moderate Muslim Brotherhood*, 86 FOREIGN AFF. 107, 115 (2007) (documenting the spread of the Muslim Brotherhood through the Arab world and Europe); *Fatah v. Hamas*, *supra* note 78 (discussing the roles of Fatah and Hamas in Palestine).

86. *See Profile: Hamas Palestinian Movement*, BBC NEWS (May 12, 2017), <http://www.bbc.com/news/world-middle-east-13331522> [<https://perma.cc/NHD6-DYSE>] (“Hamas found it had an effective power of veto over the process by launching suicide attacks. . . [i]n February and March 1996, it carried out several suicide bus bombings, killing nearly 60 Israelis[.]”); *see also* Walter Rogers, *Hamas Admits to Fatal Israeli Bus Bombings*, CNN (Feb. 25, 1996 at 11:50 PM), http://www.cnn.com/WORLD/9602/israel_explosion/02-25/pm [<https://perma.cc/XXW4-2SDL>] (stating Hamas claimed responsibility for the two suicide bombings in Jerusalem and Ashkelon in 1996).

87. Brown, *supra* note 80, at 43–45. *See* Nathalie Dina, Note, *Human Rights Council Trampling on Rights: Finding Israel’s Blockade Legal Underpins the Core Argument of the United Nations Report Condemning Israel’s Attacks on the Flotilla*, 18 SW. J. INT’L L. 347, 348 (2011) (describing Hamas as a “self-declared extremist terrorist group [with a] mission to destroy Israel by any means possible in order to obtain the land Israel legally has, which Hamas believes belongs to Palestine. While Hamas is not the official face of Palestine, it is the controlling political party that has slowly terrorized Palestine.”).

88. Erakat, *supra* note 33, at 45–47.

89. *Id.*

imposed a blockade around the Gaza Strip, resulting in much suffering by the Palestinian people.⁹⁰

The election of Hamas triggered massive economic sanctions from Israel.⁹¹ The United States and the European Union suspended foreign aid, resulting in increased violence in Gaza.⁹² Initially there was only a land blockade in 2007,⁹³ which was followed by a sea blockade one year later—both instituted on the grounds of security concerns.⁹⁴ The splintering of Hamas and Fatah has put Gaza's population in the crossfire of a struggle that has continued for decades.⁹⁵ The rise of Hamas, along with the land, sea, and aerial blockades of Gaza have created disastrous consequences for the Middle East as well as the standing of the international legal order.⁹⁶

A. *The Humanitarian and Economic Crisis in Gaza*

One of the major reasons why the crisis in Gaza continues is the fact that international organizations treat the crisis as a political matter beyond the realm of international law.⁹⁷ The United Nations Security Council, which has authority to pass swift resolutions in humanitarian crises (as it has in Somalia, Bosnia and Herzegovina), has not done so in Gaza.⁹⁸ This disproportionality has been attributed to political pressure from its

90. *Id.* See generally Ian Kennedy, *Practice Makes Custom: A Closer Look at the Traditional Law of Naval Blockade*, 70 U. TORONTO FAC. L. REV. 10, 15 (2012) (giving a detailed chronology of the implementation of the various blockades); Ellen Knickmeyer, *Gaza Straining at Egypt's Door*, WASH. POST (June 18, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/17/AR2007061701357.html> [https://perma.cc/AM5J-7MU5] (documenting the effect of the blockade on Gazans).

91. HARMS & FERRY, *supra* note 77, at 185.

92. *Id.* at 185–86.

93. Kennedy, *supra* note 90, at 15; See U.N. Human Rights Council, *Report of the 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*, ¶30 U.N. Doc. A/HRC/15/21 (September 27, 2010) [hereinafter *U.N. Flotilla Report*] (reporting on the Israeli attack on the humanitarian aid flotilla the *Mavi Marmara*).

94. Kennedy, *supra* note 90, at 15; *U.N. Flotilla Report*, *supra* note 93, at ¶ 30, 34.

95. HARMS & FERRY, *supra* note 77, at 190.

96. Bisharat et al., *supra* note 35, at 44.

97. Erakat, *supra* note 33, at 65.

98. See *id.* at 69 (describing the Security Council passing six resolutions in a calendar year addressing the humanitarian crisis in Somalia and nine resolutions in eight months responding to the conflict in Bosnia and Herzegovina).

permanent members, primarily the United States, which uses its veto power to block critical resolutions.⁹⁹ There were only two resolutions that dealt with Gaza between 2005 and 2010, though neither discussed international humanitarian law: only one nominally addressed the blockade, and the other was silent.¹⁰⁰ The Gaza Strip between Israel and Egypt “occupies an area of three hundred and sixty square kilometers and is the most densely populated area in the world.”¹⁰¹ Hamas has taken control of major “aspects of social, political, and economic life in Gaza.”¹⁰² Hamas has refused to follow the Palestinian Authority’s constitutional framework by appointing its own ministers without the Legislative Council’s approval.¹⁰³ Hamas has retaliated against Fatah by preventing Fatah members from traveling to the West Bank from Gaza to attend congressional sessions and has pushed pro-Hamas members into NGOs and social clubs.¹⁰⁴ Hamas has replaced Gaza’s civil servants, judges, and teachers with its own.¹⁰⁵ On a larger scale, the “effective entrenchment” in Gaza has reaped dire humanitarian and economic consequences on every sector of society.¹⁰⁶ According to the United Nations, “Gazans are now, on average, worse off than they were in the 1990s.”¹⁰⁷ Import and export restrictions have brought foreign exchange

99. *Id.* The U.S. used its veto power 32 times to protect Israel from Security Council resolutions and sanctions between 1972 and 1997. *Id.* The U.S. had cast only 69 total vetoes from the founding of the U.N. to 1997. *Id.*

100. *Id.* at 70–72.

101. Solon Solomon, *Occupied or Not: The Question of Gaza’s Legal Status After the Israeli Disengagement*, 19 *CARDOZO J. INT’L & COMP. L.* 59, 60–61 (2011).

102. Brown, *supra* note 80, at 41.

103. *Id.*

104. *Id.* at 42.

105. *Id.*

106. *Id.* at 44; *see also* Erakat, *supra* note 33, at 46–47 (commenting on the severity of the humanitarian crisis in the Gaza Strip).

107. *See* UNITED NATIONS COUNTRY TEAM, *GAZA IN 2020: A LIVEABLE PLACE?* at 4 (Aug. 2012), <https://www.unrwa.org/userfiles/file/publications/gaza/Gaza%20in%202020.pdf> [<https://perma.cc/GB4M-X72Z>] [hereinafter *GAZA IN 2020*] (detailing the realities of the future due to the humanitarian and economic crisis in Gaza).

to a halt while water, sanitation, and agriculture have been totally diminished due to prolonged military strikes.¹⁰⁸ Moreover, 51% of the population in Gaza are comprised of persons eighteen years or younger.¹⁰⁹ Compared to the 1990s, unemployment increased in 2012 with 47% of women unemployed and 58% of persons between twenty and twenty-four unemployed.¹¹⁰ Additionally, Gaza needs 71,000 housing units to accommodate its density and lack of land.¹¹¹ Due in large part to Gaza's geographic location, the lack of average rainfall and natural streams providing clean drinking water has also created a water and sanitation crisis in the region.¹¹² Finally, Gaza has a shortage of schools: out of the 677 in Gaza, 85% run double shifts, classes are shorter, and only 30% of kindergarten children attend licensed schools.¹¹³ The blockade, along with prolonged destruction of infrastructure and homes over the course of the last nine years, "amount[s] to collective punishment" of Gaza's entire population.¹¹⁴ The ideological split between the two political parties is a key issue;¹¹⁵ however, blockades maintained by Israel and Egypt are intensifying the dire humanitarian situation in Gaza and perpetuating the political rifts between Israel and Palestine.¹¹⁶

108. *Id.* at 9; see Erakat, *supra* note 33, at 46 (explaining the imports in Gaza are nowhere near what is needed to support the population).

109. GAZA IN 2020, *supra* note 107, at 9. This number is significant in that a large youth population approaching working-age can either contribute to the labor pool and grow the economy, or increase the unemployment rate if job opportunities are scarce, further contributing to negative social outcomes associated with high unemployment. *Id.*

110. *Id.* at 4; see also Human Rights Council, *Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1*, at ¶ 587, U.N. Doc. A/HRC/29/CRP.4 (June 22, 2015), www.ohchr.org/Documents/HRBodies/HRCouncil/ColGaza/A_HRC_CRP_4.doc [<https://perma.cc/BZF7-ECBG>] [hereinafter *U.N. Report on S-21/1*] (stating the Gaza Strip has the highest unemployment rate in the world).

111. GAZA IN 2020, *supra* note 107, at 9.

112. *Id.* at 11.

113. *Id.* at 14.

114. AMNESTY INT'L, THE CONFLICT IN GAZA: A BRIEFING ON APPLICABLE LAW, INVESTIGATIONS, AND ACCOUNTABILITY 10 (Jan. 2009), <https://www.amnesty.org/en/documents/MDE15/007/2009/en> [<https://perma.cc/4X7C-E2B7>] [hereinafter APPLICABLE LAW].

115. See Brown, *supra* note 80, at 44–46 (discussing the gap between Fatah and Hamas but also highlighting overlapping theories and priorities between the two ruling parties).

116. Bisharat et al., *supra* note 35, at 58–59.

IV. CONFLICT AND CONFRONTATION IN PALESTINE

A. *The Law of the Blockade*

Generally, the international law of blockade is part of customary law.¹¹⁷ Customary law is founded on state practice and *opinio juris*.¹¹⁸ *Opinio juris*, a key concept in international law is:

[A] multidimensional concept—a critical, constitutive component of customary international law...[its] essence is characterized by both a state's subjective belief as to the legality of a particular usage, as well as the binding international obligation which results from its existence. The continuing challenge of the application of *opinio juris* is to objectify its subjective nature. A state's actions, express statements, consent, acquiescence, protests, or lack of protests are all objective factors capable of manifesting *opinio juris*.¹¹⁹

Opinio juris consists of verbal statements by governmental officials to international organizations, through international organizations of resolutions, declarations, and other normative instruments, and by consent of states.¹²⁰

Sea blockades are a form of actual and economic warfare used to deny ingress and egress to vessels during international armed conflicts.¹²¹ Traditionally, international law governing blockades provided balance and a form of protection from armed conflict;¹²² that is, until the modern development and sophistication of technology and warfare.¹²³ Presently,

117. Thomas David Jones, *The International Law of Maritime Blockade — A Measure of Naval Economic Interdiction*, 26 HOW. L.J. 759, 761 (1983); see also Michael G. Fraunces, Note, *The International Law of Blockade: New Guiding Principles in Contemporary State Practice*, 101 YALE L.J. 893 (1992) (covering the development of blockade law from WWI to its modern state).

118. Kennedy, *supra* note 90, at 23.

119. Jo Lynn Slama, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603, 656 (1990).

120. Meron, *supra* note 34, at 244. The International Court of Justice establishes the rules governing consenting states, using international customs as evidence of acceptance of general law. U.N. Charter art. 92; Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute]; see also Fraunces, *supra* note 117, at 908 (explaining state practices can create customary international law and utilizing blockade law is an example).

121. Jones, *supra* note 117, at 762; Kennedy, *supra* note 90, at 18.

122. See Fraunces, *supra* note 117, at 899 (noting blockades promoted the rights of both neutral and belligerent nations which ultimately decreased the likelihood of further conflict).

123. See *id.* at 902 (1992) (explaining that new technologies used to combat blockades, such as submarines and mines, greatly changed the effectiveness of blockades); Jones, *supra* note 117,

it has become apparent that international laws governing the implementation of blockades have been ambivalent and misleading.¹²⁴

The first compromise between maritime powers was the Declaration of Paris in 1856, which codified the rules of maritime war and was generally accepted by the maritime powers.¹²⁵ Ultimately, the purposefully ambiguous language of the declaration did not fulfill the expectations of the powers.¹²⁶ The only accepted code of blockade was the Declaration of London in 1909, fifty-three years after the initial declaration.¹²⁷ The 1909 declaration is the basis of today's modern "international law of blockade, contraband, and neutral maritime rights."¹²⁸ Despite its achievements, the Declaration was never ratified in England (the sponsoring nation) nor did other powers attempt to ratify it.¹²⁹ Although the convention failed, it still managed to establish standards by which the international community judges whether a blockade is legal or not due to customary practice in international law.¹³⁰

The traditional standards of blockade law have developed through blockade practices delineated by courts, prompting other nations to accept these principles in their own courts.¹³¹ The traditional principles governing the law of blockade are: 1) proper establishment; 2) adequate notice; 3) effective enforcement; 4) impartial application; and 5) respect

at 767–68 (describing how dramatic changes in military warfare, especially in the World Wars, shifted the rules of naval blockades); see also Matthew L. Tucker, Note, *Mitigating Collateral Damage to the Natural Environment in Naval Warfare: An Examination of the Israeli Naval Blockade of 2006*, 57 NAVAL L. REV. 161, 171–72 (2009) (stating German submarines that "waged unrestricted warfare" in exclusion zones in both World Wars led to a restructuring of the traditional blockade in later modern conflicts).

124. See James F. McNulty, *Blockade: Evolution and Expectation*, 62 INT'L. L. STUD. SER. US NAVAL WAR COL. 172, 172 (1980) (arguing the current definition of blockade has not reached any sense of "logical maturity").

125. *Id.* at 178.

126. *Id.*

127. See *id.* at 182 (discussing the significant legal documents that established a basis for blockade law).

128. *Id.*

129. *Id.*

130. *Id.* at 183 (explaining that although the Declaration was not formally adopted, it is still considered to be part of developed maritime warfare law).

131. See Fraunces, *supra* note 117, at 896 (noting that by articulating how a state enforced its blockades and how it expected other nations to enforce them, courts created expectations that developed into law).

for neutral rights.¹³² Modern day blockade law, however, has become complicated due to recent changes in technology, actors, objectives, and territories.¹³³ The San Remo Manual, ratified in 1994 by the International Committee of the Red Cross, is a notable recent attempt to organize blockade law.¹³⁴ Since WWII, three requisite prongs of analysis with respect to the permissibility of naval blockades have developed: impartiality, notice, and reasonableness.¹³⁵ Impartiality requires the blockade to apply to all vessels regardless of their nationality.¹³⁶ Notice is initially given through formal diplomatic channels, the blockade zones are clearly identified for neutral vessels, and the method of blockade enforcement is given.¹³⁷ Reasonableness is the last requirement, dictating the blockade should be of a reasonable size.¹³⁸ This means the blockading party must decide the size of the blockade and whether or not it is proportionate to its goals.¹³⁹ The needs of neutral parties, their access and method of enforcement must also be taken into consideration.¹⁴⁰ Though uncommon, the law of blockade is still relevant in modern warfare, hailed as a method of “winning without killing.”¹⁴¹

Naval blockades are distinct due to their function as a form of economic warfare, which occurs when a nation is barred from any outside movement, such as in the Gaza Strip.¹⁴² At the center of the issue on the

132. *Id.* at 895.

133. *Id.*

134. Kennedy, *supra* note 90, at 21; *see* Tucker, *supra* note 123, at 175 (arguing that the law of the sea should be concerned with international environmental law and the damage that occurs to the environment during military conflict).

135. Fraunces, *supra* note 117, at 912.

136. *Id.* at 897.

137. *Id.* at 913.

138. *Id.*

139. *Id.* at 913–17.

140. *See id.* at 913–17 (discussing modern considerations nations must include before implementing a blockade and the seven guidelines for compliance with the principle of reasonableness: proportionality, high probability of severe damage, neutral needs, neutral strength, military necessity, method of enforcement, and accommodation).

141. *See* Jones, *supra* note 117, at 761 (characterizing blockades as a more efficient form of warfare with minimized casualties).

142. *See* Erakat, *supra* note 33, at 46–47 (“Israel’s policies have amounted to an almost complete prohibition on the movement of people into and out of the Strip with few exceptions even for the ill seeking medical treatment.”); *see also* Bisharat et al., *supra* note 35, at 58 (stressing the economic and social consequences of Israel’s blockade of the Gaza Strip).

legality of the blockade and occupation in Gaza is the snowballing international humanitarian crisis perpetuated by the air, sea, and land blockade of the Strip.¹⁴³ This crisis is attributed to Israel's "sole control of Gaza's airspace and territorial waters" and the restrictions on movement of people and goods.¹⁴⁴ It has been argued the current blockade in Gaza is a "collective punishment of its entire population."¹⁴⁵

B. *The Gaza Strip Blockade*

The San Remo Manual stipulates five conditions that must be satisfied to declare a legal naval blockade: the blockade 1) must be declared and notified; 2) must be effective; 3) must be applied impartially to all vessels; 4) cannot prevent access to ports and costs of natural states; and 5) must comply with certain humanitarian obligations.¹⁴⁶ Israel argues in the Turkel Report that it has satisfied all conditions required for a legal naval blockade, although the Turkel Report and the Palmer Reports take different stances on the issue.¹⁴⁷

143. See *Deprived and Endangered: Humanitarian Crisis in the Gaza Strip*, HUM. RTS. WATCH (Jan. 13, 2009), <https://www.hrw.org/news/2009/01/13/deprived-and-endangered-humanitarian-crisis-gaza-strip> [<https://perma.cc/Y7NX-MLK3>] [hereinafter *Deprived and Endangered*] (explaining how 1.5 million people in Gaza are without resources because of the Israeli blockade).

144. See APPLICABLE LAW, *supra* note 114 at 7 ("Israel maintains sole control of Gaza's airspace and territorial waters and does not allow any movement of people or goods in and out of Gaza via air or sea."); see also *U.N. Report on S-21/1*, *supra* note 110, at ¶29 ("[C]ontinuous patrolling of the territorial sea adjacent to Gaza by the Israeli Navy and constant surveillance flights of IDF aircraft, in particular remotely piloted aircraft, demonstrate the continued exclusive control by Israel of Gaza's airspace and maritime areas which . . . Palestinians are not allowed to use").

145. See APPLICABLE LAW, *supra* note 114, at 10 ("The prolonged blockade of Gaza, which had already been in place for some 18 months before the current fighting began, amounts to *collective punishment* of its entire population") (emphasis added); Bisharat et al., *supra* note 35, at 60 (emphasis added) ("A blockade against a civilian population inherently raises concerns of *collective punishment* because of the effect that prohibiting food and other essentials may have, particularly over the long run, on the survival of that population"). The blockade upon the Gaza Strip is described as a collective punishment despite regulations prohibiting same in Article 33 of the Fourth Geneva Convention. *Id.*

146. Elizabeth Spelman, *The Legality of the Israeli Naval Blockade of the Gaza Strip*, 19 EUR. J. CURRENT LEGAL ISSUES 1, 10 (2013).

147. Compare TURKEL COMM'N, THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2012, at 111 (Jan. 2011), https://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/TurkelCommission.pdf [<https://perma.cc/7K8W-8A7V>] (outlining the commission's conclusions in the report regarding compliance with relevant human rights laws in its blockade of the Gaza Strip), with TURKISH NATIONAL COMMISSION OF INQUIRY, REPORT ON THE ISRAELI ATTACK ON THE HUMANITARIAN AID CONVOY TO GAZA ON 31 MAY 2010 at 113–17

Israel maintains the blockade was properly announced on January 6, 2009 through notices on its government websites, a formal Notice to Mariners via maritime radio, and expressed to flag states directly.¹⁴⁸ The Minister of Defense declared the Gaza blockade by stating “All mariners are advised that as of 03 January 2009, 1700 UTC, Gaza maritime area is closed to all maritime traffic and is under blockade imposed by Israeli Navy until further notice.”¹⁴⁹ However, the San Remo Manual dictates in paragraph 94 that “the declaration shall specify the commencement, duration, location, and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline.”¹⁵⁰ In Israel’s Notice to Mariners, the only hint of duration comes from the words “until further notice.” Israel opines there is a lack of clarity in customary international law regarding the duration requirement; therefore, the San Remo Manual does not control this issue.¹⁵¹ According to the Turkel Report, the statement, “until further notice” satisfies the duration requirement.¹⁵² But the sea blockade in Gaza began in 2009 and is still in effect, even after many years of imposition.¹⁵³ Israel also maintains the blockade has been enforced impartially and effectively by not allowing any vessels entry into the blockaded maritime territory.¹⁵⁴ The fifth and greatly disputed standard

(Feb. 2011) <http://www.mfa.gov.tr/data/Turkish%20Report%20Final%20-%20UN%20Copy.pdf> [<https://perma.cc/ZR87-5BSA>] (outlining the Turkish National Commission’s conclusion that the May 2010 attack was in violation of international law).

148. See SIR GEOFFREY PALMER ET AL., U.N. SECRETARY-GENERAL, REPORT OF THE SECRETARY-GENERAL’S PANEL OF INQUIRY ON THE 31 MAY 2010 FLOTILLA INCIDENT at 27 (Sept. 2011) www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf [<https://perma.cc/BS5Q-NQNZ>] (“Notification of the blockade was published on the websites of relevant Israeli agencies, issued through a formal Notice to Mariners and broadcast on maritime radio, and conveyed to relevant flag States directly.”)

149. TURKEL COMM’N, *supra* note 147, at 36.

150. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA 26 (Louise Doswald-Beck ed., 1995).

151. TURKEL COMM’N, *supra* note 147, at 63.

152. See *id.* (“Even if we regard the ‘duration’ as an emerging rule of customary international law, great weight is not attached to establishing a specific term during which the blockade is required to run.”).

153. See Sarah Helm, *Bitter Palestinian Rivalry Adds to the Agony of Gaza’s Vulnerable*, GUARDIAN (July 22, 2017) <https://www.theguardian.com/world/2017/jul/22/gaza-electricity-shortages-hamas-israel-blockade-children> [<https://perma.cc/L4MF-8VSF>] (illustrating the severe effects of the decade-long sea blockade).

154. See Spelman, *supra* note 146, at no. 1 (explaining Israel’s position on the blockade).

is the requirement the blockade must comply with certain humanitarian obligations.¹⁵⁵ In order to pass legal muster under the humanitarian prong, the blockade cannot be intended to starve or collectively punish the civilian population.¹⁵⁶ Israel posits the main purpose of the blockade is security, focusing on preventing weapons and military supplies from entering the Gaza Strip.¹⁵⁷ In spite of this, the Turkel Report admits it is difficult to measure the humanitarian impact of imposing the maritime blockade.¹⁵⁸ Human Rights Watch reports Gazan residents are “facing dire shortages of food, water, cooking gas, fuel and medical care due to insecurity, the enforced closure of all of Gaza’s borders [E]lectricity is sharply down, and in some places open sewage is spilling into the streets.”¹⁵⁹ In addition, the Turkel Commission clarifies there is no evidence Israel is trying to starve the inhabitants of the Gaza Strip, insisting food insecurity is not the same as starvation.¹⁶⁰ In actuality, this argument is specious and offers no comfort to the people of Gaza. As of 2014, humanitarian aid shipments and commercial imports to the area have decreased.¹⁶¹ In fact, there were only 14,614 humanitarian aid shipments that year—a significant drop from the 20,358 shipments in the previous year.¹⁶² Commercial shipments have also dropped from 47,287 in 2013 to 37,065 in 2014.¹⁶³ There are currently only three crossing points in and out of Gaza: Erez, Rafah, and Kerem Shalom.¹⁶⁴ Despite

155. *See id.* (discussing the difficulties surrounding the definition of “compliance” with humanitarian requirements).

156. *See PALMER ET AL.*, *supra* note 148, at 42 (“Important humanitarian considerations constrain the imposition of a naval blockade. For one, it would be illegal if its imposition was intended to starve or to collectively punish the civilian population.”). However, the panel found there was no evidence of intent to starve the population and sided with the military objectives excuse. *Id.*

157. TURKEL COMM’N, *supra* note 147, at 53.

158. *Id.* at 65–66.

159. *Deprived and Endangered*, *supra* note 143.

160. TURKEL COMM’N, *supra* note 147, at 84.

161. *Gaza Crossings: Movement of People and Goods*, OCHA, <https://www.ochaopt.org/page/gaza-crossings-movement-people-and-goods> [hereinafter *Gaza Crossings*] (last visited Feb. 26, 2018).

162. *Id.*

163. *Id.*

164. *See The Coordination and Liaison Administration to the Gaza Strip*, COGAT, <http://www.cogat.mod.gov.il/en/Gaza/Pages/default.aspx#matakZone> [https://perma.cc/WW78-A64K] (last visited Feb. 25, 2018) (stating the Erez Crossing “serves mainly as a terminal for pedestrian traffic between Israel and the Gaza Strip[]” and the Kerem Shalom Crossing functions

these numbers, the population of the Gaza Strip is roughly 1.8 million people.¹⁶⁵ Since 2015, there has been a steady decline of individuals crossing into Israel.

Number of Individuals Crossing Into Israel ¹⁶⁶		
2015	2016	2017
181,229	158,249	82,809

Number of Individuals Entering and Exiting Israel at the Rafah Crossing ¹⁶⁷							
2014		2015		2016		2017	
Entering	48,005	Entering	14,292	Entering	16,510	Entering	18,436
Exiting	49,685	Exiting	14,416	Exiting	25,727	Exiting	16,723

Moreover, humanitarian aid workers in Gaza face numerous obstacles, such as restrictions on imports and exports by Israeli and Egyptian authorities that fuel shortages of supplies and danger of prolonged military skirmishes.¹⁶⁸ One of the most devastating attacks on

as “an entry and exit point for various goods.”); *see also* *Egypt Opens Rafah Crossing with Gaza for 4-day Opening*, MA’AN NEWS AGENCY, <https://www.maannews.com/Content.aspx?id=779643> [<https://perma.cc/ZBK7-2NVG>] [hereinafter *Egypt Opens Rafah*] (last updated Dec. 18, 2017) (stating Egyptian authorities opened the Rafah crossing for four days in the middle December, 2017). The crossing was open for three days in the middle of November, 2017. In 2016, Egyptian authorities partially opened the crossing for forty-four days. *Id.* In 2015, Egyptian authorities opened the crossing for twenty-one days. *But see* Oren Liebermann & Joshua Berlinger, *Israel Closes Gaza Border Crossings*, CNN, <https://www.cnn.com/2017/12/14/middleeast/israel-gaza-border-intl/index.html> [<https://perma.cc/N2VM-DJAD>] (last updated Dec. 14, 2017) (stating the Israeli military “will close border crossings into Gaza beginning [Dec. 14, 2017] until further notice[.]”).

165. *Gaza Crossings*, *supra* note 161.

166. *Id.*

167. *Id.*

168. *See* GAZA IN 2020, *supra* note 107 (discussing the loss of infrastructure after Israel’s “Operation Cast Lead” and the prevailing effects of Israel’s blockades); *see also* Bisharat et al., *supra* note 35, at 58–59, 71–74, 87–90, 99–100 (discussing the effect of Israel’s blockade on access to aid and supplies, the destruction of infrastructure during Israel’s “Operation Cast Lead” in 2008 and 2009, and Israeli attacks on medical personnel and medical facilities in Gaza); *Egypt Opens Rafah*, *supra* note 164 (stating the Egyptian authorities uphold the Israeli blockade).

humanitarian staff and UN facilities was the 2014 shelling by Israel of United Nations Relief and Works Agency (UNRWA) designated schools, which were used as shelter during Operation Protective Edge.¹⁶⁹ Forty-seven people were killed in this attack, including seventeen children.¹⁷⁰ Despite this, UNRWA is still working in Gaza to rebuild schools, disburse funding to reconstruct destroyed homes, and spread medical services to the people of Gaza who face unfathomable levels of poverty and civil unrest.¹⁷¹ As a consequence of the imposition of the total blockade¹⁷² and continued military operations in the cramped territory, it appears inevitable that additional atrocities will occur before international action is taken.¹⁷³

C. *The Mavi Marmara*

Two sizable military incursions into Gaza have occurred in the last nine years.¹⁷⁴ The first hostility erupted in 2009 during Operation Cast Lead;¹⁷⁵ the second in 2014 during Operation Protective Edge.¹⁷⁶

169. Peter Beaumont, *Israel Responsible for Gaza Strikes on UN Schools and Shelters, Inquiry Finds*, GUARDIAN (Apr. 27, 2015), <http://www.theguardian.com/world/2015/apr/27/israel-responsible-gaza-strikes-un-schools-ban-ki-moon> [https://perma.cc/C4QX-JZVX]; Pierre Krähenbühl, *UNRWA Strongly Condemns Israeli Shelling of Its School in Gaza as a Serious Violation of International Law*, UNRWA (July 30, 2014), <http://www.unrwa.org/newsroom/official-statements/unrwa-strongly-condemns-israeli-shelling-its-school-gaza-serious> [https://perma.cc/V6Y7-EMGK]; Anne Paq, *Israel: In-Depth Look at Gaza School Attacks*, HUM. RTS. WATCH (Sept. 10, 2014), <https://www.hrw.org/news/2014/09/11/israel-depth-look-gaza-school-attacks> [https://perma.cc/9PJE-32CB]; *Gaza: Deadly Shelling of Another UN School Draws Condemnations, Calls for Ceasefire*, UN NEWS CENTRE (July 30, 2014), <http://www.un.org/apps/news/story.asp?NewsID=48369#.VtyWI8czMII> [https://perma.cc/F42R-85L7].

170. Paq, *supra* note 169.

171. GAZA SITUATION REPORT 133, UNRWA (Mar. 4, 2016), <http://www.unrwa.org/newsroom/emergency-reports/gaza-situation-report-133> [https://perma.cc/DC78-C9AR].

172. *U.N. Flotilla Report*, *supra* note 93, at ¶29–36; Human Rights Council, *Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, ¶¶ 27, 205, 322-3, 1246, 1252, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf> [https://perma.cc/G3F5-8DEA] [hereinafter *U.N. Report on Gaza Conflict*].

173. *U.N. Flotilla Report*, *supra* note 93, at ¶ 39–42; *U.N. Report on Gaza Conflict*, *supra* note 172, at ¶¶ 29–34, 41–55, 65–75, 79–80, 83–84.

174. *U.N. Report on S-21/I*, *supra* note 110, at ¶ 58; Bisharat et al., *supra* note 35, at 41.

175. Bisharat et al., *supra* note 35, at 41; see Solomon, *supra* note 101, at 68 (discussing the U.N. Human Rights Counsel's fact-finding mission to investigate possible war crimes committed during "Cast Lead").

176. See *U.N. Report on S-21/I*, *supra* note 110, at ¶¶ 54, 58 (stating the initial phase of Operation Protective Edge consisted of airstrikes during Ramadan, the second phase involved

Citing Hamas as an imminent threat to Israel,¹⁷⁷ Israeli Defense Forces carried out 6,000 airstrikes during the conflict in 2014, including targeted attacks on residential buildings.¹⁷⁸ Before the ceasefire of Operation Protective Edge in August 2014, 28% of the population of Gaza—almost 500,000 people—were internally displaced in government and informal shelters.¹⁷⁹ Due to the land, sea, and air blockades surrounding Gaza, the citizens of Gaza have been isolated into dire economic and living conditions.¹⁸⁰ Gaza's fishermen cannot go beyond six nautical miles from the shore, severely limiting their ability to work and forcing them to pass illegally beyond the blockade.¹⁸¹ On May 31, 2010, while allegedly attempting to enforce the maritime blockade, Israeli Defense Forces illegally overtook several unarmed humanitarian aid vessels in international waters, culminating in the death of nine aid workers aboard the *Mavi Marmara*.¹⁸²

ground operations, and the third phase alternated between ceasefires and airstrikes); Salil Shetty, *Amnesty International Annual Report 2014/2015*, AMNESTY INT'L, <https://www.amnesty.org/en/latest/research/2015/02/annual-report-201415> [<https://perma.cc/T43P-QQ7Q>] (last visited Feb. 5, 2018) (stating the 2014 Israeli assault on Gaza killed two thousand Palestinians).

177. See *U.N. Report on S-21/1*, *supra* note 110, at ¶¶ 59–64, 84–87 (stating there were at least ten organized militant groups “of various ideologies” operating within Gaza at the time of Operation Protective Edge). These militant organizations fired approximately 4,500 rockets and mortar rounds into Israel in the summer of 2014. *Id.* at ¶¶ 59–64, 84–87. Following escalations, the U.N. requested “a more detailed assessment” of the situation from Israel, Palestine, and Hamas; none responded. *Id.* at ¶¶ 59–64, 84–87.

178. See *id.* at ¶¶ 111–14 (stating between 742 and 1,066 people died as a result of the airstrikes on residential buildings).

179. U.N. OFF. FOR THE COORDINATION OF HUM. AFF. OCCUPIED PALESTINIAN TERRITORY, *FRAGMENTED LIVES HUMANITARIAN OVERVIEW 2014* at 10 (2015) https://www.ochaopt.org/sites/default/files/Annual_Humanitarian_Overview_2014_English_final.pdf [<https://perma.cc/B43Z-SQAH>] [hereinafter *FRAGMENTED LIVES*].

180. See generally Bisharat et al., *supra* note 35, at 58 (arguing Hamas' and Israel's military conflicts violate international humanitarian law and create dire consequences for the population of both actors).

181. See *Gaza Fishermen: Restricted Livelihoods*, UNRWA (July 19, 2016), <https://www.unrwa.org/newsroom/features/gaza-fishermen-restricted-livelihoods> [<https://perma.cc/8X6R-D38H>] (describing the history and ever-changing limit to the fishing zone, which at one time was 20 nautical miles from shore and as limited as 3 nautical miles); *FRAGMENTED LIVES*, *supra* note 179, at 14 (illustrating the use of force and live ammunition by the Israeli navy on Palestinian fisherman when enforcing the restricted fishing zone).

182. PALMER ET AL., *supra* note 148, at 14–16, 18–22; see Robert Booth, *Israeli Attack on Gaza Flotilla Sparks International Outrage*, *GUARDIAN* (May 31, 2010), <http://www.theguardian.com/world/2010/may/31/israeli-attacks-gaza-flotilla-activists> [<https://perma.cc/S9CC-AJFH>] (describing the flotilla attack by the Israeli Defense Force on May 31, 2010 and the consequences for those aboard).

The incident sparked international outrage¹⁸³ resulting in various international inquiries into the legality of the flotilla interception.¹⁸⁴ The U.N. Human Rights Council report on the incident classified Israel as an occupying power, and was thereby bound by customary international law and international humanitarian law standards promulgated in the Fourth Geneva Convention.¹⁸⁵ Israel was declared an occupying power because:

Given the specific geopolitical configuration of the Gaza Strip, the powers that Israel exercises from the borders enable it to determine the conditions of life within the Gaza Strip. Israel controls the border crossings...decides what and who gets in or out...also controls the territorial sea...thereby regulating economic activity...also keeps control of the airspace of the Gaza Strip...makes military incursions...regulates monetary market based on the Israeli currency and controls taxes and custom duties.¹⁸⁶

The report also stated the Israeli Defense Forces are not only bound to adhere to the laws of armed conflict, but must also adhere to human rights law.¹⁸⁷ According to the U.N. report, the flotilla passengers were classified as civilians, thus under the protection of Article 4¹⁸⁸ and Article 147¹⁸⁹ of the Fourth Geneva Convention.¹⁹⁰ Article 147 of the Geneva mandates important limits on how much force may be used against persons, stating:

183. Isabel Kershner, *After Deadly Raid at Sea, Israel is Sharply Criticized*, N.Y. TIMES (June 1, 2010), <https://www.nytimes.com/2010/06/01/world/middleeast/01flotilla.html> [<https://nyti.ms/2JED3hV>].

184. See PALMER ET AL., *supra* note 148, at 3 (second official report by the United Nations Secretary General into the flotilla attack); *U.N. Flotilla Report*, *supra* note 93, at ¶ 1,4 (promulgating the official report of the investigation into the flotilla interception by the U.N. Human Rights Council).

185. *U.N. Flotilla Report*, *supra* note 93, at ¶¶ 62–63.

186. *Id.* at ¶ 64.

187. *Id.* at ¶ 62.

188. *Id.* at ¶ 66. See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 <https://www.icrc.org/ihl/385ec082b509e76c41256739003e636d/6756482d86146898c125641e004aa3c5> [<https://perma.cc/8ZYN-N4Q5>] [hereinafter *Fourth Geneva Convention*] (stating that pursuant to Article 4, “[p]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”).

189. See *Fourth Geneva Convention*, *supra* note 188, at art. 147 (expounding international humanitarian law on the treatment of persons in times of war).

190. *U.N. Flotilla Report*, *supra* note 93, at ¶ 65.

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and want only.¹⁹¹

The report, which includes participant interviews, made clear that those on the flotilla were attempting to break the blockade by drawing international attention to the blockade and the situation in the Gaza Strip in order to facilitate humanitarian assistance to Gaza.¹⁹² However, the U.N. characterized the incursion by the *Mavi Marmara* into Gaza as primarily political.¹⁹³ This characterization was largely due to the fact that Israel offered to allow delivery of humanitarian aid to Gaza through Israel's ports via a neutral organization, but there was no port in the Gaza Strip deep enough to dock the vessels in the flotilla.¹⁹⁴ The IDF shot live baton beanbags, plastic bullets, and live ammunition when passengers boarded the *Mavi Marmara*; the shooting killed nine passengers and seriously wounded twenty-four.¹⁹⁵

D. *The Effect of President Trump's Jerusalem Declaration*

On December 6, 2017, U.S. President Donald Trump inexplicably declared the United States would recognize Jerusalem as the capital of Israel.¹⁹⁶ This is problematic for a number of reasons, not least of which

191. *Fourth Geneva Convention*, *supra* note 188, at 147.

192. *See generally U.N. Flotilla Report*, *supra* note 93, at ¶ 79 (identifying the three-fold purpose of the mission, but emphasizing the paramount importance of delivering humanitarian aid to the Gaza Strip).

193. *Id.* at ¶ 80.

194. *Id.*

195. *Id.* at ¶ 118.

196. *See Full Video and Transcript: Trump's Speech Recognizing Jerusalem as the Capital of Israel*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/world/middleeast/trump-israel-speech-transcript.html> [<https://nyti.ms/2AYRITI>] (stating "I have determined that it is

is the fact that Jerusalem is located in an area effectively split in half by Israel and Palestine. East Jerusalem has long been designated by Palestine as the future capital of an eventual Palestinian state, while Israel's parliament resides in West Jerusalem.¹⁹⁷ Presently, the U.S. embassy in Israel is located in Tel Aviv; however, recognizing Jerusalem as the undivided capital of Israel and subsequent planning to move the U.S. Embassy to Jerusalem has been on the agenda since Congress passed the Jerusalem Embassy Act in 1995.¹⁹⁸ President Trump's declaration is not a major departure from past presidential positions on the issue either. Designating Jerusalem as the (sometimes) undivided capital of Israel, ignoring Palestine's declaration of East Jerusalem as its rightful capital, has been a disingenuous campaign tactic for some time,¹⁹⁹ even

time to officially recognize Jerusalem as the capital of Israel. While previous presidents have made this a major campaign promise, they have failed to deliver. Today, I am delivering.”)

197. Sarah Wildman, *Trump's Plan to Declare Jerusalem the Capital of Israel will Derail Decades of US Diplomacy*, VOX (Dec. 6, 2017), <https://www.vox.com/2017/12/5/16735072/trump-jerusalem-capital-embassy-palestinians-israelis> [<https://perma.cc/4SYP-QV4Z>]. Israel claimed possession of East Jerusalem in 1949 and West Jerusalem in 1967. *Id.* The broader international community believes East Jerusalem to be an occupied territory—not the capital of Israel. *Id.* Israel and Palestine agreed in the 1993 peace accord to settle the Jerusalem issue in peace talks at a later date. Alexandra Wilts, *Donald Trump Recognizing Jerusalem as Israel's Capital Will Cause 'Major Catastrophe', Middle East Leaders Warn*, INDEPENDENT (Dec. 4, 2017), <http://www.independent.co.uk/news/world/americas/us-politics/trump-jersusalem-israel-capital-violence-unrest-threat-warning-middle-east-latest-a8091766.html> [<https://perma.cc/G3SJ-6QHW>].

198. Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, 109 Stat. 398 (1995). In pertinent part, the Act declares Jerusalem to be the undivided city and capital of the State of Israel and the U.S. Embassy should be established in Jerusalem no later than May, 1999. *Id.* at § 3. One peculiar aspect of the Act, the President may suspend the timetable limitation described in Section 3 for a six-month period for purposes of protecting national security interests. *Id.* at § 7. Every President since the time the Act was passed has signed similar waivers, ensuring the U.S. Embassy remains in Tel Aviv. Wildman, *supra* note 197.

199. *See Transcript: Obama's Speech at AIPAC*, NPR: ELECTION 2008 (June 4, 2008, 11:10 AM), <https://www.npr.org/templates/story/story.php?storyId=91150432> (“Jerusalem will remain the capital of Israel, and it must remain undivided.”); Alison Mitchell, *Bush Says Clinton Misstepped in Israel*, N.Y. TIMES (May 23, 2000) <https://www.nytimes.com/2000/05/23/us/bush-says-clinton-misstepped-in-israel.html> [<https://nyti.ms/2IKkwiX>] (quoting candidate Bush at the 2000 AIPAC conference: “[S]omething will happen when I'm president: as soon as I take office I will begin the process of moving the U.S. ambassador to the city Israel has chosen as its capital”); Amir Tibon, *From Bill Clinton to Trump: The Never-Ending Story of the Jerusalem Embassy Move*, HAARETZ (Feb. 5, 2017, 5:39 AM) <https://www.haaretz.com/israel-news/.premium-the-never-ending-story-of-the-jerusalem-embassy-move-1.5494231> [<https://perma.cc/6RQ8-3CE7>] (highlighting candidate Bill Clinton's campaign promise to support Jerusalem's designation as Israel's capital). None of these campaign promises were fulfilled. *See Facing Criticism, Obama*

if the current president appears poised to follow through. The ultimate decision on the division of Jerusalem is of key importance to the Israel–Palestine conflict, as Palestine would—in a two-state solution—divide Jerusalem and solidify East Jerusalem as its capital.²⁰⁰ One still must wonder if Trump’s latest decree will have any effect on the ongoing conflict in Palestine.

In the days preceding Trump’s statement, leaders in the Middle East and Europe issued advance pleas for Trump to reconsider speaking on this issue out of fear his declaration could lead to violence and raise tensions in an already volatile region.²⁰¹ On December 21, 2017, in response to Trump’s edict, the United Nations member states voted overwhelmingly to declare any recognition of Jerusalem as the Israeli capital “null and void.”²⁰² A spokesman for Palestinian President Mahmoud Abbas believed the vote was a reaffirmation of global support for Palestine, while Saeb Erekat, chief negotiator for Palestine, condemned Trump’s statement as a mark of shame for Palestine’s

Modifies Jerusalem Stance, REUTERS (June 5, 2008, 6:16 PM) <https://www.reuters.com/article/us-usa-politics-obama-mideast/facing-criticism-obama-modifies-jerusalem-stance-idUSN0547673120080605> [<https://perma.cc/2LDF-8574>] (couching his earlier declaration that Israel would remain undivided, candidate Obama said “Well, obviously, it’s going to be up to the parties to negotiate a range of these issues. And Jerusalem will be part of those negotiations”); Presidential Determination No. 2001–19, Memorandum on Suspension of Limitations Under the Jerusalem Embassy Act, 3 C.F.R. 901 (2001) (suspending limitations of the Jerusalem Embassy Act for six months by then-president George W. Bush); John Kifner, *Clinton Hints That He is Ready to Move Embassy to Jerusalem*, N.Y. TIMES (July 29, 2000) <https://www.nytimes.com/2000/07/29/world/clinton-hints-that-he-is-ready-to-move-embassy-to-jerusalem.html> [<https://nyti.ms/2JFdIKd>] (contemplating the negative effect the Embassy move would have on the peace effort, President Clinton indicated “I have always wanted to move our embassy to West Jerusalem. [] I have not done so because I didn’t want to do anything to undermine our ability to help broker a secure and fair and lasting peace for Israelis and for Palestinians”).

200. Jennifer Williams & Sarah Wildman, *Trump’s Recognition of Jerusalem as Israel’s Capital, Explained*, VOX (Dec. 6, 2017), <https://www.vox.com/world/2017/12/6/16741528/trump-jerusalem-speech-israel-tel-aviv> [<https://perma.cc/4ZS7-V3YQ>].

201. See Wilts, *supra* note 197 (expressing concern of several leaders, one of whom stated “[a]ny US announcement on the status of Jerusalem prior to a final settlement would have a detrimental impact on the peace process and would heighten tensions in the region.”).

202. Peter Beaumont, *UN Votes Resoundingly to Reject Trump’s Recognition of Jerusalem as Capital*, GUARDIAN (Dec. 21, 2017), <https://www.theguardian.com/world/2017/dec/21/united-nations-un-vote-donald-trump-jerusalem-israel> [<https://perma.cc/B6RR-V47T>].

detractors.²⁰³ In contrast, Israel thanked President Trump for his declaration by stating its intention to name a Jerusalem train station after him.²⁰⁴ Nikki Haley, the United States Ambassador to the United Nations, threatened Washington would not forget the 128 countries who “disrespected” America as a consequence of this vote.²⁰⁵

Thousands of Palestinians responded to Trump’s announcement by demonstrating in the streets of East Jerusalem.²⁰⁶ In response, Israel cracked down on the protestors, causing injuries to hundreds of demonstrators, dozens of arrests, and the death of at least eight Palestinians.²⁰⁷ Israeli Education Minister, Naftali Bennett, issued a grave warning to the protestors: “I recommend to Israeli Arabs, and to those Arabs who are rioting, not to test our patience.”²⁰⁸ Betty Herschman, a director for Ir Amim, a non-profit group focused on the Israeli–Palestinian conflict, stated that as a result of Trump’s statement “Israel will be further emboldened to take its own unilateral steps to intensify the occupation of East Jerusalem and its people, as well as steps to transfer them from the city.”²⁰⁹

203. *UN General Assembly Rejects Trump’s Jerusalem Move*, AL JAZEERA (Dec. 21, 2017), <http://www.aljazeera.com/news/2017/12/general-assembly-rejects-trump-jerusalem-move-171221135806725.html> [<https://perma.cc/V6DC-QKFU>].

204. Ruth Eglash, *Israel’s Transport Minister Wants to Name a New Jerusalem Train Station After Trump*, WASH. POST (Dec. 27, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/12/27/israels-transport-minister-wants-to-name-a-new-jerusalem-train-station-after-trump/?utm_term=.06988bad759a [<https://perma.cc/474H-HH2X>].

205. See Beaumont, *supra* note 202 (noting 128 member states rejected Trump’s resolution, while nine sided with Trump—Israel included—and thirty-five abstained). Ambassador Haley issued this stinging rebuke to the U.N. vote:

The United States will remember this day in which it was singled out in this assembly for the very act of exercising our right as a sovereign nation [. . .] We will remember it when, once again, we are called up to make the world’s largest contribution to the U.N., and we will remember it when many countries come calling on us to pay even more and to use our influence for their benefit.

Nicole Goodkind, *President Trump Cuts Funding to UN After Israel Vote*, NEWSWEEK (Dec. 25, 2017), <http://www.newsweek.com/united-nations-donald-trump-nikki-haley-jerusalem-funding-758849> [<https://perma.cc/KXV5-J4WR>].

206. Henriette Chacar, *Trump’s Jerusalem Announcement Sparked Deadly Violence — From Israel*, INTERCEPT (Dec. 18, 2017), <https://theintercept.com/2017/12/18/trump-jerusalem-israel-palestinian-protest> [<https://perma.cc/P9X7-SHGU>].

207. *Id.*

208. *Id.*

209. *Id.*

The ultimate legal effect of Trump's statement remains to be seen.²¹⁰ At a minimum, the decision has created more conflict between the United States and the overwhelming majority of the remaining United Nations member states who rejected Washington's position on the matter.²¹¹ The decision signaled a clear message to Palestinians regarding America's sympathies in the conflict—at least during President Trump's tenure.²¹² What is almost certain is if the United States follows through with its intention to relocate its embassy to Jerusalem, violence will be all but guaranteed to follow.²¹³

V. THE CONSTRAINTS OF INTERNATIONAL HUMANITARIAN LAW

As previously mentioned, international humanitarian law is constrained by political motives and policies of powerful nations.²¹⁴ There is no methodology in place to decide whether or not intervention is justified.²¹⁵ As a result, it becomes increasingly difficult to classify and act, particularly in a territory such as Gaza, when the terms of engagement are already so vague.²¹⁶ However, it is clear the legal status

210. See Tracy Wilkinson, *Legal Impact of Trump's Jerusalem Decision Still Murky*, L.A. TIMES (Dec. 7, 2017), <http://www.latimes.com/politics/washington/la-na-pol-essential-washington-updates-legal-impact-of-trump-s-jerusalem-1512680351-htmlstory.html> [https://perma.cc/VC2U-XRC3] (discussing the various uncertainties and ambiguities in President Trump's announcement regarding the Embassy relocation).

211. See Brian Katulis & Alia Awadallah, *The United States Should Listen to Jordan on the Jerusalem Decision*, THE HILL (Feb. 1, 2018), <http://thehill.com/opinion/international/371724-the-united-states-should-listen-to-jordan-on-the-jerusalem-decision> [https://perma.cc/8XJ4-EBBU] (arguing the declaration has isolated the U.S. and left the country's efforts in the Middle East "dead in the water"); Max Fisher, *The Jerusalem Issue, Explained*, N.Y. TIMES: MIDDLE EAST (Dec. 9, 2017), <https://www.nytimes.com/2017/12/09/world/middleeast/jerusalem-trump-capital.html> [https://nyti.ms/2jASMml] (finding the U.S. meddling in Israel, in particular Jerusalem, has undermined the nation's credibility as a neutral arbiter and cast it as a "biased and unhelpful actor").

212. *Palestine Refuses Peace Talks Until Trump Reverses U.S. Embassy's Move to Jerusalem*, SOUTH CHINA MORNING POST (Jan. 31, 2018), <http://www.scmp.com/news/world/middle-east/article/2131279/no-talks-us-until-jerusalem-move-reversed-says-palestinian> [https://perma.cc/S4BJ-MZL7] (stating the secretary general of the Palestine Liberation Organization said Trump's move was "part of a new American era of moving from negotiation to dictation").

213. Cristina Maza, *Jordan's King Says Moving U.S. Embassy to Jerusalem Will Cause Terrorism and Despair*, NEWSWEEK (Dec. 1, 2017), <http://www.newsweek.com/jordan-king-israel-palestine-us-embassy-terrorism-jerusalem-729208> [https://perma.cc/KNE7-Z44Y].

214. Marcus, *supra* note 51, at 106.

215. *Id.* at 108.

216. *Id.* at 138–39.

of Gaza remains contested in the international legal community.²¹⁷ One major factor contributing to Palestine's contested status is whether Gaza is still subject to belligerent occupation as defined by international law following Israel's disengagement from the territory in 2005.²¹⁸ The main sources of law governing war are the 1907 Hague Regulations, the Four Geneva Conventions, and their Additional Protocols I and II.²¹⁹ Both Israel and Palestine have signed and ratified the Fourth Geneva Convention.²²⁰ Outside authorities have argued Gaza is still under the belligerent occupation, while Israel has rebutted this stance.²²¹ Article

Humanitarian intervention may be viewed as a legitimate use of force for collective self-defense. In this case, it is engaged on very compelling grounds; namely, that systematic and flagrant violations of human rights and humanitarian law are the concern of every nation and individual and that protection of the victims is the universal obligation of humanity. But a humanitarian intervention force that intervenes to ensure compliance with humanitarian law cannot then engage in violations of international law.

Id.

217. Bisharat et al., *supra* note 35, at 46; see also Yoram Dinstein, *The Arab-Israeli Conflict from the Perspective of International Law*, 43 U.N.B.L.J. 310, 317 (1994) (explaining that due to Gaza's unique status as a separate entity, rather than as a merger of multiple entities, no freedom of movement was offered and sovereignty is therefore unsettled).

218. Bisharat et al., *supra* note 35, at 46; see Daniel Benoliel, *Israel, Turkey, and the Gaza Blockade*, 33 U. PA. J. INT'L. L. 615, 625 (2011) (arguing that even if one were to acknowledge that Gaza is belligerently occupied by Israel, the governing laws are merely customary to international armed conflict and are thus inconsistently applied).

219. Erakat, *supra* note 33, at 54.

220. Imseis, *supra* note 63, at 93.

221.

The test for determining whether a territory is occupied under international law is effective control, and not the permanent physical presence of the occupying Power's military forces in the territory in question. Judged by this test it is clear that Israel remains the occupying Power as technological developments have made it possible for Israel to assert control over the people of Gaza without a permanent military presence.

Human Rights Council, *Human Rights Situation in Palestine and Other Occupied Territories*, at ¶ 11, U.N. Doc. A/HRC/7/17 (Jan. 21, 2008) <https://unispal.un.org/DPA/DPR/unispal.nsf/0/F71BE9FAE0ABBE1C852573EC006DDE2E> [<https://perma.cc/D7EU-YT3L>]. See Benoliel, *supra* note 218, at 651 (claiming reports and arguments by international organizations stating Israel wholly occupies Gaza are flawed);

Israel has maintained effective control of the Gaza Strip within the meaning of Article 42 of the 1907 Hague Regulations. The assessment that Gaza continues to be occupied by Israel is shared by the international community as articulated by the General Assembly and reaffirmed by the International Committee of the Red Cross (ICRC) and Prosecutor of the International Criminal Court (ICC).

U.N. Report on S-21/1, *supra* note 110, at ¶ 30.

42 of the 1907 Hague Regulations asserts: “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.”²²² Article 42 also established the “effective control” test to identify occupation.²²³ The “effective control” test was applied in *USA v. Wilhelm List et al.*, where the U.S. Military Tribunal concluded the standard does not require the presence of permanent military personnel.²²⁴ Nevertheless, Israel maintains the Gaza Strip is neither sovereign nor occupied.²²⁵

The position of the Israeli Supreme Court and its current case law is in line with its government’s position: Israel disengaged from the Gaza Strip in 2005 and has not occupied the territory since.²²⁶ If one takes the stance that Israel does in fact retain “effective control” of the Gaza Strip, then Israel is still bound by international humanitarian law duties under the Hague Convention on the law of occupation.²²⁷ Additionally, Israel will have duties under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War treatise.²²⁸ These duties include protecting the civilian way of life and preserving the personal freedoms of the citizens in the occupied state.²²⁹ It is important to keep in mind that even though Israel has not ratified certain provisions of the Fourth Geneva Convention, it still undertakes some of those provisions

222. *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land*, INT’L COMMITTEE OF THE RED CROSS at art. 42 (Oct. 8, 1907), <https://www.icrc.org/applic/ihl/ihl.nsf/0/1d1726425f6955aec125641e0038bfd6> [<https://perma.cc/DK44-6H3V>].

223. Bisharat et al., *supra* note 35, at 49; *see* Spelman, *supra* note 146, at 5 (applying Article 42 to the Israeli naval blockade of the Gaza Strip and finding Gaza is, in fact, occupied by Israel).

224. *In Re List and Others (Hostages Trial)*, 15 ANN. DIG. & REP. PUB. INT’L L. CASES 632, 646–47 (U.S. Mil. Trib. Nuremberg 1948); *see also U.N. Report on S-21/1*, *supra* note 110, at ¶ 27 (proclaiming international law does not require a region to be occupied by military forces in order to be regarded as occupied by international law).

225. Spelman, *supra* note 146, at § 1.3.

226. H CJ 9132/07 Al-Bassiouni v. Prime Minister 1(12) (2008) (Isr.); *see also* TURKEL COMM’N, *supra* note 147, at 50 (discussing Israel’s lack of control in government and military capacity in Gaza Strip since September 2005).

227. Spelman, *supra* note 146, at § 1.3.

228. *See* Bisharat et al., *supra* note 35, at 50–51 (describing obligations Israel could have if found to be in occupation of the Gaza Strip).

229. *See Fourth Geneva Convention*, *supra* note 188, at art. 27 (emphasizing protections regarding respect, honor, rights, religion, manners, and customs for all persons in territories of conflict and protected territories).

through customary international law.²³⁰ Despite not being a party to the agreement, Israel has recognized the 1907 Hague Regulations reflect customary international law.²³¹ Further, Israel argued it *de facto* applies the Fourth Geneva Convention's humanitarian provisions, but does not apply the provisions *de jure* to Palestine.²³² The International Court of Justice rejected this argument, confirming the Fourth Geneva Convention's applicability to occupied Palestinian territory.²³³ In response to these international condemnations, Israel has adopted a legal policy describing the ongoing hostilities as an "armed conflict" and classifying Hamas as a military force instead of militants.²³⁴ Israel has received criticism for adopting such language because it opened the door for the use of "war like" tactics against those in the occupied territories.²³⁵ For example, during Operation Protective Edge "[t]he IDF carried out more than 6,000 airstrikes in Gaza during the 2014 Operation, from the first day throughout the Operation. These included targeted attacks on residential and other buildings."²³⁶

The term "armed conflict" does not have a universally agreed upon meaning in international law, but is defined in general terms by the International Court of Justice's opinion in *Prosecutor v. Dusko Tadić*:

An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a

230. *U.N. Report on S-21/I*, *supra* note 110, at ¶ 24.

231. *Id.*

232. *Id.* at ¶ 25.

233. *Id.* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 177, at ¶ 101 (July 9, 2004) (finding the Convention is applicable to Palestinian territories).

234. Yotam Feldman & Uri Blau, *Consent and Advise*, HAARETZ (Jan. 29, 2009), <http://www.haaretz.com/consent-and-advise-1.269127> [<https://perma.cc/6MEA-CQ9Q>] (explaining how Hamas can be seen as the equivalent of an army).

235. Bisharat et al., *supra* note 35, at 53.

236. *U.N. Report on S-21/I*, *supra* note 110, at ¶ 111; *see also* STATE OF ISRAEL, MINISTRY OF FOREIGN AFF., THE 2014 GAZA CONFLICT 179 (May 2015), <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf> [<https://perma.cc/8ZWM-HLJH>] ("In certain cases, the IDF employed delay fuses for bombs to detonate deep inside targets, to limit damage to adjacent structures.").

peaceful settlement is achieved...international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.²³⁷

By application of this definition, Israel maintains it is involved in an armed conflict with Hamas and as such is a legitimate military force.²³⁸ But Israel's rationalization becomes untenable when applying the "effective control" test. Generally, when determining the level of control of authority, one would examine factors such as military presence and the potential for hostile takeovers.²³⁹ Currently, Israel controls the import of goods into Gaza, supplies 60% of Gaza's fuel and electricity, and maintains an air, sea, and land blockade that strictly governs who can enter and leave the area.²⁴⁰ This total restriction of movement has spurred the rapid growth of tunnels from Gaza into Israel and Egypt.²⁴¹ During Operation Cast Lead, the IDF found 32 tunnels which undoubtedly have been used for escape as well as a means to facilitate an attack by armed groups intent on striking beyond the Green Line into Israel.²⁴²

Israel's current stance is that it has, in fact, abided by the rules of the international armed conflict by invoking the right to self-defense under Article 51 of the United Nations Charter.²⁴³ Article 51 provides an

237. Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

238. Spelman, *supra* note 146, at § 1.4.

239. Susan Power, *War, Invasion, Occupation? A Problem of Status on the Gaza Strip*, 12 TRINITY C.L. REV. 25, 30 (2009).

240. *Id.* at 36; see Erakat, *supra* note 33, at 50 (discussing application of "effective control" regarding Israel as an occupying power in the Gaza Strip); see also Kennedy, *supra* note 90, at 15 (outlining restrictions imposed on passage of imports, oil, electricity, shipping, and persons in and out of the Strip).

241. See U.N. Report on S-21/1, *supra* note 110, at ¶¶ 58, 107 (explaining how this "network of cross-border assault tunnels" strikes fear in civilians because they are so close to neighborhoods and are primarily used to target civilians).

242. *Id.* at ¶¶ 105, 107; see also *Operation Protective Edge (July/August 2014)*, ISRAEL DEFENSE FORCE, <https://www.idf.il/en/minisites/wars-and-operations/operation-protective-edge-julyaugust-2014> [<https://perma.cc/637S-EHMM>] (last visited Jan. 29, 2018) (reporting how IDF destroyed 32 "terror tunnels" during Operation). The authors add speculation that these tunnels may have been used by citizens as a means of escape.

243. See U.N. Security Council, *Identical Letters Dated 27 December 2008 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and*

“inherent right of individual or collective self-defense if an armed attack occurs” against a member state of the United Nations.²⁴⁴ The ICJ has cast major doubts upon Israel’s self-defense claims under Article 51.²⁴⁵ In an advisory opinion concerning construction of a wall in occupied territory, the ICJ held Israel does not have the right to build a wall in the West Bank—even in order to prevent attacks.²⁴⁶

After examining the Palestinian situation within the broad and undefined concept of armed conflict in conjunction with its pliant application, it is evident international action is necessary. The dire conditions in Palestine cannot continue to be ignored. The current framework of international humanitarian law and calls for adherence to the legal limitations of proportionality and belligerent occupation have been insufficient to quell the discord in the region and support the civilians of Gaza.

A. *Proportionality of Force & Self-Defense*

Article 51 requires a proportionality test be met in the event a state does take action under the self-defense principle.²⁴⁷ While the state acting in self-defense may use force only to the extent necessary in preventing the attacks, it may not use excessive force or force amounting to an unprovoked response.²⁴⁸ Rule 14 of Customary International Humanitarian Law (pursuant to a study by the International Committee of the Red Cross) provides:

to the President of the Security Council, U.N. Doc. S/2008/816 (Dec. 27, 2008), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Gaza%20S2008816.pdf> [<https://perma.cc/38JM-ECSK>] (voicing Israel’s position to the Security Council as to how Israel exercised self-defense, an inherent right, on the morning of Operation Cast Lead); *see also* Bisharat et al., *supra* note 35, at 54 (inferring how Israel treated Operation Cast Lead as an international armed conflict, claiming Hamas is guilty of war crimes).

244. U.N. Charter art. 51.

245. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 194, at ¶ 139 (July 9, 2004) (holding Article 51 only applies where there is an armed attack by one State against another, but Israel has not accused another State of attacks and thereby cannot justifiably invoke the right to self-defense).

246. *See id.* at ¶ 137 (holding construction of the wall is not necessary, infringes on the rights of citizens, and fails to conform to international humanitarian law).

247. *See* Bisharat et al., *supra* note 35, at 66 (explaining how the self-defense action taken must be proportional to the harm endured).

248. *See id.* at 66–67 (exemplifying how attacks on civilians are not related to rocket fire and would thus be excessive if Israel were to claim it was a victim of an unprovoked rocket fire attack).

Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.²⁴⁹

Israel and its allies emphasize its right to self-defense against attacks by Palestine and Hamas.²⁵⁰ It is true that Hamas is responsible for attacks in Israel—even attacks against civilian targets.²⁵¹ It is also true, as detailed throughout this article, that Israel has made a habit of targeting Palestinian civilians.²⁵² As neither party is operating with clean hands, it is necessary to consider the scope and sophistication of the parties, both claiming to be responding to attacks by the other.²⁵³

249. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 46 (vol. 1, 2009), <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> [<https://perma.cc/GJ2L-ZFLZ>].

250. See 155 CONG. REC. 412–33 (2009) (debating the passage of the 2009 House Resolution 34 on recognizing Israel's right to self-defense in the Gaza Strip against attacks by Hamas); see also TOI Staff, *Clinton: Hamas is Provocateur, Israel Has Right to Self-Defense*, TIMES OF ISRAEL (Apr. 10, 2016), <https://www.timesofisrael.com/clinton-hits-back-at-sanders-over-gaza-comments> [<https://perma.cc/2R37-58B5>] (discussing 2016 U.S. Democratic presidential candidates Bernie Sanders's and Hillary Clinton's position on support for Israel's military campaign against Hamas in the Gaza Strip).

251. See *Amnesty: Hamas Rocket Attacks Amounted to War Crimes*, BBC NEWS (Mar. 26, 2015), <http://www.bbc.com/news/world-middle-east-32053999> [<https://perma.cc/YC9D-FP4B>] (“According to U.N. data more than 4,800 rockets and 17,000 mortars were fired from Gaza towards Israel between 8 July and 26 August. Around 224 projectiles are believed to have struck Israeli residents.”); *Israel/Palestine: Hamas Bus Bombing Targets Civilians*, HUM. RTS. WATCH (Apr. 26, 2016), <https://www.hrw.org/news/2016/04/25/israel/palestine-hamas-bus-bombing-targets-civilians> [<https://perma.cc/FWF2-JYHN>] (“The bombing of a bus in West Jerusalem on April 18, 2016 apparently by a member of the militant Palestinian group Hamas [. . .] injured at least 19 Israelis.”).

252. See Ben Norton, *Independent Investigation Details Israel's Deliberate Targeting of Civilians in Gaza*, MONDOWEISS; NEWS & OPINION ABOUT PALESTINE, ISRAEL & THE UNITED STATES (Jan. 29, 2015), <http://mondoweiss.net/2015/01/independent-investigation-deliberate> [<https://perma.cc/B2HM-RLCK>] (citing a fifty-day attack by Israel where seventy percent of Palestinian casualties were civilians); Mairav Zonszain, *Israel Killed More Palestinians in 2014 Than in Any Other Year Since 1967*, GUARDIAN (Mar. 27, 2015), <https://www.theguardian.com/world/2015/mar/27/israel-kills-more-palestinians-2014-than-any-other-year-since-1967> [<https://perma.cc/SP5V-PASZ>] (“Israel killed more Palestinian civilians in 2014 than in any other year since the occupation of the West Bank and Gaza Strip began in 1967, a UN report has said.”).

253. Compare James Marc Leas, *Neither Facts Nor Law Support Israel's Self-Defense Claim Regarding its 2014 Assault on Gaza*, NAT'L LAWYERS GUILD INT'L 6 (July 6, 2015), http://www.nlginternational.org/report/Neither_facts_nor_law_support_Israeli_self-

In the period between the second intifada and the initiation of Israel's Operation Cast Lead, 4,858 Palestinians were killed by Israeli agents while only 1,063 Israelis were killed by Palestinian operations.²⁵⁴ That amounts to roughly 4.5 Palestinians killed for every 1 Israeli.²⁵⁵ In the United Nations' investigation into the entire Operation Cast Lead, the organization stated, "[In] Gaza, the scale of the devastation was unprecedented. The death toll alone speaks volumes: 2251 Palestinians were killed, including 1462 Palestinian civilians with 299 women and 551 children."²⁵⁶ In the first month of Operation Protective Edge, nearly 1500 Palestinians were killed compared to roughly 45 Israelis: a ratio of 33.3 to 1.²⁵⁷ Historically, Israel has regularly engaged in disproportionate offensives and responses to attacks by Hamas and Palestine.²⁵⁸ As to the relative sophistication of attacks by both parties, an Amnesty International press release during Operation Cast Lead states:

defense_claim_submission_to_ICC.pdf [https://perma.cc/JDM5-6J3V] ("Israeli and Palestinian sources that track and contemporaneously describe the attacks by one or both sides, and their lethal effects, gave details of the Israeli aerial strike, and others by Israeli forces that were omitted from the Israeli government report and that were also inconsistent with Israel's self-defense claim.") with Seumas Milne, *It's Palestinians Who Have the Right to Defend Themselves*, GUARDIAN (Nov. 20, 2012), <https://www.theguardian.com/commentisfree/2012/nov/20/palestinians-have-right-defend-themselves> [https://perma.cc/B7PN-VZYG] ("[A]n examination of the sequence of events over the last month shows that Israel played the decisive role in the military escalation."). See also *Support Israel's Right to Self-Defense*, AIPAC: AMERICA'S PRO-ISRAEL LOBBY, <https://www.aipac.org/learn/legislative-agenda/agenda-display?agendaId=%7B570c7179-9618-4dac-a0c6-e5e35e1fa5cb%7D> [https://perma.cc/EN9V-CYHB] (last visited Feb. 27, 2018) ("Hamas and other Gaza terrorists have launched more than 3,000 rockets at the Jewish state since July 8. These actions constitute an unprovoked escalation aimed solely at killing, maiming and terrorizing Israelis. Hamas actively rejects Israel's right to exist and . . . has killed hundreds of Israelis.").

254. Eli Clifton, *The Proportionality of a 33-To-1 Casualty Ratio*, LOBE LOG (Nov. 19, 2012), <https://lobelog.com/the-proportionality-of-a-33-to-1-casualty-ratio/>.

255. *Id.*

256. *U.N. Report on S-21/1*, *supra* note 110, at ¶ 574 (adding further that "11,231 Palestinians, including 3,540 women and 3,436 children, were injured with almost 10 [%] suffering permanent disability as a result.").

257. See Clifton, *supra* note 254 ("Reports from Gaza indicate an overall death toll reaching 100. Three Israelis have died. The current ratio of Palestinian to Israeli casualties is 33.3 to one.").

258. See Lionel Beehner, *Israel and the Doctrine of Proportionality*, COUNCIL ON FOREIGN REL. (July 13, 2006), <https://www.cfr.org/backgrounder/israel-and-doctrine-proportionality> [https://perma.cc/84YK-GYB2] (stating a number of experts believe Israel has historically disobeyed the doctrine of proportionality in places like Lebanon and Iraq).

In southern Israel, Amnesty International also saw the remains of 'Qassam', Grad, and other indiscriminate rockets fired by Hamas and other Palestinian armed groups against civilian areas. These unsophisticated weapons are either smuggled into Gaza clandestinely or constructed there from components secretly brought in from abroad. *They cannot be aimed accurately and stand no comparison with the weaponry deployed by Israel* but they have caused several deaths of Israeli civilians, injured others[,] and [caused] damage to civilian property.²⁵⁹

The inescapable fact of Palestine's relative unsophistication compared with Israeli capability should be part of the proportionality analysis.

The role of proportionality in international humanitarian law is a key concept. To pass the "effective control" test from Article 42 of the 1907 Hague Regulations, the territory does not necessarily have to be under military presence—to the contrary—the occupied population only has to be limited in its self-determination.²⁶⁰ As an occupying power, Israel has a responsibility to the people of Gaza. The civilian population in the Gaza Strip must be supplied with humanitarian aid, water, food, medical supplies, and all other items that satisfy their basic needs under Articles 55, 56, and 57 of the Fourth Geneva Convention.²⁶¹ The Hague Regulations and Four Geneva Conventions prescribe the conduct and law of war, governing the amount of force that can lawfully be employed in Gaza. Article 48 of the Additional Protocols of the Geneva Convention expound that "in order to ensure respect for and protection of the civilian population and civilian objects [. . .] [parties] to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."²⁶² Parties involved in the conflict must differentiate between combatants and

259. Press Release, Amnesty Int'l, *Isr./Occupied Palestinian Territories: Evidence of Misuse of US-Weapons Reinforces Need for Arms Embargo* (Feb. 23, 2009) (emphasis added), <https://www.amnesty.org/en/press-releases/2009/02/israeloccupied-palestinian-territories-evidence-misuse-us-weapons-reinfo> [<https://perma.cc/Y4FX-C9UZ>].

260. Erakat, *supra* note 33, at 50.

261. *Id.* at 52.

262. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977 at art. 48, INT'L COMM. OF THE RED CROSS (Jun. 8, 1977), <https://www.icrc.org/ihl/4e473c7bc8854f2ec12563f60039c738/8a9e7e14c63c7f30c12563cd0051de5c?OpenDocument> [<https://perma.cc/R8QD-BD48>] [hereinafter *Fourth Protocol Addition*].

civilians, and must make efforts to preserve the civilian population.²⁶³ The principle of proportionality provides that, because of the inherent imbalance of power between parties, the belligerent group may not use force greater than necessary to achieve their military goals without harming the civilian population.²⁶⁴ In other words, the “principle of proportionality merely dictates that any harm caused as a result of the use of force cannot be disproportionate to the military advantage of the act.”²⁶⁵ According to Amnesty International, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) reported Palestinians, including children, suffered injuries after being shot at by Israeli forces using non-lethal rubber-coated metal bullets and, in some instances, lethal ammunition, where protesters were accused of throwing rocks at Israeli forces.²⁶⁶ The principle of proportionality is relevant here because using lethal and even non-lethal ammunition in response to rock-throwing is neither an equal amount of force or a less harmful alternative. International criminal law will hold an individual or a state criminally liable if they violate the principle of proportionality, which means they will prosecute parties who commit acts that constitute war crimes.²⁶⁷

The issue with holding someone criminally liable under the principle of proportionality is the principle itself is difficult to calculate.²⁶⁸ Proportionality tends to focus not on civilian objects, but on: “1) what military objectives are, 2) what ‘military advantage’ means and what its boundaries are, and 3) how to balance this against ‘incidental’ harm to

263. Erakat, *supra* note 33, at 55.

264. *Id.*

265. Bisharat et al., *supra* note 35, at 82.

266. See *Israel and Occupied Palestinian Territories*, AMNESTY INT’L, <https://www.amnesty.org/en/countries/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories> [https://perma.cc/7X5H-3U7E] (last visited Feb. 27, 2018) (“Israeli forces used excessive, sometimes lethal, force against Palestinian protesters . . . killing 22 and injuring thousands with rubber-coated metal bullets and live ammunition. Many protesters threw rocks or other projectiles but were posing no threat to the lives of well-protected Israeli soldiers when they were shot.”).

267. Bisharat et al., *supra* note 35, at 82 (citing r. 14 and r. 156 of Customary International Humanitarian law, JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 46, 568 (vol. 1, 2009)).

268. See *id.* at 81 (“The proportionality principle is notoriously difficult to apply in live battle circumstances, and proving violations of the principle is similarly fraught.”).

civilians.”²⁶⁹ Military objectives have two guidelines: the first is the proposed target “by their nature, location, purpose or use make an effective contribution to military actions,” and the second is “the total or partial destruction, capture[,] or neutralization offers a definitive military advantage.”²⁷⁰ Military objectives are combatants, civilians participating in combat, and physical objects.²⁷¹ This concept is easy to confuse when you are involved in direct combat; however, all reasonable measures should be taken to prevent the confusion of roles. The advantage prong is more difficult to effectuate because it turns on whether the objecting force is offering a direct military advantage, rather than something merely potentially advantageous in the future.²⁷² Whether or not the long-term actions of such military events will harm civilians and the environment in all functions of life, instances of injury to civilians has been a long-standing issue.²⁷³ Of course, injury to civilians is precisely what is occurring in Gaza due to disproportionality of attacks directed at the civilian population.²⁷⁴ Disproportionate use of force has become a common and admitted occurrence.²⁷⁵ In responding to the potential threats from Syria, Gaza, and Lebanon, an Israeli army colonel proclaimed before Operation Cast Lead that the result will be swift and disproportionate:

Challenges can be overcome by adopting the principle of a disproportionate strike against the enemy’s weak points as a primary war

269. *Id.* at 83.

270. *Id.* at 83 (citing William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT’L L. 539, 545 (1997)).

271. *See id.* (“For the purpose of the first criterion, customary international law considers legitimate military objectives to be combatants, civilians taking direct participation in hostilities, as well as physical objects that comport with the above described general description.”)

272. *See id.* at 83–84 (“This clause indicated that when an object is identified as a military objective, the means with which it is attacked and the hoped for outcome are not unlimited.”).

273. *See id.* at 84 (considering lasting consequences of military actions on civilian populations and their cities which “lends support to the position that ‘planners must consider the long-term, indirect effects on a civilian population’ instead of myopic immediate harm analysis”).

274. *See* GAZA IN 2020, *supra* note 107, at 14 (demonstrating 1.6 million people live with a high population density of people per kilometer squared, with half of them being children; this results in 85% of schools running double shifts to accommodate everyone).

275. *See* Gabriel Siboni, *Disproportionate Force: Israel’s Concept of Response in Light of the Second Lebanon War*, INDEP. MEDIA REV. ANALYSIS (Oct. 3, 2008) <http://www.imra.org.il/story.php3?id=40928> [<https://perma.cc/QM95-ZNH4>] (stating “[Israel] will have to respond disproportionately in order to make it abundantly clear that the State of Israel will accept no attempt to disrupt the calm currently prevailing along its borders.”).

effort, and operations to disable the enemy's missile launching capabilities as a secondary war effort. With an outbreak of hostilities, the IDF will need to act immediately, decisively, and with force that is disproportionate to the enemy's actions and the threat it poses. Such a response aims at inflicting damage and meting out punishment to an extent that will demand long and expensive reconstruction processes. The strike must be carried out as quickly as possible.²⁷⁶

As a result of Hamas gaining power in Gaza, Israel has been implementing methods of deterrence: a way of preventing war and weakening the opponent.²⁷⁷ Unfortunately, this strategy leads to massive suffering and infliction of pain on the people of Gaza and those participating in the relief efforts.²⁷⁸ Despite the fact that medical personnel do retain a protected status under customary international law, there have been numerous documented cases of attacks on medical personnel in Gaza.²⁷⁹ Article 18 of the Geneva Convention also protects medical units and hospitals, stating "civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict."²⁸⁰ Six medics died in IDF attacks on hospitals in Gaza during the 2014 Operation Protective Edge.²⁸¹ There were also instances of medical teams being prevented from reaching and helping victims of the attacks.²⁸² Reports indicate

276. *Id.*

277. See Bisharat et al., *supra* note 35, at 87 (stating "one of Israel's apparent goals in launching its massive attack on the Gaza Strip was to restore its 'deterrent capacity.'").

278. See *id.* (stating Israel is "[t]errorizing 1.5 million people so that Hamas, as well as other regional adversaries, 'learns its lesson.'").

279. See *Fourth Geneva Convention*, *supra* note 188, at art. 48 (stating the parties shall "...direct their operations only against military objectives" and not civilian objectives); see also Bisharat et al., *supra* note 35, at 87–89 (stating medical personnel's protected status and describing attacks carried out on medical personnel in Gaza).

280. *Fourth Geneva Convention*, *supra* note 188, at art. 18.

281. See *Mounting Evidence of Deliberate Attacks on Gaza Health Workers by Israeli Army*, AMNESTY INT'L (Aug. 7, 2014), <https://www.amnesty.org/en/latest/news/2014/08/mounting-evidence-deliberate-attacks-gaza-health-workers-israeli-army> [<https://perma.cc/9VRM-UMJS>] [hereinafter *Mounting Evidence*] (describing the attacks on medical personnel and medical buildings); *Israel 'to Stop Using White Phosphorus Shells'*, BBC NEWS (Apr. 26, 2013), <http://www.bbc.com/news/world-middle-east-22310544> [<https://perma.cc/PXP9-DL8C>] [hereinafter *Stop Using Shells*] (discussing Israel's previous use of white phosphorous in the Gaza war).

282. *Mounting Evidence*, *supra* note 281.

hospitals were shelled and ambulances were targeted.²⁸³ Additionally, there have been alarming reports on the use of illegal weapons in Gaza.²⁸⁴ The use of a weapon to attack a civilian population is prohibited under international law; more specifically, the use of illegal weapons such as white phosphorous and other experimental weaponry is categorically prohibited.²⁸⁵ Article 35(2) of the Additional Protocols prohibits “employ [of] weapons, projectiles[,] and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”²⁸⁶ In spite of this prohibition, the IDF fired white phosphorous shells into Gaza during Operation Cast Lead.²⁸⁷ The white phosphorous shells were fired into a UN school being used as a shelter

283. *Id.*

284. *See, e.g.,* Amira Hass, *Is Israel Using Illegal Weapons in Its Offensive on Gaza?*, HARRETTZ (Jan. 15, 2009), <https://www.haaretz.com/is-israel-using-illegal-weapons-in-its-offensive-on-gaza-1.268230> [<https://perma.cc/4M5Y-QZ43>] (reporting Israel is using white phosphorus bombs based on observations made by a senior military analyst at Human Rights Watch); Rania Khalek, *Israel Firing Experimental Weapons at Gaza's Civilians, Say Doctors*, ELECTRONIC INTIFADA (July 15, 2014), <https://electronicintifada.net/blogs/rania-khalek/israel-firing-experimental-weapons-gazas-civilians-say-doctors> [<https://perma.cc/67B6-A6WM>] (describing the use of DIME bombs containing tungsten, a cancer-causing metal, used on a larger scale during Operation Cast Lead); Rory McCarthy, *Israel Accused of Indiscriminate Phosphorus Use in Gaza*, GUARDIAN (Mar. 25, 2009), <https://www.theguardian.com/world/2009/mar/25/israel-white-phosphorus-gaza> [<https://perma.cc/AJQ9-6QFC>] (investigating the violations of international law for using phosphorus); Harriet Sherwood, *Israel Using Flechette Shells in Gaza*, GUARDIAN (July 20, 2014), <https://www.theguardian.com/world/2014/jul/20/israel-using-flechette-shells-in-gaza> [<https://perma.cc/7RCC-6HUT>] (explaining that although the munitions are not barred under international law, they are deemed illegal under certain humanitarian laws); *Military Expert: Israel is Using 3 Internationally Banned Weapons in Gaza*, MIDDLE EAST MONITOR (Aug. 4, 2014), <https://www.middleeastmonitor.com/20140804-military-expert-israel-is-using-3-internationally-banned-weapons-in-gaza> [<https://perma.cc/HK77-359V>] (referring to the use of DIME munitions, armor piercing bombs, and phosphorous); *Stop Using Shells*, *supra* note 281 (reporting Israel “deliberately or recklessly” used white phosphorus shells in violation of the laws of war, causing “needless civilian deaths”).

285. *See* Bisharat et al., *supra* note 35, at 93 (“On January 21, 2009, the Israeli government admitted that its troops might have used white [phosphorous] in contravention of international law, despite the fact that it was claimed up until that point that it was only used from legal purposes.”).

286. *Fourth Protocol Addition*, *supra* note 262, at art. 35.

287. *See Rain of Fire: Israel's Unlawful Use of White Phosphorous in Gaza*, HUM. RTS. WATCH (Mar. 25, 2009), <https://www.hrw.org/report/2009/03/25/rain-fire/israels-unlawful-use-white-phosphorus-gaza> [<https://perma.cc/9JHU-CWYE>] (“[T]he Israel Defense Forces (IDF) repeatedly exploded white phosphorus munitions in the air over populated areas, killing and injuring civilians, and damaging civilian structures, including a school, a market, a humanitarian aid warehouse and a hospital”).

and killed two sleeping boys, while injuring 12 more.²⁸⁸ The attack was rendered all the more monstrous when it was revealed the UN had previously informed the IDF of the precise location and use of the school.²⁸⁹ These continuous attacks are clearly disproportionate, perhaps intentionally so, and are destroying Gaza's civilian population²⁹⁰ and effectively incapacitating it. More than 12,000 homes were completely destroyed in Operation Cast Lead attacks; 130,975 homes had partial or minor damage as well.²⁹¹ The catastrophic result of the continuous bloodshed in Gaza has been reported by UN Secretary Ban Ki-moon, who relayed the destruction in Gaza is "beyond description" and represents the "shame of the international community."²⁹² The central role of the United Nations in the enforcement and promulgation of the rules and regulations governing the laws of war makes the United Nations a key actor in the future of stabilization in Palestine.²⁹³

Consider again the story of Ahd Tamimi who was arrested for, among other charges, throwing stones at Israeli soldiers.²⁹⁴ Consider the killing of Rushdie Tamimi, whose death at the hands of Israeli soldiers was purportedly committed in response to stone throwing by Rushdie and others.²⁹⁵ There was also Fares Udah, the thirteen-year-old Palestinian child in the iconic photograph depicting Fares primed to hurl a rock in the direction of an Israeli tank; Fares was killed by IDF soldiers for stone throwing only days after the famous photograph was taken.²⁹⁶

288. *See id.* (describing the attack that left two brothers dead, wounding twelve others, and setting a classroom on fire).

289. *See id.* ("As with all of its facilities in Gaza, the UN had provided the IDF with the GPS coordinates of the school prior to military operations.")

290. *See id.* (describing the impact the attacks have had on civilians).

291. FRAGMENTED LIVES, *supra*, note 179, at 10.

292. Peter Beaumont, *Ban Ki-moon: Gaza is a Source of Shame to the International Community*, GUARDIAN (Oct. 14, 2014), <http://www.theguardian.com/world/2014/oct/14/ban-ki-moon-visits-gaza-views-destruction-of-un-school> [<https://perma.cc/PS3Q-HDFM>].

293. *See id.* (describing the "commission of inquiry" that the UN Human rights council has established to investigate the shelling of the UN facilities and the killing of UN staff).

294. *See* Berger & Kubovich, *supra* note 26 (describing the events leading to the indictment of Ahd Tamimi).

295. *See* Levinson & Khoury, *supra* note 6 (indicating that Tamimi "was killed when a group of Palestinians in the village began throwing stones toward a road from a long distance, and an army reserve unit tried to disperse them.")

296. Delinda Curtiss Hanley, *Israel's Spin-Doctors Wage War of Images and Words Against Palestinian Rock Children*, WASH. REP. ON MIDDLE EAST AFF. (Jan.-Feb. 2001),

Stone throwing is a common act of resistance in Palestine that has global historic precedent as a tactic for repelling foreign or occupying forces.²⁹⁷ Israel routinely asserts its right to defend against rock throwing as the pretext for its use of force against the Palestinians.²⁹⁸ This, again, raises the issue of proportionality.²⁹⁹ On the topic of stone throwing in Palestine, Ben Ehrenreich, son of famed author and feminist, Barbara Ehrenreich, offers:

The question of whether stone throwing counts as violence becomes much less impressive if you spend any time at these protests. The difference between 16-year-old boys throwing stones and soldiers in body armor shooting tear gas canisters, shooting rubber-coated steel bullets, shooting live ammunition is so radical that the question really just disappears when you're there on the ground [...] I do know, and it's certainly been pointed out to me, that people have been killed by stonethrowing and people have been injured by stones. Of course stones hurt if you're hit by them. But I did contact the [Israeli Defense Forces], and they were able to confirm they have no records at all of any soldiers ever being killed in a stone-throwing incident. I don't think it's an exaggeration to say that there have been millions of stones thrown at Israeli soldiers since the first intifada. Yet not a single Israeli soldier has been killed by one. Many hundreds of Palestinians have been killed at demonstrations by Israeli bullets, but it never occurs to us to ask if the Israeli cause wouldn't be better served if Israel disowned all forms of violence.³⁰⁰

<https://www.wrmea.org/2001-january-february/israel-s-spin-doctors-wage-war-of-images-and-words-against-palestinian-rock-children.html> [<https://perma.cc/B59Y-GX7Y>].

297. See Amira Hass, *The Inner Syntax of Palestinian Stone-Throwing*, HAARETZ (Apr. 3, 2013), <https://www.haaretz.com/opinion/the-inner-syntax-of-palestinian-stone-throwing-premium-1.513131> [<https://perma.cc/GT9S-7BHR>] (discussing the meaning behind stone throwing); see also Ehrenreich, *supra* note 1 (describing throwing stones as a message that says “[w]e don’t accept you”).

298. Adam Chandler, *Should Israel Be Declaring War on Rock-Throwing?*, ATLANTIC (Sept. 17, 2015), <https://www.theatlantic.com/international/archive/2015/09/should-israel-be-declaring-war-on-rock-throwing/405895> [<https://perma.cc/NR38-DB2B>].

299. See Howard Schweber, *The World Post on Proportionality*, HUFFINGTON POST, https://www.huffingtonpost.com/howard-schweber/on-proportionality_b_157846.html [<https://perma.cc/2GY3-HL5G>] (last visited Feb. 27, 2018) (opining “while it’s a crime for someone to throw a rock through my window, that does not justify my spraying the street with automatic weapons”).

300. Sheerly Avni, *Ben Ehrenreich Throws Stones at Conventional Wisdom About Israel*, FORWARD (July 8, 2016), <https://forward.com/culture/343816/ben-ehrenreich-throws-stones-at-conventional-wisdom-about-israel> [<https://perma.cc/ZW48-AKMB>].

Finally, consider the proportionality of punishment for violations of law in Israel. Yifat Alkobi has been convicted more than five times for the offense of throwing stones at Israeli soldiers, but has never been jailed, and only once served a period of probation longer than a month.³⁰¹ Ahed Tamimi, by contrast, will be jailed at least until her court proceedings have concluded, and even longer if sentenced to any period of imprisonment.³⁰² Both Ahed and Yifat are known by the Israeli military, both committed the same offense, and yet the two received disparate treatment.³⁰³ The difference between the two is that Ahed is Palestinian, while Yifat is a Jewish Israeli.³⁰⁴ In terms of raw numbers concerning the more than 20,500 prisoners in Israel as of September 2016, only 5,659 are Jewish compared to 12,397 who are Arab.³⁰⁵ In fact, Arabs account for 43% of the total prison population— more than twice its proportion in the overall population.³⁰⁶

B. *Belligerent Occupation of the Gaza Strip*

Gaza's legal status with respect to international humanitarian law is ambiguous.³⁰⁷ Gaza's coastal and land borders are controlled by Egypt and Israel. As a result, Gaza cannot independently manage its internal or external economic and social matters.³⁰⁸ Whether the conflict in Gaza is an international armed conflict or a non-international armed conflict will have a great impact on the legality of both groups' actions against one another.³⁰⁹ Despite the intra/inter distinction, international humanitarian law may recognize both of these conflicts as armed conflicts.³¹⁰ Armed conflict can be said to occur in a territory where

301. Noa Osterreicher, *What Happened When a Jewish Settler Slapped an Israeli Soldier*, HAARETZ (Jan. 5, 2018), <https://www.haaretz.com/opinion/.premium-1.832939> [<https://perma.cc/6R3M-DZL2>].

302. *Id.*

303. *Id.*

304. *Id.*

305. Noam Rotem, *In the Jewish State, Most Prisoners Are Arabs*, +972 MAG. (Sept. 2, 2016), <https://972mag.com/in-the-jewish-state-most-prisoners-are-arabs/121686> [<https://perma.cc/XX8V-WHEK>].

306. *Id.*

307. Solomon, *supra* note 101, at 70.

308. *Id.* at 78–84.

309. See Spelman, *supra* note 146, at 6 (covering the different arguments made by international parties involved in regulating and managing the conflict).

310. *Id.*

there is prolonged combat between a government and organized armed groups.³¹¹ The Fourth Geneva Convention differentiates between international conflicts and non-international conflicts.³¹² Specifically, conflicts of an international nature are defined in Article 2 of the Geneva Convention: “the provisions which shall be implemented in peacetime [...] [This] Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”³¹³ Regarding the type of occupation that is required, Article 2 states, “the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”³¹⁴ These definitions and rules of customary international law make terminology significant in determining which parties are involved in the armed conflict, whether the parties are international or non-international, and how to proceed once these determinations are made.³¹⁵ Israel maintains that the conflict with Hamas meets the criteria for armed conflict, although it has never recognized Gaza as a state, much less opined whether the conflict is an international armed conflict or a non-international armed conflict.³¹⁶ Non-international conflict is defined by Article 3 of the Fourth Geneva Convention, explaining that persons not taking part in the hostilities “shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”³¹⁷ The argument has been advanced that the Hamas takeover of Gaza in 2007 amounts to an international armed conflict.³¹⁸ The claim is that it is Hamas—not Israel—who has effective control over Gaza’s borders.³¹⁹ Proponents of this position may argue Hamas exerts civil and military control over the entire Gaza Strip; therefore, the people of Gaza are not belligerently occupied by Israel

311. Meron, *supra* note 34, at 260.

312. *Id.*

313. *Fourth Geneva Convention*, *supra* note 188, at art. 2.

314. *Id.*

315. Meron, *supra* note 34, at 260.

316. Spelman, *supra* note 146, at 6 (explaining the logic of both groups’ classification of their conflict).

317. *Fourth Geneva Convention*, *supra* note 188, at art. 3.

318. Benoliel, *supra* note 218, at 633–34.

319. *Id.* at 639–40.

because they are not *protected persons* under international humanitarian law.³²⁰

The law of belligerent occupation imposes two requirements on the occupier: to 1) protect the life and property of the inhabitants; and 2) respect the sovereign rights of the ousted government.³²¹ Thus, scholars arguing Gaza is still effectively occupied by Israel emphasize the rules of belligerent occupation are part of customary international law, thereby binding Israel.³²² Accordingly, despite the professed disengagement, Israel still owes a duty to the civilian population in Gaza.³²³ The “effective control” test created by Article 42 of the 1907 Hague Regulations is helpful with respect to the claim that Israel still occupies the Gaza Strip.³²⁴ The Hague Convention and the Fourth Geneva Convention are both part of international customary law, and all states are bound to it during war even if they claim otherwise.³²⁵ Since Israel has complete control over the movement of people, goods, airspace, sea, electricity, sewage systems, telecommunications network, legal residency, and the ability to shut the border crossings, it can hardly be argued Israel has ended its occupation of Gaza.³²⁶ This type of control amounts to more than just border and immigration control; nor can it equate to safety measures as Israel claims. The presence of Israeli control over the Gaza Strip is “felt” by the people of Gaza in all aspects of life.³²⁷ For example, there are only two channels for entering or exiting Gaza:

320. *Id.* at 640 (emphasis added).

321. Benvenisti, *supra* note 42, at 622.

322. Bisharat et al., *supra* note 35, at 48.

323. *See id.* at 100 (explaining the laws of belligerent occupation impose a special duty on Israel).

324. *Id.* at 48–49 (quoting *In Re List and Others (Hostages Trial)*; 15 ANN. DIG. & REP. PUB. INT’L L. CASES 632 (U.S. Mil. Trib. Nuremberg 1948) (arguing Israel retains effective control over Gaza, because “Israel not only retains the *ability* to exercise such power, but also continues actively to exercise such power”).

325. *See Imseis*, *supra* note 63, at 90 (explaining both treaties include provisions expressly stating that Parties to a conflict are bound by customary international law even where the parties have denounced the conventions).

326. *See Bisharat et al.*, *supra* note 35, at 49–50 (arguing “[t]he degree of control Israel retains over the Gaza Strip makes it clear that” Israel’s claims that the withdrawal of its land troops ended the occupation are incongruous).

327. *See Marcus*, *supra* note 51, at 116 (pointing out the British Manual on Military Law definition of “occupation” also applies to humanitarian intervention and belligerent occupation, because in all three scenarios “[t]he presence of occupying troops makes their control ‘felt’ by the population”).

one can travel through Israel or through Egypt, but both states have the exclusive privilege to determine who enters and leaves Gaza.³²⁸ Since Operation Cast Lead, Israel has repositioned the situation in Gaza as an international armed conflict by invoking Article 51 of the United Nations Charter of self-defense and condemning Hamas for war crimes.³²⁹ This new stance could be valid in some cases of conflict in the region; however, it cannot apply to Gaza as a whole due to Israel's effective control of the region. This argument is damaging to international humanitarian law as a whole as it allows for the deterioration of safeguards that protect those affected by war and occupation.³³⁰ Israel's application of unequal and excessively destructive force has resulted in many years of bloodshed, loss, and disproportionate harm to the people of Gaza and their way of life.³³¹

VI. SOLUTIONS: INTERNATIONAL ENFORCEMENT MEASURES

Enforcement mechanisms to alleviate the crisis in Gaza are as convoluted as the issue itself. In practice, these methods may be enforced by states and international organizations.³³² There are a variety of mechanisms in international law that would allow enforcement. The U.N. Charter Chapter VII could be invoked to circumvent Article 51; criminal liability could be imposed; economic sanctions; prosecution via the International Criminal Court (ICC); remediation via the International

328. See Bisharat et al., *supra* note 35, at 50 (noting the operation of the Rafah Crossing, the sole crossing point between Egypt and Gaza, is maintained by an agreement between the Palestinian Authority and Israel, subject to Israel's "[a]b[ility] to shut the crossing at will").

329. See *id.* at 54 (observing Israel's conduct is consistent with practices commonly relied upon in an international armed conflict); see also THE TURKEL COMM'N, *supra* note 147, at 46–47 (referencing testimony of an Israeli Military Advocate-General stating that after Operation Cast Lead, Israel took the position that it was bound by the laws that govern international armed conflicts).

330. See Bisharat et al., *supra* note 35, at 54–55 ("It is by virtue of superior military strength that occupiers become occupiers; it is to be expected, therefore, that they would press for legal standards that permit them to exploit their military advantage.").

331. Dinstein, *supra* note 217, at 318.

332. See generally Imseis, *supra* note 63, at 127–137 (demonstrating enforcement mechanisms are either internal to the Fourth Geneva Convention, such as a party's implicit ability to exercise universal jurisdiction over other parties in breach of the treaty, and external to the Convention, such as economic pressure and the creation of ad hoc international criminal tribunals).

Court of Justice (described in its advisory opinion); and/or increased international action to urge an end to the blockade.³³³

Humanitarian intervention may be achieved through independent state action or in conjunction with the help of the United Nations.³³⁴ Humanitarian intervention has its legal beginnings in Article 2 of the United Nations Charter.³³⁵ The charter prohibits states from using force against one another unless the state can establish—as Israel would attempt—that the self-defense exception in Article 51 permitting armed attacks between two states is applicable.³³⁶ The second exception to circumventing Article 2 is Chapter VII of the U.N. Charter, which allows the Security Council to determine whether there are major war crimes being committed and if they can prevent additional incidents from occurring.³³⁷ For example, intervention may be warranted when international conflict or state actions are viewed as a “threat to international peace” and security is necessary to prevent “turmoil” likely to produce more refugees and neighboring military responses, thereby raising the situation to the level of international concern.”³³⁸ In other words, there must be grave violations of human rights and international law for the international community to step in and protect civilians.³³⁹ The Security Council may use its Chapter 7 powers to create a special tribunal to investigate the alleged war crimes. Unfortunately, this power

333. See generally *id.* (considering the various international enforcement mechanisms that could be used to bring Israel into full compliance with the terms of the Fourth Geneva Convention).

334. Marcus, *supra* note 51, at 102–03.

335. See U.N. Charter art. 2, ¶4 (“All Members shall refrain in their international relationships from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”). Cf. Marcus, *supra* note 51, at 103 (noting Article 2(4) of the U.N. Charter is at the center of the debate concerning the legality of humanitarian intervention, especially in light of the U.N.’s general prohibition against intervention).

336. See U.N. Charter art. 51 (“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”); see also Marcus, *supra* note 51, at 103 (discussing exceptions to the general rule that states should not use force or threaten to use force against another sovereign nation).

337. See generally U.N. Charter arts. 37–49 (outlining the Security Council’s discretion regarding the use of force in response to threats and breaches of the peace and acts of aggression in the maintenance of international peace and security); see also Marcus, *supra* note 51, at 103 (interpreting the relevant U.N. Charter Chapter VII articles).

338. Marcus, *supra* note 51, at 104.

339. *Id.*

is limited because there are no established standards for humanitarian intervention, the process may stagnate, and it may be perceived as too political based on the interests and veto powers of the U.N. Security Council.³⁴⁰ Moreover, the modern tendency toward military engagement in humanitarian intervention, as previously stated, makes it a less appealing pathway.

The second option is to impose individual criminal liability under international criminal law.³⁴¹ The military tribunal in Nuremberg affirmed “[i]ndividuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”³⁴² Thus, it is possible to try individuals who are particularly guilty of war crimes.

The third mechanism is economic sanctions. The United Nations Security Council can implement sanctions against Israel for furthering the humanitarian crisis in the Gaza Strip.³⁴³ Israel has trade agreements with the United States, Canada, and the European Union and is the largest recipient of cumulative aid from the United States.³⁴⁴ Israel has received a total of over \$91 billion in U.S. aid since 1949.³⁴⁵ Individual states have the power to pressure Israel economically to provide humanitarian aid, lessen the blockade restrictions, and take a willing stance to negotiate terms of ceasefire. Unfortunately, as discussed previously, action by the Security Council is difficult to muster because of its members’ politics and veto powers.³⁴⁶

The fourth mechanism available is the International Criminal Court, which was established in the late 1990s and designed to provide “the international community with a permanent judicial forum for those accused of the most serious international crimes (i.e., war crimes, crimes

340. Marcus, *supra* note 51, at 106–07 (describing permanent members on the Security Council exercising their veto power in order to maintain or pursue their own geopolitical interests as opposed to resolving actual humanitarian crises).

341. Bisharat et al., *supra* note 35, at 104–06.

342. The Avalon Project, *Judgment: The Law of the Charter*, <http://avalon.law.yale.edu/imt/judlawch.asp> [<https://perma.cc/Y4AN-LCQ7>] (last visited Feb. 27, 2018).

343. Erakat, *supra* note 33, at 81.

344. Imseis, *supra* note 63, at 133.

345. *Id.*

346. Erakat, *supra* note 33, at 81.

against humanity, genocide) to be brought to justice.”³⁴⁷ The definitions of what constitutes a war crime can be found in Article 8 of the Rome Statute and Article 146 of the Fourth Geneva Convention.³⁴⁸ Palestine became a signatory of the ICC in 2015 despite strong opposition from the United States, Israel, and Canada.³⁴⁹ Palestine submitted documents to the ICC that urge the prosecutor to press charges for war crimes that occurred during Operation Protective Edge.³⁵⁰ Since Israel withdrew its signature from the Rome Statute, it will be difficult to bring an Israeli national to court before the ICC for war crimes.³⁵¹ Despite the perceived difficulty, on January 16, 2015, the ICC prosecutor initiated a preliminary investigation into the situation in Palestine to determine whether the Rome Statute criteria was satisfied before opening an official investigation.³⁵² The U.N. Security Council may utilize the ICC if acting under Chapter 7; however, this is unlikely due to the United States’ veto power.³⁵³

The fifth mechanism of enforcement is to bring the case to the International Court of Justice (ICJ). The ICJ was created by the United Nations in 1945 and is the “principal judicial organ of the United Nations.”³⁵⁴ Israel can be sued in the ICJ as all members of the United Nations are also party to the ICJ statutes.³⁵⁵ However, the jurisdiction

347. Imseis, *supra* note 63, at 129–30.

348. *See id.* at 130 (defining war crimes as “grave breaches” and “serious violations of the laws and customs applicable in international armed conflict.”).

349. *ICC: Palestine is Newest Member*, HUM. RTS. WATCH (April 1, 2015) <https://www.hrw.org/news/2015/04/01/icc-palestine-newest-member> [<https://perma.cc/3CFA-HJ74>].

350. *See* William Booth, *Palestinians Press International Criminal Court to Charge Israel*, WASH. POST (June 25, 2015), https://www.washingtonpost.com/world/middle_east/palestinians-press-international-criminal-court-to-charge-israel-with-war-crimes/2015/06/25/c0c85306-19d1-11e5-bed8-1093ee58dad0_story.html [https://www.washingtonpost.com/world/middle_east/palestinians-press-international-criminal-court-to-charge-israel-with-war-crimes/2015/06/25/c0c85306-19d1-11e5-bed8-1093ee58dad0_story.html] (describing documents related to Israel fighting in the Gaza Strip and constructing settlements in the West Bank).

351. Imseis, *supra* note 63, at 130.

352. *See Palestine*, INT’L CRIM. CT., <https://www.icc-cpi.int/palestine?ln=en> [<https://perma.cc/F8U4-8SNM>] (last visited Feb. 27, 2018) (stating that pursuant to article 53(1) of the Rome Statute, “the Prosecutor shall consider issues of jurisdiction, admissibility and the interests of justice.”).

353. Imseis, *supra* note 63, at 130.

354. ICJ Statute, *supra* note 120, at art. 1.

355. *Id.* at art. 93, ¶ 1; Imseis, *supra* note 63, at 131.

of the ICJ is limited to adjudicating “contentious” cases between states and issuing “advisory opinions.”³⁵⁶ Palestine is not a full member of the United Nations; as such, Palestine cannot consent with Israel to submit the case to the ICJ for adjudication.³⁵⁷ Palestine may still ask the ICJ for a non-binding advisory opinion authorized under Article 65(1) of the ICJ, which states “the Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”³⁵⁸ It is important to note ICJ advisory opinions have been disregarded by Israel in the past.³⁵⁹ Nevertheless, an opinion could explore significant topics, such as how to apply the Fourth Geneva Convention to the region and the responsibilities of the United Nations with regard to the humanitarian crisis in Gaza.³⁶⁰ While the ICJ opinions are non-binding, previous advisory opinions have been tremendously influential in interpreting international law and policy.³⁶¹

The sixth and final mechanism is increased action by the international community and the United Nations in providing humanitarian relief and urging negotiations between parties. Some scholars urge the “international civil society ‘prosecution’ can help act where traditional forms of international criminal prosecution have failed.”³⁶² This is a plea to the international community to recognize and take action before the humanitarian crisis in Gaza can no longer be remedied by any amount of humanitarian aid. The international community and the United Nations must strive to protect the lives of the civilians living in the Gaza Strip, as well as to maintain peace and security in the international world order.

356. *See id.* at 130 (defining “contentious” as “all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”).

357. *Id.* at 131.

358. ICJ Statute, *supra* note 120, at art. 65, ¶ 1.

359. *See* Bisharat et al., *supra* note 35, at 112 (describing Israel’s reluctance to participate in ICJ proceedings and adhere to their advisory opinions).

360. *See, e.g.,* Imseis, *supra* note 63, at 132 (delineating advisory topics, such as: “questions of applicability of the Fourth Geneva Convention to the OPT and international responsibility regarding its enforcement.”).

361. *Id.*; *see e.g.,* Advisory Opinion on the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (Jul. 8, 1996) (describing a landmark advisory opinion which held states were free to threaten or use nuclear weapons absent prohibitive rules).

362. Bisharat et al., *supra* note 35, at 113.

VII. CONCLUSION

We have endeavored to emphasize the vast levels of disproportionality that exist between the two parties: Israel and Palestine.³⁶³ Israel has been able to circumvent international law due to its special relationships with key nations in the international legal order. Israel also retains vast military superiority over its opponent. This disproportionate relationship will most likely continue in spite of any threat from Hamas due to the support and aid the international community provides to Israel.³⁶⁴ A central aspect of the continued international law breaches in the Gaza Strip is the lack of action by the international community at large.³⁶⁵ Despite the obligations of the U.N. Security Council and U.N. member states under the Fourth Geneva Convention, the 1907 Hague Convention, the U.N. charter, and customary international law, Israel has been allowed to maintain its status quo. Furthermore, the position of international law in this debate has been depreciated.³⁶⁶ What is intended to be used to govern peace, extract culpability, and supply humanitarian aid to victims of war has been taken advantage of and turned into a formula, allowing a state to avoid all accountability for their actions.³⁶⁷ The international community must utilize the tools at its disposal to push for an end to the Gaza Strip blockade and, most importantly, cooperative efforts between the two parties to save what is left of the land they call home. We make no pretense at suggesting or supporting a one- or two-state solution in the region. Our hope is only that the Palestinians be permitted the right of self-determination sufficient to develop a solution that puts them in a position of equal bargaining power with Israel. As it stands now, this is an often violent debate between drastically uneven parties, both in terms of access to necessary resources and in standing under the law. A central purpose of international humanitarian law is its intent to help the helpless.

363. See Imseis, *supra* note 63, at 108 (stating the methods of warfare employed by Israeli Defense Forces in Gaza include: “sniper fire, undercover death squads, and heavy weapons.”).

364. See *id.* at 122–23 (commenting on the relationship and external protection the United States provides Israel).

365. See *id.* at 137 (emphasizing the international community’s “failure to act effectively will strike a blow at the Convention norms and at the entire scheme of international humanitarian law.”).

366. See Erakat, *supra* note 33, at 79 (characterizing the United Nations’ response to the crisis in Gaza as deficient).

367. See Bisharat et al., *supra* note 35, at 114 (describing the ineffectiveness of international law that is “jeopardized by one nation operating in open defiance of its strictures.”).

The global community must start using the law to remedy the severe human suffering in Palestine, rather than permitting the law to be implemented as a mechanism for excusing fault.

It is difficult to envision the international legal path toward remedying the pain and damage done to the Tamimi family and others like theirs. Ahd Tamimi faces the prospect of spending a significant portion of her young life in an Israeli prison if convicted. Her case is ongoing and has gained global attention. During a perhaps apocryphal, though no less powerful exchange, an Israeli judge is thought to have asked the detained Ahd, “How did you slap our soldier?”³⁶⁸ To which Ahd responded defiantly, “Remove the handcuffs so I can show you how.”³⁶⁹

368. Matthew Gindin, *Who Is Ahd Tamimi?*, FORWARD (Jan. 4, 2018), <https://forward.com/opinion/391390/who-is-ahed-tamimi> [<https://perma.cc/AG36-MNBQ>] (noting the possibility that this exchange was embellished).

369. *Id.*